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34 Cal.2d 226

BLUMBERG et ux. v. M. & T. Inc. et al.

S. F. 17945.

Supreme Court of California, in Bank.

Aug. 31, 1949.

Benjamin Blumberg and Charlotte Blumberg, his wife sued M. & T. Incorporated, a corporation, and others for injuries sustained by Charlotte Blumberg in fall in lobby of defendants' office building allegedly caused by heel of Mrs. Blumberg's shoe becoming wedged in mat on lobby floor. The Superior Court for San Francisco County granted a nonsuit and from the judgment, plaintiffs appealed.

The Supreme Court, Edmonds, J., reversed the judgment, holding that plaintiffs as invitees of tenants of building were business visitors and that evidence was sufficient to take case to jury on questions of whether fall was caused by nature of the mat as alleged, whether defendants were negligent in maintaining such mat on lobby floor, and whether nature of mat was obvious to Mrs. Blumberg so as to warn her of danger.

Traynor, Shenk, and Schauer, JJ., dissented.

Prior opinion, 202 P.2d 311.

1. Trial 🔑165

Trial court is justified in granting a nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

2. Landlord and tenant 🔑167(8)

Invitees of tenants of business building were "business visitors" to whom owner owed duty to exercise ordinary care to keep premises in reasonably safe condition or warn them of danger and such duty was not limited to conditions actually known by owner to be dangerous, but extended to conditions which might have been found dangerous by exercise of reasonable care.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Business Visitor".

3. Landlord and tenant 🔑169(10)

In action for injuries sustained by business visitor in fall in lobby of defendants' business building evidence was sufficient to take case to jury on questions of whether heel of visitor's shoe became wedged in mat on lobby floor causing her to fall and whether defendants were negligent in maintaining such mat on lobby floor.

4. Landlord and tenant 🔑169(10)

In action against owner of business building for injuries sustained by business visitor in fall allegedly caused by heel of visitor's shoe becoming wedged in mat on lobby floor, whether nature of mat was obvious to visitor so as to warn her of danger was a question of fact for jury.

5. Landlord and tenant 🔑167(8)

That mat in lobby of business building, on which business visitor allegedly fell and was injured, was widely used constituted no legal excuse for maintenance of a dangerous condition.

6. Negligence 🔑5

That a negligent practice is general does not transform it into reasonable care.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Ernest I. Spiegl, San Francisco, for appellants.

Cooley, Crowley, Gaither & Dana, Cooley, Crowley & Gaither and Louis V. Crowley, San Francisco, for respondents.

EDMONDS, Justice.

Benjamin and Charlotte Blumberg sued to recover damages for personal injuries which she assertedly sustained when she fell in the lobby of a downtown office building in San Francisco. Their appeal from an adverse judgment challenges the ruling of the trial court granting the property owner's motion for a nonsuit.

According to the settled statement, about two hours after a dinner with Mr. and Mrs. Melvin Isaacs, the Blumbergs accompanied their friends to see Mr. Isaacs' office. The accident occurred after they returned to the ground floor. Mrs. Blumberg testified in part: "* * * I remember taking a few steps and then all of a sudden * * * there was a feeling as though something held me down and right with that simultaneously my head was hitting this terrazzo floor and someone called out. It was all in one, this blow here; I just remember going down and cracking my head." When asked whether there was "any sensation as if your foot had slipped?" she replied: "Oh, no." She gave the same answer to the question: "Was there any sensation of your ankle having turned?" In further explanation of her injuries, she said that she fell on a large mat in front of the elevators while walking with head erect, watching her way. As described by her, she fell toward the lobby door, with her head striking the bare floor and her legs on the mat. After the accident, her right stocking bore the imprint of the mat.

Mrs. Isaacs testified that, after the two couples descended in the elevator, the men preceded their wives across the lobby. Mrs. Blumberg followed them. Mrs. Isaacs, walking slightly behind the three, saw Mrs. Blumberg fall "* * * absolutely straight as though she had had something hold her or pull her * * *. She fell in one straight piece * * * her knees didn't go down first, her arms didn't go down first * * *." Mrs. Isaacs added that, immediately prior to the accident, Mrs. Blumberg's manner of walking was normal. She was not running, and the witness did not see her slip.

The record shows that the mat mentioned in the evidence was constructed of small pieces or strips of rubber or similar material held together in a row, running in both directions at right angles, with open spaces of varying sizes up to, but not greater than, $1\frac{1}{16}$ths of an inch by $\frac{5}{8}$ths of an inch. A witness familiar with the shoe business testified that the left shoe worn by Mrs. Blumberg on the night of the accident was made with a medium spike heel of the type worn on the street by about 60 per cent of the women in San Francisco. The usual measurement across the base of heels of this type, he added, is from $\frac{11}{16}$ to $\frac{12}{16}$ths of an inch. However, Mrs. Blumberg's heel had been shortened on a trimmer and measured $\frac{14}{16}$ths of an inch across the front of the base and $\frac{13}{16}$ths of an inch from front to rear. Upon cross-examination, he declared that a small cap at the base of the heel had been put on by a repair shop; that the shoe was a regular street shoe rather than an evening shoe; and that there is no such thing as a standard heel.

As justifying a reversal of the judgment on the ground that this evidence would support a verdict and judgment in their favor, the Blumbergs contend that the evidence is sufficient to warrant a finding that Mrs. Blumberg's left heel became wedged in one of the interstices in the mat. Their theory is that, although her heel was too large to enter any one of the spaces squarely, it must have entered and become wedged in one of the $1\frac{1}{16}$ths of an inch by $\frac{5}{8}$ths of an inch spaces when brought down at an angle with toe raised, in the manner common to women walking in high heeled shoes. The evidence also indicates, they argue, that the accident could not have happened in any other manner, since she did not slip, trip or turn her ankle, and there was no foreign matter on the mat. As the basis of liability, it is said that the size of the openings was inherently dangerous for the San Francisco women who wear such heels for street use, and the property owner knew, or should have known, of such danger. Finally, it is said, the Blumbergs were invitees, and the property owner owed a duty to maintain the lobby in a safe condition or to give warning of any danger.

As justifying the ruling on the motion, the respondent takes the position that the evidence offered by the Blumbergs is insufficient to support a verdict for them because (1) it does not show that the mat was defective; nor (2) that it was dangerously constructed, or different from mats generally used in office building lobbies; nor (3) that the property owner knew the relation between the sizes of the heel of a woman's shoe and the openings in the mat; nor (4) that the owner knew, or had any reason to believe, that there was danger in maintaining the mat; nor (5) that Mrs. Blumberg's heel actually caught in an opening in the mat. Finally, they insist if the mat was dangerous, its nature was obvious to Mrs. Blumberg, who was therefore warned of its condition.

[1] A trial court is justified in granting a motion for nonsuit "* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191; see also Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1; Neel v. Mannings, Inc., 19 Cal.2d 647, 650, 122 P.2d 576; In re Estate of Lances, 216 Cal. 397, 401, 14 P.2d 768. As stated in Re Estate of Lances, supra, 216 Cal. page 400, 14 P.2d page 769, "Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury."

[2] As invitees of Mr. and Mrs. Isaacs, tenants of the building, the Blumbergs were business visitors and as to them the property owner was obliged to exercise ordinary care to keep the premises in a reasonably safe condition, or to warn them of danger. The duty was not limited to conditions actually known by the owner to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care. Mondine v. Sarlin, 11 Cal.2d 593, 597, 81 P.2d 903; Dobbie v. Pacific Gas and Electric Co., 95 Cal.App. 781, 790, 273 P. 630.

[3] The uncontradicted testimony clearly shows that the floor mat upon which Mrs. Blumberg fell had openings of sufficient size to allow a portion of the heel of her shoe to slip into one of them, at least at an angle. There is also evidence that the shoes of a large number of the women in San Francisco have heels of the size worn by her. Accordingly, the jury reasonably could have inferred that her left heel became wedged in the mat in precisely that manner, causing her to fall.

[4-6] Reasonable inquiry and inspection would have informed the property owner that it was maintaining in the lobby a mat with openings likely to retain and hold the heel of a shoe such as is customarily worn by a large number of the women in San Francisco. Moreover, whether the nature of the mat was obvious to Mrs. Blumberg was a question of fact for the determination of the jury. The claim that the mat in question was widely used is no legal excuse for the maintenance of a dangerous condition. The fact that a negligent practice is general does not transform it into reasonable care.

The judgment is reversed.

GIBSON, C. J., and CARTER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

A possessor of land is not an insurer of the safety of his business guests, nor is he liable for harm resulting from a condition from which no unreasonable risk was to be anticipated. He "is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

"(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724; Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933; Chapman v. Title Insurance & Trust Co., 68 Cal.App.2d 745, 751, 158 P.2d 42; Jones v. Bridges, 38 Cal.App.2d 341, 345, 101 P.2d 91, and

"(b) has no reason to believe that they will discover the condition or realize the risk involved therein, Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512-513, 50 P.2d 801; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P.2d 793; Royal Insurance Co. v. Mazzei, 50 Cal.App.2d 549, 552-553, 123 P.2d 586, and

"(c) invites or permits them to enter or remain upon the land without exercising reasonable care

"(i) to make the condition reasonably safe, or

"(ii) to give a warning adequate to enable them to avoid the harm." 2 Restatement, Torts, § 343, pp. 938-939. It was therefore incumbent on plaintiffs to present evidence from which reasonable men could conclude: (1) that defendants should have realized that the mat involved an unreasonable risk to business visitors; and (2) that defendants had no reason to believe such visitors would realize the risk involved therein. In my opinion there was no evidence that would warrant either of these conclusions.

1. The evidence fails to show that the mat was in any way different from those in general use. Yearsley v. American Stores Co., 97 Pa.Super. 275, 277. There was no evidence that other persons had slipped or fallen on that mat or similar mats, which might have given defendants reason to believe that the continued use of the mat would be dangerous. The majority opinion states that "The fact that a negligent practice is general does not transform it into reasonable care." It is equally true, however, that a practice that has been generally followed without incident is not transformed into negligence merely by the occurrence of a single accident not reasonably foreseeable. Plaintiffs rely upon the testimony of a witness familiar with the shoe business that plaintiff was wearing the type of heel that 60% of the women of San Francisco wear for street use. Even if it is assumed that defendants were aware of this fact, it does not follow that they should have concluded therefrom that the mat was unsafe. There is no negligence if harm could not reasonably be foreseen. "The standard must be one of conduct, not of consequences." Prosser, Torts, § 35, p. 220. Any accident raises the question whether it could reasonably be foreseen, but one cannot conclude that it could have been foreseen merely because it occurred; negligence cannot be inferred by looking backward "with the wisdom born of the event." Cardozo, C. J., in Greene v. Sibley, Lindsay & Curr Co., 257 N.Y. 190, 192, 177 N.E. 416, 417; Dickson v. Emporium Mercantile Co., Inc., 193 Minn. 629, 631, 259 N.W. 375.

It is plaintiffs' theory that the heel of Mrs. Blumberg's shoe became wedged in one of the interstices of defendants' mat after being inserted at an angle with the toe pointed upward. They contend that "the accident could not have happened in any other manner." Diagram B illustrates the outline of Mrs. Blumberg's shoe with the heel in what plaintiffs term "the situation which must have occurred at the moment of Mrs. Blumberg's injury." They

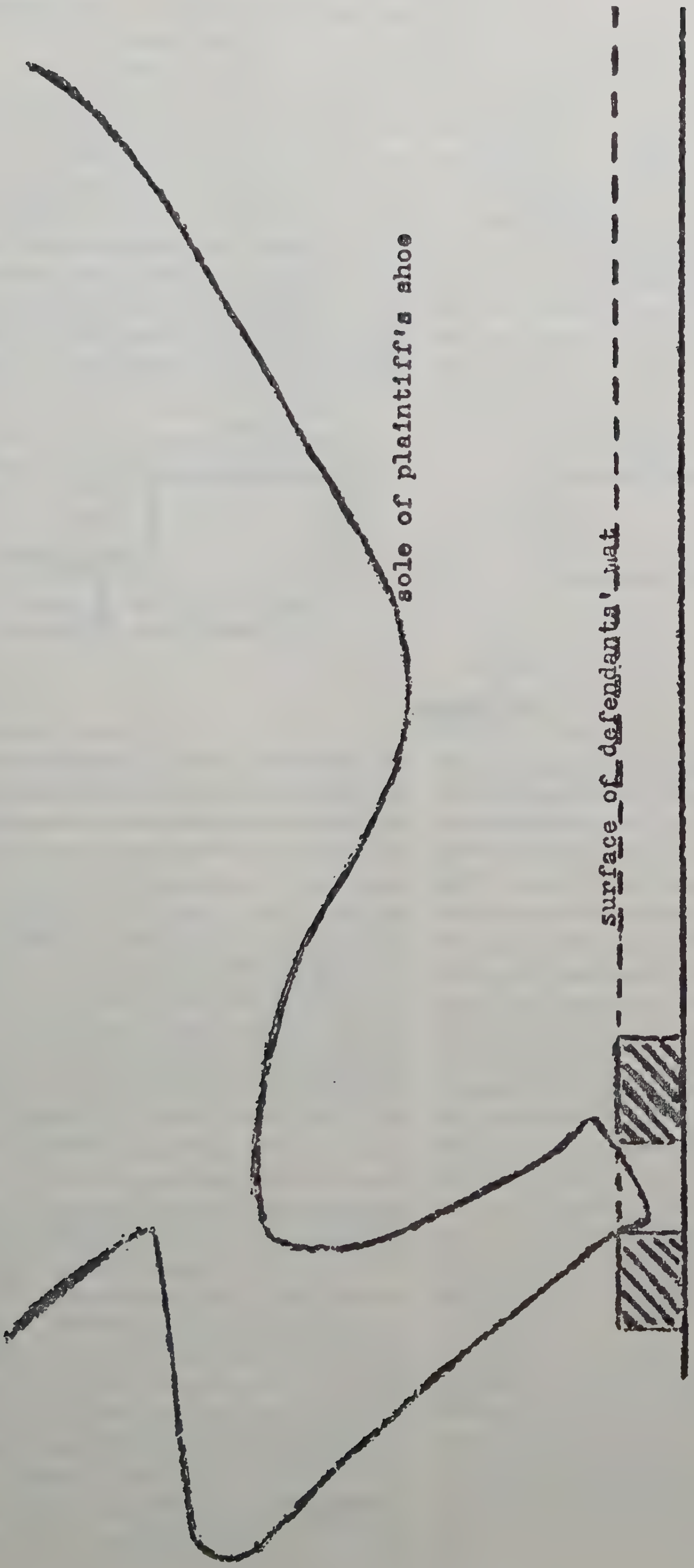
sole of plaintiff's shoe
surface of defendants' mat

DIAGRAM B

contend that as her toe descended and her foot rolled forward, the back of her heel, describing an arc, wedged against the latitudinal strip of the interstice, causing her to fall. Even if it is assumed that the accident occurred according to plaintiffs' theory, can it reasonably be said that it was within the normal scope of prevision of a possessor of land? A comparison of the sizes of the base of Mrs. Blumberg's heel and the largest space in the mat demonstrates the unlikelihood of a heel's wedging in the manner alleged.

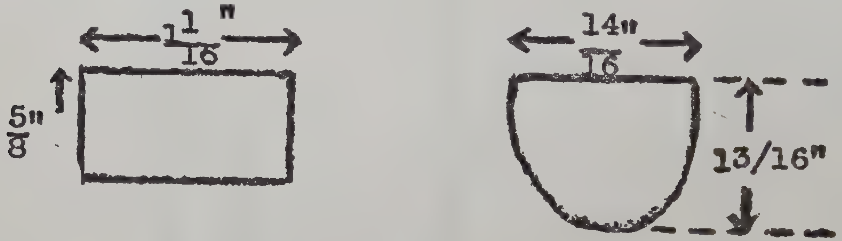

DIAGRAM A

Had plaintiff stepped straight down on the mat, it would admittedly have been impossible for her heel to enter the interstice. The accident could only have occurred, by plaintiffs' own admission, because Mrs. Blumberg crossed the mat at a right angle to the long side of the interstice and the heel fell well into it. It is clear from Diagram B that plaintiff's toe must have been raised at a relatively high angle and at about the only angle that could prevent the heel from swinging free as plaintiff stepped forward. The jury might have inferred that these unusual circumstances conspired to cause Mrs. Blumberg to fall. But the duty to anticipate such a possibility, which became apparent only by hindsight, cannot be said to be part of the requirement of ordinary care. Baran v. Reading Iron Co., 202 Pa. 274, 51 A. 979; Austin v. Eastern Mass. St. Ry. Co., 269 Mass. 420, 169 N.E. 484; see also Whiting v. National City, 9 Cal.2d 163, 165, 166, 69 P.2d 990; Baddeley v. Shea, 114 Cal. 1, 7, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56.

2. Even if reasonable men could differ as to whether the mat created an unreasonable risk to business visitors, the judgment should be affirmed. Any danger inherent in the mat was as apparent to Mrs. Blumberg as to defendants, and a reasonable jury could not conclude that defendants had reason to believe that she would not realize the risk involved in walking across the mat with the type of heels she was wearing. One ordinarily looks where one is going, and the interstices of the mat were clearly visible. There was nothing unusual about them in size or design, nothing defective, to trip the average walker. Actually there was no danger in the mat lying in wait for Mrs. Blumberg. The danger to be anticipated was from the spiked heels, not from the mat. Those who walk on spiked heels court danger. That is their privilege, but it is also their responsibility to consider the consequences, to be aware of the peculiarities of the shoes they wear. Mrs. Blumberg not only could see everything that defendants could by looking at the mat, over which she had walked when she entered the building, but she knew as they did not the type of heel she was wearing. An "owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793, 794; Royal Insurance Co. v. Mazzei, 50 Cal.App.2d 549, 552-553, 123 P.2d 586; see also Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 512-513, 50 P.2d 801.

SHENK and SCHAUER, JJ., concur.

ROBERTS v. CITY OF PALOS VERDES ESTATES et al.

Civ. 17070.

District Court of Appeal, Second District, Division 1, California.

Sept. 7, 1949.

Rehearing Denied Sept. 29, 1949.

Hearing Denied Nov. 3, 1949.

Action by Ray C. Roberts against City of Palos Verdes Estates, a municipal corporation of the sixth class, incorporated under the laws of California; Herman Fritz Bismark Roessler and others, members of the City Council of the City of Palos Verdes Estates, to enjoin erection of vehicle storage buildings on property granted for park purposes.

The Superior Court of Los Angeles County, Caryl M. Sheldon, J., rendered judgment and both plaintiff and defendants appealed.

The District Court of Appeal, Doran, J., reversed the judgment holding that deed conveying land to city prohibited proposed construction.

1. Covenants ⚷49

Where a grant deed is for a specified, limited and definite purpose, the subject of grant cannot be used for another and different purpose.

2. Covenants ⚷51(2)

Deed to city prohibiting erection of buildings unless properly incidental to convenient or proper use of land for park purposes, prohibited grantee from erecting buildings for storage of equipment used in improvement and maintenance of the park lands, and incidentally in maintenance of other city property.

McLaughlin, McGinley & Hanson, and James A. McLaughlin, Los Angeles, for appellant.

Donald Armstrong, San Pedro, for respondents.

DORAN, Justice.

The record reveals that the respondent City of Palos Verdes Estates acquired certain lands which were originally granted exclusively for park purposes. The original grantees deeded the property to the city subject to the conditions of the original deed with a few added conditions. There is no dispute as to the facts; the litigation relates to the construction and interpretation to be placed upon the provisions of the deed which recites "that except as provided above, no buildings, structures or concessions shall be erected, maintained or permitted upon the said realty, except such as (in the opinion of the Park Department of Palos Verdes Homes Association), are properly incidental to the convenient and/or proper use of said realty for park purposes."

The action is for injunctive relief and alleges in substance that the city has commenced the erection of certain buildings on the property to be used for purposes in violation of the above quoted provisions in that said project is a housing yard for city-owned trucks and vehicles used by the city for various purposes.

Respondents admit the allegation to the extent that such project is to be used only for "the storage of equipment used in the improvement and maintenance of the park lands even though some of the equipment is incidentally used in the maintenance of other city property." It is contended by respondents that use for such purpose is not in violation of the deed restrictions.

The judgment provides as follows:

"Now Therefore, It Is Ordered, Adjudged and Decreed:

"That the defendant City of Palos Verdes Estates does have the right to construct on the property of the defendant city constituting a part of the defendant city's park property, which is now being used as a golf course, two buildings, each covering an area of 1,600 square feet, for the purpose of housing and storing any and all vehicles and equipment used by the defendant city exclusively in connection with the care, maintenance and upkeep of the defendant city's parks and park property. That the defendant City of Palos Verdes Estates does not have the right to construct such buildings for the purpose of, or to use such buildings when so constructed, for the purpose of storing any vehicles or equipment that are not used excluively for the care, maintenance and upkeep of the defendant city's park property. That any vehicles or equipment of the defendant city which are used by the defendant city or maintained by the defendant city for use on any properties or projects other than the defendant city's parks and park properties may not be stored, maintained, or kept in such buildings."

Plaintiff Ray C. Roberts appeals from that portion of the judgment decreeing that defendant city has the right to use such park property for storing vehicles and equipment used by the city exclusively in connection with the care, maintenance and upkeep of the city's parks and park property.

The defendants have appealed from that portion of the judgment which provides that the city does not have the right to construct buildings, or to use such buildings, for the purpose of storing any vehicles or equipment not used exclusively for the care, maintenance and upkeep of the city's park property, and that the city may not store or maintain in such buildings any vehicles or equipment used on any properties or projects other than the city's parks and park properties.

[1] It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose. Mulvey v. Wangenheim, 23 Cal.App. 268, 137 P. 1106; Kelly v. Town of Hayward, 192 Cal. 242, 219 P. 749; McCullough v. Board of Education of San Francisco, 51 Cal. 418; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 227 P. 649; Wessinger v. Mische, 1914, 71 Or. 239, 142 P. 612.

[2] Respondents' argument in effect seeks to add the word "indirectly" to the restrictive provisions, that is to say if buildings, structures or concessions are indirectly "incidental to the convenient and/or proper use of said realty for park purposes" they escape the limitation of the deed restrictions. Obviously such contention cannot be upheld. Courts have guarded zealously the restrictive covenants in donations of property for public use as the foregoing cited decisions will reveal. Such an effort on the part of a municipality if successful may be but the opening wedge and, as stated in Kelly v. Town of Hayward, supra [192 Cal. 242, 219 P. 750], "some future board might claim that under their discretion a corporation yard and rock pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied."

What a city council or board of trustees would like to do under whatever guise it may be proposed is not the test as to the validity of the proposal. The terms of the deed alone are controlling.

Unless the buildings directly contribute to the use and enjoyment of the property in question for park purposes, there exists a violation of the restrictions.

The judgment therefore goes beyond the restrictions when it gives the city authority to use buildings erected on the property for the purposes specified in the judgment. It may be assumed that the city owns other parks or may acquire other parks, and there is nothing in the deed which suggests that the property in question may be used "for park purposes" except for the purposes of the particular park dedicated and described in the deed.

It is necessary, therefore, to reverse the judgment and remand the cause for trial on the sole issue as to whether the building or buildings would by necessary and appropriate, and hence, "incidental to the convenient and/or proper use of said realty for park purposes." And, as above noted, the use of said building or buildings is limited to the "park" described in the deed and for no other purpose.

For the foregoing reasons the judgment is reversed and the cause remanded, costs to appellant Roberts.

WHITE, P. J., and DRAPEAU, J., concur

93 Cal.App.2d 325

BEYNE v. VAN AALST.

Civ. 17165.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1949.

Pleading 🔑192(3), 345(1.4)

In action for alleged failure of attorney to file an action for injuries before statute of frauds foreclosed action, complaint alleging that defendant "negligently permitted said plaintiff's cause of action to become barred by statute of limitations of the State of California in such cases made and provided", was sufficient as against a general demurrer or motion for judgment on the pleadings, on ground that complaint pleaded a mere conclusion of law.

Appeal from Superior Court, Los Angeles County; Philip H. Richards, Judge.

Action by Peter J. Beyne against John Van Aalst, an attorney at law, for damages resulting from alleged failure of defendant to file an action for injuries before statute of limitations foreclosed the action. From an adverse judgment, plaintiff appeals.

Reversed.

George Appell, Los Angeles, for appellant.

Krag & Sweet, David T. Sweet, Alhambra, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Plaintiff filed the within action for damages based on the alleged negligence of defendant, an attorney at law, for failure to file an action for damages for personal injuries before the statute of limitations foreclosed the action. When the action was called for trial, defendant made a motion for judgment on the pleadings based on the contention that plaintiff's "complaint was fatally defective in that it alleged a mere conclusion of law in the latter portion of paragraph V of said Complaint, wherein it recited, '* * * and negligently permitted said plaintiff's cause of action to become barred by the Statute of Limitations of the State of California in such cases made and provided.'" The court in ruling on the motion directed the entry of a minute order as follows, "Defendant's motion for a judgment on the pleadings is now denied on condition that plaintiff file an Amended Complaint within ten days from date hereof and leave to file said amended complaint is granted and defendant is given usual time to answer. Cause is ordered off calendar. Notice is waived." Plaintiff declined to amend and judgment followed from which plaintiff appeals.

It is well settled that a complaint so phrased is sufficient against a general demurrer or motion for judgment on the pleadings.

Judgment is reversed.

WHITE, P. J., and DRAPEAU, J., concur.

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93 Cal.App.2d 291

LAMONT et ux. v. BALL et ux.

Civ. 13878.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1949.

Rehearing Denied Sept. 8, 1949.

Hearing Denied Sept. 29, 1949.

1. Vendor and purchaser 🔑148

Where vendor did not tender deed on date balance of purchase price fell due or at subsequent times when payment was demanded by vendor, purchasers' failure to make payment did not put them in default and their rights under contract were not forfeited.

2. Contracts 🔑271

When time is not made of essence of a contract, party who would terminate contract must give notice to other and a reasonable time within which to do any act required on his part before he can be absolved therefrom.

3. Vendor and purchaser 🔑101

Where time was not of essence in contract for sale of realty, vendor could not terminate contract without giving notice to purchasers and allowing them a reasonable time within which to pay balance of purchase price due under contract.

4. Vendor and purchaser 🔑101, 159

Where time is of essence in a contract for sale of realty, failure of vendor to tender deed on due date constitutes a waiver of strict performance of contract, and thereafter vendor can place purchaser in default and forfeit their rights under contract only by giving definite notice that unless payment is made on a date fixed therefor far enough in future to give purchaser reasonable time and opportunity to comply with contract by making payment, contract will be terminated and forfeiture will take place.

5. Vendor and purchaser 🔑104

Evidence did not sustain finding that placing of mortgages on purchasers' equity under contract for sale of realty or removal of personalty from premises was in violation of oral contract for sale of realty so that neither act operated to work a forfeiture of the contract.

6. Vendor and purchaser 🔑92

Where purchasers of realty requested vendors to place deed in escrow to facilitate their sale of realty to a third party, withdrawal of deed from escrow on failure of intended sale to third party did not work a forfeiture of purchasers' rights under contract.

7. Contracts 🔑318

The law abhors forfeitures. Civ.Code, § 1442.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Sherman M. Lamont and Beth Lamont, his wife, against Wilbert M. Ball and Dorothea M. Ball, his wife, for specific performance of an oral contract to sell and convey realty and certain personalty wherein defendants cross-complained. From a judgment for the defendants, plaintiffs appeal.

Reversed.

Irving M. Liner, Lionel B. Benas, Oakland, for appellants.

Deasy, Crittenden, Dodge & Alexander, Oakland, for respondents.

DOOLING, Justice.

Plaintiffs and appellants sued defendants and respondents for specific performance of an oral contract to sell and convey a lot of land improved with a dwelling house and the furniture and furnishings thereof and respondents cross-complained to quiet their title to the real property. Judgment went against appellants on their complaint and in favor of respondents on the cross-complaint.

On September 13, 1945, the parties entered into an oral agreement whereby respondents agreed to sell the real and personal property for $3000, $2000 of which was paid at the time, the balance of $1000 being represented by a promissory note payable on December 31, 1945. Appellants also agreed to assume an existing indebtedness secured by a mortgage on the real property. The trial court expressly found that under the terms of said agreement time was not of the essence. Under the agreement appellants were immediately let into possession.

On December 31, 1945 the promissory note was not paid nor did respondents tender a deed to the property. On February 28, 1946 respondents demanded payment of the promissory note by appellants with interest as provided therein on or before March 12, 1946 on penalty of forfeiture of their rights. However no deed was tendered to appellants on or before the latter date. In April, 1946 appellants requested respondents to place a deed to appellants in an escrow opened for that purpose promising: "The deal should close quickly and your check will be sent you by the title company." On May 3, 1946 respondents deposited a deed in escrow as requested with instructions to deliver it on payment of $1000 with interest to date at the rate provided in the promissory note.

The sale which appellants had negotiated to a third party fell through because of mortgage liens which appellants had created on their equity in the real property and on August 1, 1946 the escrow was closed. In June, 1946 appellants vacated the property in anticipation of its proposed sale and early in September, 1946 respondents having learned that the escrow was terminated and finding the property vacant reoccupied it. On September 28, 1946 appellants tendered the balance due to respondents and demanded a deed which respondents refused on the ground that appellants' rights had been forfeited,

[1] On December 31, 1945, the date when the balance of the purchase price fell due, the payment of the balance by appellants and the delivery of a deed by respondents were concurrent conditions, and the appellants were not in default because respondents failed to tender them a deed to the property. Kerr v. Reed, 187 Cal. 409, 202 P. 142; Monnette v. Title Guar. & T. Co., 30 Cal.App.2d 428, 86 P.2d 848; 25 Cal.Jur., Vendor and Purchaser, sec. 109, p. 600. For this reason the demand for payment made on February 28, 1946 and notice of intended forfeiture if payment was not made by March 12, 1946 were of no legal effect since respondents made no tender of a deed at any time during that period.

[2, 3] Thus the contract was still in full force and effect on May 3, 1946 when at appellants' request respondents finally placed a deed in escrow. Accompanying the deed was no demand for payment at any particular time nor any notice of intended forfeiture for failure to pay within any specified time or at all. Time not being of the essence, as specifically found by the trial court, the rule stated in Alexander v. Jackson, 92 Cal. 514, 522, 28 P. 593, 595, 27 Am.St.Rep. 158, was applicable: "When time is not made of the essence of the contract, it is incumbent upon the party who would terminate the contract to give notice to the other, and a reasonable time within which to do any act required on his part before he can be absolved therefrom."

[4] Respondents argue that time was of the essence in spite of the court's finding to the contrary. Even so respondents would be in no better position. By failing to tender a deed on December 31, 1945 respondents themselves waived a strict performance of the contract and even if time was of the essence respondents could thereafter only place appellants in default and forfeit their rights under the contract by giving definite notice that unless payment was made on "a date fixed therefor, far enough in the future to give the purchaser reasonable time and opportunity to comply with his contract by making the payments, the contract will be terminated and a forfeiture will take place." Adams & McKee Land Co. v. Dugan, 68 Cal. App. 226, 231, 228 P. 681, 683; Stevinson v. Joy, 164 Cal. 279, 285, 128 P. 751; Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541; Urban v. Yoakum, 89 Cal.App. 202, 208, 264 P. 493; Leballister v. Morris, 59 Cal.App. 699, 703, 211 P. 851; 25 Cal.Jur., Vendor and Purchaser, sec. 119, p. 618. This was never done.

Respondents attempted to excuse this failure to give such a notice by testimony of unsuccessful efforts to locate the appellants after reoccupying the property on September 1, 1946. The effect of this testimony was destroyed by Mr. Ball's admission on cross-examination that he had met appellant Sherman Lamont on September 10 and had neither asked him where he was living nor said anything "about the house."

Thus on September 28, 1946, eighteen days after this meeting, when appellants tendered the balance due with interest and demanded a deed respondents had never at any time taken the necessary steps to terminate the contract and work a forfeiture.

[5-7] The placing of mortgages upon appellants' equity did not operate to work a forfeiture nor did the removal of the personal property from the premises. There is no support in the evidence for the finding of the trial court that either act was in violation of the contract, and

upon payment of the balance of the purchase price as tendered neither act could possibly be harmful to respondents. Nor can we find that the withdrawal of the deed and instructions from escrow on the failure of the intended sale worked a forfeiture. The law abhors forfeitures (Civ.Code, sec. 1442; 12 Cal.Jur., Forfeitures, sec. 3, p. 633) and respondents having once waived strict performance appellants were entitled to treat the contract as continuing in the absence of notice to the contrary in accordance with the above stated rules. The evidence simply does not support the essential findings. Since no default was proved we need not consider the question of appellants' right to be relieved. Barkis v. Scott, 34 Cal.2d ——, 208 P.2d 367.

Judgment reversed.

GOODELL, J., concurs

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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93 Cal.App.2d 869

PACIFIC GAS & ELECTRIC CO. v. DAVIS et al.

Civ. 7717.

Sac. 6041.

District Court of Appeal, Third District, California.

Aug. 29, 1949.

Stipulations 🔑14(5)

Where parties filed written stipulation to effect that in event District Court of Appeal should reverse judgment in a similar case then pending appeal, and Supreme Court should deny hearing therein, District Court of Appeal should reverse judgment and judgment in case pending appeal was thereafter reversed, judgment would accordingly be reversed.

◆

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Action by Pacific Gas & Electric Company to enjoin Alvin Davis and Maude Davis, his wife, Dan Foley, Charles N. Bessac, Mechanics & Merchants National Bank of Vallejo and others from maintaining or removing buildings allegedly constructed on rights of way and easements of plaintiff across defendants' lands. From a judgment for the plaintiff, defendants appeal.

Reversed with directions.

Taft, Wright & Hopkins, Vallejo, O'Hara, Randall, Castagnetto & Kilpatrick, Vallejo, for appellants.

Robert H. Gerdes, W. R. Dunn, San Francisco, Goodman & Goodman, Fairfield, for respondent.

PER CURIAM.

This is a suit for injunction to restrain the defendants from maintaining or removing buildings alleged to have been constructed on the rights of way and easements of plaintiff across the lands of defendants in Solano County. The amended answer of the defendants alleges equitable defenses to the action. Plaintiff's demurrer to the answer was sustained without leave to amend the pleading. Judgment was rendered accordingly in favor of the plaintiff enjoining the defendants and their successors and assigns from "erecting or maintaining beneath said lines of poles and wires or any wires thereof at said place any building, structure or improvement, excepting roads and fences." From that judgment the defendants have appealed. The pleadings and issues of this case are similar to those which were involved in the case of Pacific Gas and Electric Company v. Minnette, in which this court reversed a judgment for plaintiff on the ground that the trial court abused its discretion in sustaining plaintiff's demurrer to the answer without granting defendants leave to amend their pleading, Pacific Gas & Electric Co., v. Minnette, 92 Cal. App.2d 401, 206 P.2d 1138. The Supreme Court denied a hearing in that case.

While the appeals in both of said cases were pending in this court and undetermined, the respective parties to this action filed their written stipulation to the effect that in the event this court should reverse the judgment in the Minnette case, and the Supreme Court should deny a hearing therein, this court would thereupon reverse the judgment in the present case and direct the trial court to overrule plaintiff's demurrer to the amended answer.

Pursuant to the foregoing stipulation, the judgment which was rendered in this case on April 21, 1949, is reversed, and the court is directed to overrule plaintiff's demurrer to defendants' amended complaint. By stipulation the remittitur is to issue forthwith.

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93 Cal.App.2d 295

THEIN v. STICHA et al.

Civ. 14030.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1949.

1. Vendor and purchaser 🔑299(1)

Where vendor wrote letter to purchaser informing him that action of eviction would be instituted unless terms of contract were complied with within a certain period, confusion arising in completing transaction from misdirection of letter would be charged to vendor.

2. Exchange of property 🔑6, 8(1)

Where defendants conveyed realty and personalty to plaintiff in accordance with contract for exchange of realty and commitment for balance due plaintiff was received by escrow from Department of Veteran's Affairs prior to deposit of deed by plaintiff, defendants were not in default and possession of exchanged realty could not be recovered by plaintiff.

3. Exchange of property 🔑6

Where defendants conveyed realty and personalty to plaintiff in accordance with contract for exchange of realty and commitment for balance due to plaintiff was received by escrow from Department of Veteran's Affairs prior to deposit of deed by plaintiff, defendants were not required to inform plaintiff that balance due on contract was in hands of escrow awaiting his deed.

4. Escrows 🔑8(1)

When papers and moneys are delivered to an escrow holder to be held by him in that capacity and to be distributed to respective parties on performance of terms of contract, escrow is agent of both parties and knowledge possessed by such an agent is to be imputed to each of parties to the escrow.

5. Exchange of property 🔑6, 8(1)

Where defendants conveyed realty and personalty to plaintiff and plaintiff delivered possession of realty to defendants in accordance with contract for exchange of realty, and balance due plaintiff had been lying with escrow agent for three months, offer of performance by plaintiff on condition that defendants pay an additional amount for rent and back interest did not put defendants in default, and plaintiff was not entitled to recover possession of realty. Civ.Code, § 1494.

6. Vendor and purchaser 🔑79, 148, 169

Where making of a deed and payment of purchase money are dependent and concurrent conditions, performance or an offer to perform on the one part, unless waived or rendered unnecessary, is a condition precedent to right to insist upon performance by the other, and vendor cannot, in absence of an excuse therefor, put vendee in default until he has tendered his deed and demanded payment, even though time is of the essence, and may not declare a forfeiture without a tender.

7. Vendor and purchaser 🔑185

Where time in contract for sale of realty was of essence and vendor did not insist on strict performance until almost three months after balance of purchase price was due, but letter in which such insistence was made was misdirected and never received by purchasers, failure of purchasers to deposit balance of purchase price within time specified in contract did not put them in default.

Appeal from Superior Court, City and County of San Mateo; Edmund Scott, Judge.

Action by Le Roy J. Thein against Albert Sticha and Mary Sticha to recover possession of realty, wherein defendants filed a cross-complaint. From a decree for defendants, plaintiff appeals.

Affirmed.

Joseph A. Brown, San Francisco, for appellant.

Marvin G. Giometti, Alex Arguello, J. Joseph Sullivan, San Francisco, for respondent.

GOODELL, Justice.

Appellant brought this possessory action against respondents, who filed a cross-complaint for specific performance. The court found in respondents' favor, and from a decree entered on the findings this appeal was taken.

Appellant owned a piece of improved real property in Bayshore City, San Mateo county. Respondents owned a piece of improved real property in Mill Valley, Marin county On February 3, 1946, two agreements were entered into between the parties for the sale of the Bayshore City property to respondents and for the sale by them to appellant of the Mill Valley parcel (together with some personal property). These two agreements, which may be treated as one, fixed the price of appellant's Bayshore City property at $7,150, and of respondents' Mill Valley property at $2,000 (inclusive of the personal property).

On February 5, respondents conveyed the Mill Valley property to appellant and transferred to him the personal property thereon, consisting of two stoves, a Ford tractor, a double bottom plow, fence posts and lumber, and an insurance policy on the property. This was the first step in the performance of the contracts and entitled respondents to a credit of $2,000 on their purchase of the Bayshore City property.

Under the contracts the balance of $5,150 was payable within 30 days, but despite the fact that it was not paid on time, appellant on March 5, turned over the possession of the Bayshore City parcel to respondents, who moved in. This was the second step toward consummation and it showed that strict performance was not being insisted on at that juncture.

Respondent Albert Sticha was eligible for a Veteran's loan and the purchase for the most part was to be financed thereby. the record shows that appellant knew this.

On May 25 Title Insurance and Guaranty Co. of San Francisco, (designated in both contracts for the closing of the transaction) received from the Department of Veterans' Affairs its commitment for a loan to Sticha of $5,200 on the Bayshore City property. This was the third step toward consummation. One of the Title Company's officers testified that that Company treated this commitment as the equivalent of cash, and the court found that it was cash, paid in by respondents as the balance on the contract.

In the meantime, in February, appellant had made out a deed of the Bayshore City property naming the Stichas as grantees, but on being informed that it had to run to the Department of Veterans' Affairs it was withdrawn.

[1] On June 19 appellant wrote a letter to respondents directing attention to the fact that the contract of February 3 called for the closing of the deal within 30 days, and concluding with the ultimatum "that unless you comply with the terms of our agreement within two weeks, I shall take advantage of my legal rights by bringing an action at law to declare the contract breached and institute an action of eviction." This letter was misdirected by appellant, and respondents never received it; it was returned to appellant, and is in evidence. It was written, obviously, without knowledge of the fact that three weeks before its date the $5,200 Veterans' commitment had been lodged with the Title Company. Had the respondents received the letter they undoubtedly would have called appellant's attention to the $5,200 then lying in the Title Company awaiting appellant's deed. Any confusion arising from the misdirection of appellant's June 19 letter cannot, of course, be charged against respondents.

On August 14 appellant lodged with the Title Company a deed to the Bayshore

City property and served on respondents a notice thereof, but included therein a demand for $5,668 instead of $5,150. This ultimatum gave respondents 5 days within which to close the transaction. No action resulted, the 5 days expired, and on August 24 appellant served notice on respondents to vacate the Bayshore City property. On August 28 respondents decided, in order to close the transaction amicably, to submit to the appellant's exaction of the additional money, but appellant did not accede, and brought this action for eviction.

It is appellant's contention that the lodgment on August 14 of the deed with the Title Company was performance on his part which put respondents in default. It is respondents' contention that the lodgment on August 14 of the deed with conditions attached which went beyond respondents' contractual obligation was not a good tender but was utterly ineffective to put them in default.

[2] The first inquiry is whether respondents were in default before June 19, the date of the misdirected and undelivered letter. The part of their obligation which was to convey the Mill Valley property was punctually performed within two days of the date of the contract, when they made the deed and transferred the personal property. They alleged in their cross-complaint that these transfers had been made and as their allegation was not denied it never became an issue in the case. It is an admitted fact that the $5,200 commitment was in the hands of the Title Company on May 25, which was three weeks before appellant in his misdirected letter attempted to make an issue of delay on respondents' part. Respondents were not in default on June 19.

All that remained, then, was for appellant to deliver a proper deed to the Title Company without any new conditions attached and for that Company to make the usual adjustments and prorations of taxes and insurance and deliver the money to appellant and the deed to respondents.

[3, 4] There was no obligation imposed on respondents to notify appellant that the $5,200 was on hand in the Title Company awaiting appellant's deed. At that stage of the proceedings the Title Company was the agent of both parties. Shreeves v. Pearson, 194 Cal. 699, 707, 708, 230 P. 448; 10 Cal.Jur. 587. "And * * * the knowledge possessed by such an agent is to be imputed to each of the parties to the escrow." Ryder v. Young, 9 Cal.A.2d 545, 553, 50 P.2d 495, 499, citing cases.

The next inquiry is whether the delivery of the deed to the Title Company on August 14 put respondents in default. The notice served on respondents showed that the deed was accompanied by appellant's demand for $5,668 which appellant specified as follows:

"Purchase price of property	$7150.00
Money due seller for rent and back interest	418.00
	———
Less allowance for equity of purchaser's property in Marin County less One Hundred Dollars ($100.00) previously paid by Mr. Thein	$7568.00 1900.00
	———
Total owed seller	$5668.00 * * *"

(There was no explanation of how the $418 item was arrived at or made up).

"An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform." Civ. Code, § 1494.

Respondents were unquestionably bound to pay $5,150, the balance on the purchase price. But were they bound to pay $418 "for rent and back interest"? They had conveyed the Mill Valley property at once and appellant had possession of it and of the personal property which went with it. Respondents had been placed in possession of the Bayshore City property by appellant; the $5,200 to close the deal had been lying in the Title Company at that time for almost 3 months.

[5] The court found definitely in respondents' favor on this question. It found that on August 14 when appellant lodged his deed with the Title Company he "made a demand for an additional sum of money, to wit, Four Hundred and Eighteen ($418) Dollars over and above the agreed price as set forth in the agreement * * *". It found "That any loss of interest or benefits

suffered by the plaintiff and cross-defendant was occasioned by his own default" and, as a conclusion of law, "That the plaintiff and cross-defendant is precluded from claiming any interest or benefits for the use and occupancy of the premises by the defendants and cross-complainants." If, therefore, the tender of August 14 imposed conditions not justified by the agreement it was not such an offer of performance as would put the vendees in default.

The conveyance of the Mill Valley property and the personalty left a lump-sum balance of $5,150 owing. No question of installment payments was involved. It is true that time was made of the essence of the contract; it is true, also, that the $5,150 had not been paid within the 30 days, but it is also true that strict performance had not been insisted on before appellant's letter of June 19 which respondents never received. The Veteran's commitment for $5,200 which was treated as cash had been lying in escrow for three weeks before that letter was written.

[6, 7] The rule is settled by numerous cases that "Where the making of a deed and the payment of the purchase money are dependent and concurrent conditions, performance or an offer to perform on the one part, unless waived or rendered unnecessary, is a condition precedent to the right to insist upon a performance by the other. In such case the vendor cannot, in the absence of any excuse therefor, put the vendee in default until he has tendered his deed and demanded payment, even though time is of the essence of the contract; and he may not, without a tender, declare a forfeiture * * *" (25 Cal.Jur. pp. 659–660). Leading cases on this subject are Lemle v. Barry, 181 Cal. 6, 10, 183 P. 148 and Kerr v. Reed, 187 Cal. 409, 202 P. 142. Recent cases are Grimes v. Steele, 56 Cal.App.2d 786, 790, 133 P.2d 874 and Lifton v. Harshman, 80 Cal.App.2d 422, 433, 182 P.2d 222. What was said in Kerr v. Reed, 187 Cal. at page 414, 202 P. at page 144 seems to fit the instant case: "* * * we have the simple situation where both parties to a contract in which time is made the essence thereof, allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default by the other without a tender."

It goes without saying that unless appellant could plead and prove that respondents were in default he could not prevail. The trial court, on evidence which was all one way had to find, as it did, that respondents were not in default. It proceeded, then, simply to hold both sides to the performance of their contract. Under its decree each side got that for which it had bargained (except, of course, the litigation).

The judgment is affirmed.

DOOLING, J., concurs.

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93 Cal.App.2d 261

PEOPLE v. REBOLLEDO.

Cr. 805.

District Court of Appeal, Fourth District, California.

Aug. 8, 1949.

1. Criminal law ⇨238

Evidence at preliminary hearing was sufficient to justify magistrate in determining that there was reasonable and probable cause that accused had committed lewd and lascivious acts on the body of a child under 14. Pen.Code, § 288.

2. Indictment and Information ⇨137(1)

Where record showed that at arraignment complaint was read to accused through an interpreter and that he was informed of his legal rights, it was presumed that magistrate advised accused of his legal rights and trial court properly refused to set aside information on ground that accused was not advised of right to counsel and of right to cross-examine witnesses. Pen.Code, §§ 686, 858.

3. Criminal law ⇨232

The representation of accused by counsel at preliminary examination was not necessary.

4. Indictment and Information ⚷137(1)

Denial by trial court of motion to set aside information on ground that committing magistrate failed to appoint an interpreter was proper where record showed that an interpreter was present and sworn, both at arraignment and preliminary hearing, and it was not shown that interpreter failed to perform his duty, and record indicated that defendant understood what was being said at preliminary hearing.

5. Criminal law ⚷642

The matter of the appointment of an interpreter is discretionary with the court.

6. Indictment and Information ⚷10, 41(6)

A preliminary examination and commitment by a magistrate is required before an information can be filed, and an examination by a grand jury before an indictment, not so much to protect the liberties of the citizen as to protect him from being prosecuted on slight evidence or mere suspicion, or at the instigation of private malice.

7. Criminal law ⚷1023(8), 1134(10)

Order denying motion to set aside information was not appealable but was reviewable on appeal from judgment of conviction.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Ignacio Rebolledo was convicted of committing lewd and lascivious acts on the body of a child under 14, and of rape, and from the judgment of conviction and from an order denying his motion to set aside the information, he appeals.

Appeal from order dismissed, and judgment affirmed.

Tom Okawara, Fresno, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Appellant was duly arraigned before a magistrate on charges of violation of section 288 of the Penal Code, and rape accomplished with a girl ten years of age. At the time of his arraignment an interpreter was present, the complaint was read to appellant, he gave his true name and was informed of his legal rights. The preliminary hearing was set for and held two weeks later, at which time an interpreter was sworn to interpret and did interpret the testimony of some of the witnesses.

The evidence produced at the preliminary hearing shows that Ramona Tafoola, the prosecutrix, was walking home from school when appellant told her to get into his truck and he would take her home. He drove to some trees where he struck the girl and she lost consciousness. When she recovered some of her clothes had been removed, her dress was bloody and she was injured internally. Soon after the occurrence appellant was caught by Ramona's grandfather, Pedro, and he told Pedro that he was guilty of attacking the girl. A medical examination disclosed internal lacerations and other injuries.

Upon this evidence appellant was held to answer for a violation of section 288 of the Penal Code. An information was filed in the Superior Court charging him with statutory rape and a violation of section 288 of the Penal Code. A motion to set aside the information was denied and appellant was tried and convicted before a jury. He appeals from the judgment and order denying the motion to set aside the information and does not here urge error as to anything occurring at the trial but claims that the judgment should be set aside on the grounds that at the preliminary hearing he was committed without reasonable or probable cause that he had committed a public offense; that he was not advised of the charges against him, of his right to counsel, and of his right to cross-examine witnesses, and finally, he contends that the committing magistrate failed to appoint an interpreter in his behalf.

[1] It is quite apparent that there was ample evidence at the preliminary hearing from which the magistrate could and did determine that there was reasonable and probable cause that appellant had committed a violation of section 288 of the Penal Code. People v. McRae, 31 Cal.2d 184,

187, 187 P.2d 741. In fact it is not here contended by appellant that he did not commit the offense charged or that the verdict of the jury was contrary to the evidence.

[2, 3] The contention of appellant that he was not advised of charges against him, of his right to counsel and to cross-examine witnesses, is without merit. The record shows that at the arraignment the complaint was read to him through an interpreter and he was informed of his legal rights. It is presumed that when the magistrate advised appellant of his "legal rights" at the arraignment, that he also advised him of his right to the aid of counsel in every stage of the proceedings (Penal Code, sec. 858); that he was entitled to produce witnesses on his own behalf and to be confronted with the witnesses against him in the presence of the court. Penal Code, sec. 686; Code of Civil Procedure, sec. 1963, sub. 15. It was not necessary that appellant be represented by counsel at the preliminary examination, People v. Campos, 10 Cal.App.2d 310, 320, 52 P.2d 251; People v. Greene, 80 Cal.App.2d 745, 748, 182 P.2d 576, however, he had been advised of that right and was given ample opportunity to secure the services of an attorney if he so desired.

At the conclusion of the testimony at the preliminary hearing appellant was asked through an interpreter if he wished to testify in his own behalf and his reply was that he would wait until an attorney was appointed.

[4] Appellant's final contention that the committing magistrate failed to appoint an interpreter in his behalf is likewise without merit. The record shows that an interpreter was present and sworn, both at the arraignment and the preliminary hearing, and it is not shown that the interpreter failed to perform his duty. The record indicates that appellant understood what was being said at the preliminary hearing and there is no evidence that he desired at the time to be more fully informed as to his rights. After the testimony at the preliminary examination, he was asked if he had anything to say. Through the interpreter he answered that he was guilty, but not of the act of which he was accused. This answer indicates that he understood the testimony.

[5] The matter of the appointment of an interpreter is discretionary with the court. In re Steve, 73 Cal.App.2d 697, 714, 167 P.2d 243. In the instant case the interpreter was sworn, performed his duty, and was available to defendant at the arraignment and the preliminary hearing.

[6] As was said in People v. Hinshaw, 194 Cal. 1, 11, 227 P. 156, 161: "A preliminary examination and commitment by a magistrate is required before an information can be filed, and an examination by a grand jury before an indictment, not so much to protect the liberties of the citizen as to protect them from being prosecuted upon slight evidence or mere suspicion, or at the instigation of private malice."

In the instant case a trial was had before a jury resulting in the conviction of appellant and no error is claimed to have occurred during the proceedings in the trial. It does not appear that appellant was deprived of any substantial right by reason of the fact that he was not represented at the preliminary hearing by counsel and did not cross-examine the witnesses called by the prosecution. People v. Turner, 28 Cal.App. 766, 769, 154 P. 34; People v. Ratterman, 38 Cal.App.2d 598, 601, 101 P.2d 750; People v. Kelso, 25 Cal.2d 848, 852, 853, 155 P.2d 819.

[7] The order denying the motion to set aside the information is not an appealable order but is reviewable on appeal from a judgment of conviction. Nelson v. Superior Court, 77 Cal.App.2d 783, 784, 176 P.2d 390.

The appeal from the order is dismissed and the judgment is affirmed.

BARNARD, P. J., concurs.

93 Cal.App.2d 479

DANIELS et ux. v. McPHAIL et al.

Civ. 14057.

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1949.

Hearing Denied Oct. 27, 1949.

Charles Daniels and wife brought an action against John McPhail, Ruth McPhail, his wife, Graham McPhail and Vera McPhail, his wife, and another for wrongfully allowing land of theirs to slide and fall upon land and improvements of plaintiffs. The named defendants filed a cross-complaint for failure of plaintiffs to provide lateral support.

The Superior Court, Marin County, Ross, J., directed a verdict for defendants in plaintiff's action and against named defendants on their cross-complaint. The plaintiffs appealed.

The District Court of Appeals, Ward, J., affirmed the judgment on the ground that plaintiffs were not liable for the damages.

1. Adjoining landowners ⚿6

Statute requiring coterminous owner of property desiring to excavate to give reasonable notice of depth of proposed excavation and of time work would commence did not apply where party making excavation then owned both parcels of land involved. Civ.Code, § 832.

2. Adjoining landowners ⚿6

Statute providing that one must so use his own rights as to not infringe upon the rights of another was not controlling in action by property owner against coterminous landowner for damages caused by landslide. Civ.Code, §§ 3509, 3514.

3. Vendor and purchaser ⚿203

Where vendors, who had excavated a portion of a parcel of land, sold excavated part and rocks and dirt slid from unexcavated portion onto vendee's property, but no warranty, negligence or fraud was claimed by vendee, vendors were not liable for damages. Civ.Code, § 832.

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Appeal from Superior Court, Marin County; Albert F. Ross, Judge.

Freitas, Keating & Freitas, San Rafael, for appellant.

Martinelli, Gardiner & Riede, San Rafael, for respondent.

WARD, Justice.

The gist of this action appears in the following paragraph of the complaint: "That in the months of February and March 1947, defendants wrongfully allowed land of theirs to slide and fall onto the land and improvements of plaintiffs, without plaintiffs' consent and against the wish of plaintiffs, thereby causing damage to plaintiffs' land and improvements in the amount of Three Thousand Two Hundred Twenty-Two and 36/100 ($3,222.36) Dollars." Defendants McPhail answered and cross-complained. The answer admits the sliding of the land, sets up contributory negligence, assumption of risk, an act of God and plaintiffs' failure to support defendants' property. In the cross-complaint defendants demanded that their land be provided with lateral support and alleged that under present conditions defendants' lands are unusable for residential or commercial purposes and damaged and diminished in market value to the extent and in the amount of the cost of a retaining wall, to wit, $5,000.00.

After the presentation of evidence each side made a motion for a directed verdict. By order of the court the jury returned a verdict in favor of defendants and against plaintiffs on the issues raised by the complaint and answer, and in favor of plaintiffs and cross-defendants and against the cross-complainants on the issues raised by the cross-complaint and the answer thereto. The appeal is by the plaintiffs from the judgment entered after the verdict. The defendants and cross-complainants do not appeal.

The evidence shows that defendants were the owners of about 18 acres of hillside land in the City of San Rafael. Defendants had excavated a rectangular lot fronting 105 feet on Fourth Street and having a depth of approximately 150 feet, so that the 105 foot frontage was leveled with Fourth Street. The excavations had been made covering a period of 25 years and the rock and dirt used as base material for roads. In December of 1945 the owners made a further excavation in the rear or north end of the lot, leaving a sloping cut with a face of approximately 40 feet from top to bottom. In the early fall of 1946 Charles Daniels and John McPhail met at the site of the property to determine if the 150 foot lot "was level." It seemed to be mutually agreed that "the bank was O. K." (referring to the slope or bluff). In September, 1946, defendants sold the excavated parcel or lower lot to plaintiffs. Consideration for the sale was paid and title in fee vested in plaintiffs. Defendants retained title to the unexcavated or upper land. Plaintiffs built a concrete storehouse, approximately 102 by 147 feet, on their lot near the bottom of the slope. In February, 1947, about 250 cubic yards of rock and dirt slid out from the bank causing a gap in the slope about 30 feet wide. An additional slide from the same bank occurred in March, 1947.

[1] Plaintiffs' argument as presented in the opening brief covers two pages and is based on (1) Civil Code section 3514, "One must so use his own rights as not to infringe upon the rights of another", citing Green v. General Petroleum Corporation, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475, and (2) that regardless of the issue of negligence defendants are liable in damages. The opening brief states: *"Such liability is absolute* in the sense that it exists although no subsidence is intended or foreseeable and although in removing the lateral support the utmost care and skill are used to prevent a subsidence. Restatement of Law of Torts, Section 817, Subsection b, page 187."

The answer to the complaint sets forth as one defense that plaintiffs failed to provide lateral and subjacent support for the land of "defendants as required by Section 832 of the Civil Code of California." Civil Code section 832 is a modification of the common-law rule. Wharam v. Investment Underwriters, 58 Cal.App.2d 346, 136 P.2d 363. It extends to land in its natural state and provides for a right to support by adjoining land. Covering the period involved in this case the section states the conditions under which a coterminous owner may excavate. It provides that the excavator must give reasonable notice of the depth of the proposed excavation and of the time that the work will commence. Other provisions of the section need not be mentioned. The section is not applicable to the present case. At the time of the excavation defendants owned both parcels of the land here involved. There was therefore no one that the excavators should notify. If the defendants are liable in damages it must be under some theory other than that of Civil Code section 832.

[2] The maxim set forth in Civil Code section 3514 is not controlling. It is simply an aid in construing the proper application of common-law principles or of code sections. Civ.Code § 3509. In Green v. General Petroleum Corporation, supra, cited by plaintiffs, the defendant leased certain lands adjoining plaintiffs' residence and was engaged in drilling a well for the production of oil. The well erupted, blowing off control valves, which resulted in a stream of oil, gas, mud and rocks shooting into the air and falling upon plaintiffs' property. It was held that under the existing circumstances of that case the defendant oil company was liable for the resultant damage without proof of negligence, upon the principle that "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, *with knowledge that injury may result to another,* proceeds and injury is done to the other as the direct and proximate consequence of the act, *however carefully done,* the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done." 205 Cal. pages 333-334, 270 P. page 955. Italics added. The liability in the Green case was not based on leasehold interest or ownership, but was based on injury resulting from "the performance of a lawful, voluntary but dangerous or perilous act" for which the actor must shoulder the responsibility and respond in damages, McGrath v. Basich Brothers Const. Co., 7 Cal.App.2d 573, 577, 46 P.2d 981, 983, because of his "knowledge that injury may result to another." Green v. General Petroleum Corp., supra, 205 Cal. at page 334, 270 P. at page 955.

In the closing brief plaintiffs cite Sager v. O'Connell, 67 Cal.App.2d 27, 153 P.2d 569, which was a case involving an action to abate a nuisance and recover damages for permitting a bulkhead to become decayed, the wall having been erected to provide lateral support to defendant's property. The court stated therein, 67 Cal. App.2d at page 33, 153 P.2d at page 572: "In this connection we point out that it is essential to recover judgment against an owner that he be shown to be guilty of some act of negligence in connection with the lateral support of respondent's property." Under the provisions of Civil Code section 832, excavations for a lawful purpose are permitted an adjoining property, but the coterminous owner is entitled to lateral and subjacent support. The section provides that an adjoining owner shall give proper notice of an intention to excavate, the depth of the excavation and the time when the work will begin. The excavator shall use ordinary care and skill and take reasonable precautions to sustain the adjoining land. In the present case no notice to any one was necessary at the time of excavation. Plaintiffs were not then the owners nor had they any interest in the property. The upper and the lower owner happened to be the same. No proof is presented of defendants' negligence in excavating and the complaint does not allege negligence. No warranties of any kind or character are alleged or proved regarding the security of the land. Plaintiffs' complaint alleges that defendants "wrongfully allowed land of theirs to slide and fall onto the land and improvements of plaintiffs." There is no allegation and no proof that at the time of the sale of the lot or at the time of the erection of plaintiffs' storehouse any demand, request or suggestion was made that defendants protect plaintiffs' land by erection of a bulkhead in any manner or form. There is some evidence that preparations may have been made to excavate on part of the upper land at some time previous to the landslide which occurred, but there is presented no proof of negligence either during the period of such excavation or subsequently.

[3] To apply the quoted portion of the Restatement of Law of Torts to the facts of this case would mean that the rule would be applied retroactively to the period when defendants were the owners of each of the two parcels of land. Plaintiffs purchased the land and bargained with full knowledge of the previous excavation and the condition of the property at the time of sale. No fraud, no warranty, no negligence is alleged, nor is evidence presented to uphold any such claim. There is no evidence that defendants had the slightest idea, nor is there a reasonable inference that could be drawn, that defendants excavated their property with knowledge that injury might result to plaintiffs.

The order of the court must be approved. It is not necessary to consider other defenses raised by defendants.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

93 Cal.App.2d 440

In re GONZALES' ESTATE.

Civ. 7611.

Sac. 5987.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

1. Executors and administrators 🔑24

Under the statute providing that executor named in will who does not within 30 days after knowledge of testator's death and knowledge that he is named as executor petition for probate, may be held to have renounced right to letters, powers of probate court to appoint administrator are not limited, and court could properly appoint public administrator in absence of relatives within state on petition for letters filed within 30 days after death reciting that decedent died intestate, notwithstanding existence in fact of will naming executor. Probate Code, §§ 420, 422, 901, 1140.

2. Executors and administrators ⚷501

Where appointment of public administrator was vacated and executor was appointed, executor could not complain for the first time on appeal of order prorating statutory fees between public administrator and executor. Probate Code, §§ 420, 422, 901, 1140.

3. Executors and administrators ⚷499

Where administratrix, before appointment was vacated, performed services relative to giving of notice to creditors, filing of claims which were approved and paid, and marshalling of assets and accounting therefor, division of fees between administratrix and subsequently appointed executor was not an abuse of discretion. Probate Code, § 901.

4. Executors and administrators ⚷501

Exercise of trial court's discretion in dividing statutory fees between executrices cannot be disturbed on appeal in absence of showing that court abused its power. Probate Code, § 901.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding in the matter of the estate of Manuel Gonzales, also known as Manuel Goncalves, also known as Manuel Gonsales, also known as Manuel Goncalves Caroto, also known as Manuel Goncalves Carouto, wherein letters of administration were issued to Sue H. Clowdsley, public administrator, and thereafter Law T. Freitas, as executor, filed a petition for probate of a will. From an order prorating fees between the public administrator and the executor, the executor appeals.

Order affirmed.

Wyatt, Green & Carr, Stockton, for appellant.

Frederick L. Felton, County Counsel, Stockton, for respondent.

ADAMS, Presiding Justice.

Manuel Gonzales died March 2, 1948, in San Joaquin County, leaving an estate therein but no known resident relatives. On March 11th Sue H. Clowdsley, Public Administrator, filed a petition for letters of administration of the estate of said decedent, and letters were issued to her on March 22nd. Subsequently that official found among the effects of decedent what purported to be a copy of a will which named Law T. Freitas executor, and investigation disclosed that Mr. Freitas had the original will in his possession. On April 22nd he filed a petition for probate and on May 8th the court made an order admitting the will to probate, appointing him executor, and vacating the prior appointment of respondent.

On June 21st respondent filed her first and final account, and same was approved July 7th, but the question of proration of fees between appellant and respondent and their respective counsel was deferred from time to time until August 5th, at which time 60% of the statutory fees was allotted to respondent and her counsel, and 40% to appellant and his counsel. This appeal was then taken by the executor who contends that the appointment of respondent was not authorized by law, that therefore she was not entitled to any compensation; but that, in any event, she was not entitled to the proportion of fees allowed and the probate court abused its discretion in awarding same to her.

Appellant first argues that at least thirty days should have elapsed after the death of decedent, before the appointment of any administrator of his estate, because of the provision of Section 324 of the Probate Code that reads:

"If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown."

[1] No authority for such construction of that section is cited, and we are of the opinion that it has no justification. The gist of the section is that an executor named in a will who does not, within thirty days after he has knowledge of the death of a testator and that he is named

as executor of decedent's will, petition for probate may be held to have renounced his right to letters. It in no sense places any limitation upon the powers of a probate court to appoint an administrator of the estate of a decedent, especially where, as here, the existence of a will is not known, and a petition for letters of administration recites that the decedent died intestate. If appellant's reasoning were sound it might as well be argued that though a person named in a will as executor thereof might have no knowledge of that fact, or might never learn of the death of the testator, or though even the existence of any will at all was unknown, the probate court could not appoint an administrator unless it was shown that a will existed, an executor was named therein, that said executor knew of the death of the testator and that he was named as executor in his will, and had not, for thirty days, petitioned for letters testamentary—a manifest absurdity.

Section 1140 of the Probate Code defines the duties of the Public Administrator, and provides that he must take immediate charge of the property within his county of persons who have died, when no executor or administrator has been appointed, and in consequence the property is being wasted, uncared for or lost; that he shall apply for letters of administration upon the estates of decedents who have no known heirs where the superior court of his county has jurisdiction thereof; and that he may apply for such letters upon *any other estate* which he is entitled to administer. No limitation upon the time when such public administrator is authorized to petition for letters is provided by that section.

Since in this case decedent left no relatives in this state, the public administrator was entitled to serve as administrator. Prob.Code, Secs. 420, 422.

Section 901 of the Probate Code provides that if there are two or more executors or administrators of any estate, the compensation shall be apportioned among them by the court according to the services actually rendered by each. Therefore it is apparent that respondent is entitled to a portion of the commission allowable under that section. That was, in effect at least, conceded by appellant, for in the probate court he made no objection to the account rendered by her, or to the allowance to her of some compensation, though in her account she set forth that the newly appointed executor should pay to petitioner and her counsel their fees as administratrix and attorney, and that a sum be fixed by the court as their shares of commissions. In fact the record does not show that any objection was interposed by appellant in that court to the amount allowed her, except that he appealed from the decision.

[2, 3] The questions raised by appellant before this court, then, appear to be raised for the first time on this appeal, which, alone, would justify an affirmance of the order of the probate court. However, the determination of the fees to be allowed in the case was a matter resting in the discretion of the probate court, and we cannot say that there was an abuse thereof. Respondent testified as to the services performed by her, and though her testimony is not in the record, it does appear that they included the statutory proceedings such as notice to creditors, the filing of two claims, both of which were approved and one paid, the marshalling of the assets of the estate, and an accounting therefor.

[4] As to the division of statutory fees between executrices, the court said in Re Estate of Roberts, 27 Cal.2d 70, 76, 162 P.2d 461, that the trial court exercised its discretion which cannot be disturbed on appeal in the absence of a showing that the court abused its power. In Re Estate and Guardianship of Vaughan, 14 Cal.App.2d 594, 58 P.2d 742, it was said that in a probate matter it is particularly within the province of the trial judge, who has all the records before him, to fix and determine what fees are proper. In Re Estate of Keith, 16 Cal.App.2d 67, 70, 60 P.2d 171 (hearing in Supreme Court denied) the same rule was stated, and it was there said that in making its order fixing fees (for extraordinary services by attorney for estate) the court has a large discretion, and that the judgment will not be interfered with on appeal, except in

the face of a plain abuse of discretion, citing 11B Cal.Jur. 506, sec. 1056, In re Estate of Parker, 186 Cal. 671, 200 P. 620; and In re Estate of Iser, 52 Cal.App. 405, 198 P. 1014. Also see In re Estate of Hardenberg, 18 Cal.App.2d 307, 310, 63 P.2d 1200.

Particularly in view of the fact that the testimony given by respondent as to the services which she and her counsel rendered to the estate is not before us, we cannot say that the trial court abused its discretion in its division of the fees.

The order appealed from is affirmed.

THOMPSON and PEEK, JJ., concur.

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NORWOOD v. JUDD.

Civ. 13972.

District Court of Appeal, First District, Division 1, California.

Aug. 10, 1949.

Hearing Denied Sept. 29, 1949.

1. Statutes 🔑228

One claiming an exemption from general statute has the burden of proving the exemption.

2. Licenses 🔑39.44

Findings that a partnership formed to conduct general contracting business of sand blasting and painting was engaged in the contracting business as defined by the Business and Professions Code, and that partnership should have secured a partnership license were supported by the evidence. Business and Professions Code, §§ 7025–7028.5, 7030, 7031, 7045–7047, 7068, 7069, 7071.

3. Contracts 🔑138(1)

The principle that participants to an illegal contract who are in pari delicto can secure no relief based on such contract, is a part of the general rule that he who comes into equity must come with clean hands.

4. Licenses 🔑39.39

Equitable relief will not be denied a party to a partnership contract against his partner where the business engaged in is a lawful one and not against public policy but the parties failed to secure a required license and the cause of action is not directly based on the partnership agreement, but is or can be based on a new promise arising out of the executed partnership agreement.

5. Licenses 🔑39.39

Licensing statutes are passed primarily for the protection and safety of the public, and not for the benefit of a greedy partner who seeks to keep for himself all the fruits of the partnership enterprise to the exclusion of another partner entitled to share therein.

6. Licenses 🔑39.43

Where partnership was formed to carry on contracting business by contractor and one without previous contracting experience and latter was to keep the books and former undertook to procure a license but failed to include name of the other partner who subsequently withdrew and remaining partner promised to account for what was due him but failed to do so, the fact that no proper license had been obtained, did not bar judicial relief by the withdrawing partner. Business and Professions Code, §§ 7025–7028.5, 7030, 7031, 7045–7047, 7068, 7069, 7071.

7. Contracts 🔑138(1)

Where the public cannot be protected by the application of the rule in pari delicto and no serious moral turpitude is involved, and the defendant is the one guilty of the greatest moral fault, and would be unjustly enriched if the rule were applied, such rule should not be applied.

Appeal from Superior Court, Alameda County; Ralph E. Hoyt, Judge.

Action by Gerald Norwood against Fred T. Judd, for dissolution of partnership and an accounting. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Bernal & Bernal, Berkeley, for appellant.

Ralph Nathanson, Oakland, Marshall Rutherford, Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff, Gerald Norwood, brought this action against his partner in the contracting business, Fred T. Judd, for a dissolution of the partnership and for an accounting. It was stipulated that a partnership existed between the parties, and that the main issues to be decided by the trial court were when the partnership began, and when, if at all, it terminated. After the two parties had presented all of their evidence on these issues, the court, on its own motion, requested counsel to brief the questions, not theretofore raised by either party, as to whether a partnership license was required, and whether the failure to secure such a license would prevent the plaintiff from recovering in the action. Thereafter, the court determined that a partnership license was required and had not been secured, that the two parties had therefore engaged illegally in the contracting business, and that, for this reason, plaintiff was not entitled to the aid of a court of equity. Judgment was entered accordingly, and plaintiff appeals.

It is admitted that on June 4, 1942, Norwood and Judd entered into a partnership agreement to conduct the general contracting business of sandblasting and painting, and to share profits equally. Judd had over twenty years' experience in this field. Norwood was Judd's brother-in-law, and was an auto mechanic. He had no experience as a sandblaster or painter. Each partner contributed cash and equipment to the new enterprise. Norwood handled the bookkeeping and accounting and a few minor jobs, while Judd supervised the actual construction work and computed the bids. Because of his experience in this type of business, because of his many friends in the industry, and because he actually performed or supervised the work of the partnership, it is quite clear that Judd contributed more to the partnership than did Norwood.

In June, 1942, Judd applied for, and secured, from the proper state department, a contractor's license in his own name, but failed to apply for, or to secure, such a license in the name of the partnership. On April 15, 1943, at the request of Judd, the name of the licensee was changed to Fred T. Judd Company, but the application failed to disclose that the company was a partnership. It is admitted that the Contractor's License Board was never informed that Norwood had an interest in the business.

In August, 1942, Norwood became ill and stayed away from work until February, 1943. At that time the partners agreed that Norwood's share of the profits and his interest in the partnership should be reduced to one-third.

The partnership engaged in the business of sandblasting and spray painting. Most of its jobs were secured as the result of competitive bidding. Judd testified that about sixty per cent of their work was performed for government agencies, thirty per cent for large corporations, and the other ten per cent small jobs that came in without solicitation. In addition, the company also developed, manufactured and sold or leased sandblasting equipment. From its inception the partnership prospered, but most of the profits were put back into the business.

By September, 1944, Norwood had become dissatisfied with the association, and on September 30th he told Judd that he wanted to get out of the partnership. Judd agreed that Norwood could leave the business. Thereafter, Norwood performed no services for the company. It is agreed that no financial adjustment was made at that time because the company was then in a weak financial condition, and, if Norwood had withdrawn his share, it would have ruined the company. Judd admitted that it was then agreed between the parties, and that he told Norwood that he would try to dispose "of the business * * * and settle up * * * whatever he had coming to him, * * * settle up the affairs of the business * * * divide the assets * * * of the business * * * on a one-third and two-thirds basis * * * I believe that I assured him that we would settle up when and if conditions would enable us to"; I told him that "I would make a settlement, I assured him I would make a settlement as soon as possible, to settle things up, to settle up the partnership, make a settlement * * * I told him we were in very poor shape at that time. That was my excuse for not making a settlement at that time * * * for not * * * paying him what he had for his share in the business * * * He wanted to get away. I wanted to settle with him when I could, but I didn't want to harm the business doing it * * * I wanted him to wait until I could get out of the difficulties we were in."

In January, 1945, Judd paid Norwood $1,500 as part payment of his share of the partnership, and renewed his promise to settle up in full as soon as possible. Judd concedes that this payment did not discharge his obligation to Norwood, but no further payments were ever made.

On these facts the trial court found that plaintiff and defendant orally entered into a copartnership agreement, on June 4, 1942 for the purpose of conducting a general contracting business of sandblasting and painting, and thereafter accumulated property and equipment which they held as partnership property; that plaintiff and defendant continued to operate as partners until September 30, 1944; that "the type of work performed by said copartnership required a contractor's license issued in the name of the copartnership"; that "defendant was issued a Contractor's License in his individual name in July, 1942, and defendant was issued a Contractor's License in the name of Fred T. Judd Company in April of 1943; that said licenses were issued to an individual and not to an association or to said copartnership and no contractor's license was ever issued to plaintiff or to said copartnership"; that it "is true that the business conducted by said plaintiff and said defendant in the absence of a contrctor's license issued to the copartnership rendered said copartnership business illegal and void and that said plaintiff is not entitled to an accounting or to any division of the profits of said copartnership"; that "said plaintiff does not come into Court with clean hands and is not entitled to the aid or interposition of a Court of equity."

The judgment based on these findings denying the plaintiff any relief, and from which this appeal is taken, deprives the plaintiff, who contributed a material portion of the assets to this partnership and whose efforts were partially responsible for the profits, from any participation at all in such assets or profits, and all of such assets and profits are retained by defendant because the latter, charged with the responsibility of securing a permit, improperly secured an individual permit when he should have secured a partnership permit. Such unjust enrichment of the defendant should not be permitted, unless compelling principles of law or equity require such a result. Fortunately, there is no legal or equitable impediment to doing justice in this case.

Before directly discussing the contentions of the parties, reference should be made to the pertinent sections of the Business and Professions Code. They are:

"§ 7025. 'Persons' defined. 'Person' as used in this chapter includes an individual, a firm, copartnership * * * or other organization * * *."

"§ 7026. 'Contractor': Defined. * * * a contractor is any person, * * * who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, substract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.

"§ 7027. Same: Includes subcontractors and excludes materialmen. A contractor * * * includes subcontractor or specialty contractor * * *."

"§ 7028. Engaging in business without license. It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, unless such person is particularly exempted from the provisions of this chapter."

"§ 7028.5. Member, etc., of firm individually acting as contractor. It is unlawful for any person who is or has been a member, officer, director or responsible managing officer of a licensed copartnership, corporation, firm, association or other organization to individually engage in the business or individually act in the capacity of a contractor within this State without having a license in good standing to so engage or act."

"§ 7030. Acting without license or conspiring to violate chapter: Misdemeanor. Any person who acts in the capacity of a contractor without a license, and any person who conspires with another person to violate any of the provisions of this chapter, is guilty of a misdemeanor."

"§ 7031. Allegation and proof of license in action on contract. No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

"§ 7045. Sale or installation of things not part of structure. This chapter does not apply to the sale or installation of any finished products, materials or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure."

"§ 7046. Personal property work. This chapter does not apply to any construction, alteration, improvement or repair of personal property."

"§ 7047. Construction on Federal-owned sites. This chapter does not apply to any construction, alteration, improvement or repair carried on within the limits and boundaries of any site or reservation, the title of which rests in the Federal Government."

"§ 7068. * * * The board shall require an applicant to show such degree of experience, and such general knowledge of the building * * * laws of the State and of the rudimentary administrative principles of the contracting business as the board deems necessary for the safety and protection of the public.

"* * * An applicant may qualify in regard to his experience and knowledge in the following ways: * * *

"(b) If a copartnership, * * * it may qualify by the appearance of the responsible managing officer or member of the personnel of such applicant firm."

"§ 7069. * * * An applicant, and each officer, director, partner, associate and responsible managing employee thereof, shall possess good character. * * *"

"§ 7071. * * * No license shall be issued to a * * * copartnership * * * if any responsible officer of such corporation, or other combination or organization, or any member of such copartnership does not meet the qualifications required of an applicant other than those qualifications relating to knowledge and experience."

[1, 2] The plaintiff contends that the evidence does not show that the contracting work performed by the partnership was not within the exceptions contained in §§ 7045, 7046 and 7047. He urges that this court should judicially notice that this partnership operated during the war period, and that there is no evidence that the jobs performed by it were not on federally owned property, § 7047, or were not performed on personalty, § 7046, or did not fall within § 7045. We are not impressed with these arguments. The work performed by this partnership falls within the definition of contracting contained in § 7026. Sections 7045, 7046 and 7047 provide that certain types of contractors are exempted from that section. One claiming an exemption from a general statute has the burden of proving that he comes within the exemption. This, plaintiff failed to do. Moreover, there is evidence that some of the work performed did not fall within § 7045; that it was performed on other than personal property,

§ 7046, and that it was performed for companies owning their own plants and sites, § 7047. The paucity of evidence on this point is explained by the fact that the issue as to the license requirement was not raised until after all the evidence had been presented. However this may be, it is quite clear that the findings that this partnership was engaged in the contracting business as defined by the Business and Professions Code, and that it should have secured a partnership license, are amply supported by the evidence.

The basic question presented is whether, under the facts here disclosed, the failure to secure a partnership license precludes plaintiff from recovering any portion of the assets and profits because of the principle that, having engaged in an illegal enterprise, he is in pari delicto and has not come into equity with clean hands, and must therefore be denied all relief.

It should be noted that this is not a case where the parties engaged in a business prohibited by statute or public policy, or where a license would not have been issued had application been made. Although Norwood was not a citizen and was not a contractor, such facts would not have prevented the company from securing a partnership license as long as Judd was a qualified contractor. §§ 7068, 7069 and 7071, Business and Professions Code.

[3] The principle that participants to an illegal contract who are in pari delicto can secure no relief based on such contract, is an ancient and most salutary one. It is part of the general rule that he who comes into equity must come with clean hands. See, generally, 2 Pomeroy's Equity Jurisprudence, Fifth Ed., §§ 397-404. The rule in license cases is most frequently applied to those situations where a firm or person required to be licensed fails to secure a license and sues a third person for services rendered or material furnished. In such event the unlicensed firm or person cannot recover because to do so would be to defeat the very purpose of the licensing statute. The contractor's license law expressly so provides. § 7031, Business and Professions Code, supra; see, also, Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37. But even this rule has its exceptions. Thus, in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, an action was brought by two partners against a third person to recover for carpenter work performed by them. The defense was that the partnership was unlicensed. The facts were that Gatti and Moore each held individual licenses as contractors. Gatti contracted individually with defendant to do the work involved. Later Gatti and Moore entered into a partnership. Defendant agreed that the partnership could complete the contract. No partnership license in the names of Gatti and Moore was ever secured. It was held that the partners could recover even though the partnership was unlicensed. The Court pointed out 27 Cal.2d at page 690, 166 P.2d at page 266, that the contractor's licensing law was passed for the safety and protection of the public, and that such a law should not be used as a "shield for the avoidance of a just obligation."

Another exception to the general rule is found in those cases holding that an unlicensed person is not precluded from recovering a commission if he had a license at the time the contract was performed and the cause of action arose, although the contract for the commission or services was executed when he was unlicensed. Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 109 P.2d 650; Houston v. Williams, 53 Cal.App. 267, 200 P. 55; Radich v. Cernokus, 65 Cal.App. 452, 224 P. 124; Brenneman v. Lane, 87 Cal.App. 414, 262 P. 400.

[4] Where the rights of third parties are not involved, California has recognized another exception to the general rule in certain cases where the action is between the contracting parties. That exception is that equitable relief will not be denied a party to a partnership contract against his partner where the business engaged in is a lawful one and not against public policy, but the parties failed to secure a required license, and where the cause of action is not directly predicated on the partnership agreement, but is or can be predicated on a new promise arising out of the

executed partnership agreement. In other words, equity can and will grant relief where the court is not required, in granting the relief, to lend its aid in enforcing a transaction illegal only because a permit that could have been secured was not secured. The leading case on this subject is Denning v. Taber, 70 Cal.App.2d 253, 160 P.2d 900 (hearing denied by the Supreme Court without a dissenting vote). The factual situation in that case was very similar to that involved in the instant one. There the plaintiff and defendant entered into a partnership agreement to operate a bar. They operated such an establishment for about sixteen months, and then agreed to close the business. The defendant orally agreed at that time to equally divide the assets of the partnership then in his hands. This he refused to do and plaintiff brought this action for an accounting. The defendant's defense was that, under the law, partners operating a bar must secure individual licenses to operate. The defendant had secured a license in his name but failed to secure a license for plaintiff. Plaintiff testified that he had relied upon the defendant to secure the required licenses. The court allowed the plaintiff to maintain his action for an accounting. The reasoning of the court is disclosed in the following quotation, 70 Cal.App.2d at page 257, 160 P.2d at page 902:

"But we cannot escape the conclusion that the illegal conducting of the saloon business without a proper license for each individual partner would ordinarily require the court to refuse upon the ground of public policy to determine issues between the partners regarding the division of, or the title to the assets of the business. Wise v. Radis, 74 Cal.App. 765, 242 P. 90. But there is a well-recognized exception to that rule which appears to be founded on good morals and sound judgment. When a business, which has been illegally conducted for lack of license, as distinguished from an unlawful and forbidden enterprise, has been completely terminated and one of the parties subsequently expressly agrees to divide in a specified manner the assets in his possession, courts will entertain suits for accounting, in assumpsit, or based on an implied trust, to recover the property belonging to the claimant. [Cases cited.] The reason assigned for the application of the foregoing exception to the general rule is * * * that:

"'When the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.'

"If that distinction controls an executed agreement which was illegally designed by the parties, it should apply with greater justice and force to a division of assets expressly agreed upon by the parties after the termination of the business by mutual consent which was merely conducted without a license contrary to law. This is especially true when the plaintiff is not in pari delicto, or when he is at least much less culpable of wrongful conduct."

At page 260 of 70 Cal.App.2d, at page 903 of 160 P.2d the Court stated: "Conceding that the saloon business was conducted illegally because a partnership license was not procured in the names of both partners as required by law, we are satisfied that the plaintiff is nevertheless entitled to maintain this suit for an accounting of assets because it does not necessarily involve the legality of the partnership agreement to conduct the Diamond Bar saloon but depends upon the oral agreement to divide the property equally which was made by the parties after the voluntary termination of the business without the aid of court."

Defendant seeks to distinguish this case on the ground that in the instant case the partnership was not fully terminated, and that the company has never discontinued operations. We do not think the Denning case can be distinguished on any such tenuous grounds. Norwood, by agreement, completely disassociated himself from the business after September, 1944. For all practical purposes the partnership was terminated at that time, and from then on Judd continued the business as sole owner. In the instant case, as in the Denning case, defendant secured the license and secured it in his own name. There was no legal obstacle to including plaintiff's name in the application, and a partnership license could have been secured, but this, defendant did not do. As in the Denning case, Judd expressly agreed to divide the assets and profits in his hands, after Norwood had terminated his relationship to the partnership.

[5, 6] It must be remembered that these licensing statutes are passed primarily for the protection and safety of the public. They are not passed for the benefit of a greedy partner who seeks to keep for himself all of the fruits of the partnership enterprise to the exclusion of another partner entitled to share therein. Where the illegal transaction has been terminated, public policy is not protected or served by denying one partner relief against the other.

The rule of the Denning case is also the rule adopted by the United States Supreme Court. Thus, in Brooks v. Martin, 2 Wall. 70, 81, 69 U.S. 70, 81, 17 L.Ed. 732, that court quoted, with approval, the following language used by the English court in Sharp v. Taylor, 2 Phillips' Ch. 801: "'The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor' (the defendant) 'received the money; and plaintiff is now only seeking payment for his share of the realized profits * * *. As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * *'"

This view was reaffirmed by the Supreme Court of the United States in Planters' Bank v. Union Bank, 16 Wall. 483, 499, 83 U.S. 483, 499, 21 L.Ed. 473, which case was cited with approval in the Denning case. It is also the view adopted in other states. See Melton v. United Retail Merchants, 24 Wash.2d 145, 163 P.2d 619, where cases from several states are collected and commented upon; see, also, cases collected and commented upon 2 Pomeroy's Equity Jurisprudence, 5th Ed., p. 134, § 402f.

It must be conceded that there are cases the other way. Many of them quote and rely upon the language used by Lord Mansfield in Holman v. Johnson, 1 Cowp. 341, where he denied relief to the plaintiff on the theory that: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have advantage of it; for, where both are equally in fault, 'potior est conditio defenditis.'" Some jurisdictions in this country follow this theory. See, Teoli v. Nardolillo, 23 R.I. 87, 49 A. 489, 492; Hoge v. George, Adm'r, 27 Wyo. 423, 200 P. 96, 18 A.L.R. 469. The Restatement of Restitution takes no position on this problem, but notes the conflict (§ 140.)

It must also be conceded that there is at least one California case that has followed the theory expressed by Lord Mansfield. That is the case of Wise v. Radis, 74 Cal.App. 765, 242 P. 90 (no hearing requested), which is strongly relied upon by defendant here. There can be little doubt but that the Wise case is a strong authority in support of defendant. There the plaintiff and defendant each had an individual broker's license. They orally agreed to work together on certain sales as equal partners. No partnership license was secured as required by statute. The plaintiff allowed his license to lapse. Thereafter, a sale was negotiated and the commission was paid to defendant who refused to split with plaintiff. The appellate court held that the plaintiff could not maintain an action against defendant for his share of the commission. In so holding, the Court 74 Cal.App. at page 780, 242 P. 90, expressly refused to recognize as an exception to the general rule the doctrine that where the illegal purpose of the partnership has been accomplished an action will lie between partners, and referred to this so-called exception as "unsound." The Court stated 74 Cal.App. at page 776, 242 P. at page 94: "* * * since respondent, in order to establish his case, necessarily must invoke the partnership contract, it follows that, if the issuance of a copartnership license was requisite, the court will not lend its aid to assist either party to the contract in an action against the other, notwithstanding the receipt by the latter of partnership profits, but will leave both parties where it finds them."

If this case is still the law of California, it would require an affirmance of the instant case. It was distinguished in the much later Denning case in which a hearing was denied. A fair reading of the two cases demonstrates that they are diametrically opposed and that, in legal effect, the Denning case overruled the Wise case. It is worth noting that, although the Wise case has, on occasion, been cited in later cases, in most such cases it was cited only to distinguish it. See Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 689, 166 P.2d 265; Denning v. Taber, 70 Cal.App.2d 253, 257, 160 P.2d 900; Wagner v. Worrell, 76 Cal.App.2d 172, 180, 172 P.2d 751.

[7] The reasoning of the Denning case is most convincing. The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the latin phrase "in pari delicto" that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied. That is the theory of the Denning case, and of the other cases above cited, and we think it is the correct and more enlightened rule.

One other case, not cited by the parties but dealing with the same subject matter, should be cited—the case of Hooper v. Barranti, 81 Cal.App.2d 570, 184 P.2d 688. Hooper operated a liquor tavern under a license issued in his own name. He made an agreement with Barranti that they become equal partners in the operation of the business, and it was agreed that Barranti was to pay Hooper $1,500 at the rate of $100 a month for this one-half interest in the business. It was also agreed that the liquor license should remain in Hooper's name until the payments were completed, although the business was to be operated by the partnership. It was further agreed that the active conduct of the business was to be undertaken by Barranti. About a year later, Hooper rescinded on the ground that Barranti was not an American citizen, and shortly thereafter he forcibly ejected Barranti from the premises and excluded him from the business. Barranti assigned his interest in the business to his brother, and, in an action by Hooper to declare the dissolution of the business and secure an accounting, the brother filed a complaint in intervention. This court held that Barranti could assert no claim or right to receive any of the assets of the partnership, and affirmed the trial court in its refusal to determine ownership of the license issued in Hooper's name. It was there stated 81 Cal.App.2d at page 579, 184 P.2d at page 693: "The partner Barranti could therefore assert no claim or right to receive any of the assets of the partnership except through the partnership and an accounting of its affairs. His ownership of those assets being that of a tenant in partnership it cannot be established without the aid of the partnership agreement. That agreement being illegal from its inception, he is without that aid. This must apply with equal force to all of the assets, including whatever interest the partnership may have had in the license standing in the name of Hooper."

This case presents a sound application of the general rule. It is clearly distinguishable from the present case. In the Hooper case the very agreement itself provided for the conducting of the bar business for 15 months without a proper license The agreement was, by its terms, in direct violation of the statute, against public policy and void on its face. In the instant case, the agreement was not per se contrary to any statute. Had Judd secured a partnership license, which could have been secured, there would have been no violation of law at all. The illegality involved was the failure to comply with a technical formality—it was not founded on the agreement itself. In the second place, in the Hooper case, it was impossible for the parties to have entered into a lawful agreement of partnership because Barranti was a non-citizen, and aliens cannot sesure liquor licenses as a partner or otherwise. No citizenship requirement, see §§ 7068, 7069 and 7071, Business and Professions Code, supra, exists in connection with the issuance of contractors' licenses. In the third place, Barranti was active in the actual conduct of the business—he operated the bar and sold liquor, which was precisely what the Legislature, in the interest of protecting the public, did not want an alien to do. Norwood, on the other hand, acted primarily as a bookkeeper, and did not directly perform contracting services. Thus, the public welfare and safety were not threatened. In the fourth place, the case may be distinguished on the same ground used by the author of the Denning opinion to distinguish the Wise case, namely, that in the instant case the partnership was terminated and thereafter Judd promised to divide the assets and profits in his hands in a specified manner, while in the Hooper case no such subsequent promise was made.

The judgment appealed from is reversed.

WARD and BRAY, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

93 Cal.App.2d 448

PEOPLE v. RHOADES.

Cr. 2089.

Sac. 16942.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

1. Abortion ⚷1

The gist of crime of abortion is not actual consummation of abortion as such but is the performance of any of acts prohibited by statute with intent to procure a miscarriage. Pen.Code, § 274.

2. Abortion ⚷1

A defendant who treated the same woman twice within a single week with the intent on both occasions to procure a miscarriage could be charged with two separate crimes of abortion, notwithstanding that only one pregnancy was involved in both treatments. Pen.Code, § 274.

3. Criminal law ⚷507(6)

An aborted woman is not, solely by reason of fact that she submitted to an abortion, an "accomplice" of person performing the abortion and her testimony may be corroborated by testimony of accomplice. Pen.Code, §§ 274.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

4. Criminal law ⚷822(1)

Entire charge to jury must be read as a whole in light of fair and reasonable construction with each instruction being considered in connection with all of the others and without straining at any particular wording or phraseology, and if when so read and construed, it reasonably may be said that the alleged error appears to have been cured by the entire charge and that the jury was fully and fairly instructed, it is sufficient.

5. Criminal law ⚷1186(4)

In prosecution for abortions, admission of testimony of policewoman concerning making of arrangements with defendant to abort a purported pregnancy, if error, would not require reversal, in view of conclusive proof of defendant's guilt. Pen.Code, § 274; Const. art. 6, § 4½.

6. Criminal law ⚷1170(2)

The refusal to admit evidence was not prejudicial where such evidence was subsequently placed before the jury.

7. Criminal law ⚷919(1), 1171(1)

The trial court possesses large discretion in considering defendant's contention on motion for new trial that district attorney was guilty of misconduct, and where evidence of guilt is substantial the appellate court will not consider alleged misconduct as prejudicial.

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Geraldine Rhoades was convicted for abortion and she appeals.

Affirmed.

Leslie C. Gillen, San Francisco, and W. E. Halley, San Francisco, for appellant.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, for respondent.

PEEK, Justice.

Defendant appeals from a judgment convicting her of four counts of the crime of abortion.

By the amended information, she was charged in Count one thereof with the commission of an abortion upon one Agnes on July 3, 1947; Count two charged the commission of the same crime upon the same person on a subsequent date, to-wit: July 9, 1947; Count three charged the commission of an abortion upon one Betty on December 20, 1946; Count four charged the commission of an abortion upon one Arlees on July 2, 1947, and Count Five charged the commission of an abortion upon one Elsie during the month of August, 1946. In addition, said information charged the defendant with the commission of a prior felony (murder in the second degree) and the service of a term of imprisonment therefor in the state prison.

The defendant pleaded not guilty to each count of abortion but admitted the prior conviction. After her motion to dismiss the information was denied the trial proceeded before a jury which returned a verdict of guilty as to counts 1, 2, 3, 4 and not guilty as to count 5.

Defendant's motion for a new trial was denied as was her application for probation. The judgment which was thereafter entered ordered that the sentence under count two should run concurrently with the sentence under count one; that the sentence under count three should run consecutively with that imposed under count one, and that the sentence under count four should run consecutively with that under count three.

Her appeal, which does not challenge the sufficiency of the evidence to sustain the verdict, sets forth four contentions, to-wit: (1) that she was placed in double jeopardy under counts one and two in that she was charged, tried and convicted twice for the same offense, (2) that the trial court committed error in the giving and refusing of instructions, (3) that the trial judge committed prejudicial error in his rulings on the admissibility of evidence and (4) that the district attorney was guilty of prejudicial misconduct.

Defendant's argument in support of her first contention is that the crimes charged in counts one and two were in fact but one crime, in that by the testimony of the prosecution witness it was shown that although she received two treatments such treatments were administered with the intent to abort but a single pregnancy, and that therefore she was placed in double jeopardy by being charged and convicted twice for what was but one offense. Such contention is without merit since section 274 of the Penal Code provides that "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

[1, 2] It is readily apparent that the gist of the crime is not the actual consummation of an abortion as such but rather it is the performing of any of the acts prohibited by said section with the intent to procure a miscarriage which constitutes the crime of abortion. Therefore despite the fact that the same single pregnancy was involved in counts one and two, nevertheless, as the information charged and the evidence conclusively shows, in each instance there was an "intent to procure" a miscarriage by prohibited means which fact is admitted by counsel for defendant. Consequently the complaint properly charged defendant with the commission of two separate crimes. See People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802.

[3] We find no merit in appellant's next contention which is an attack upon certain instructions. It is first contended that the wording of an instruction given by the court concerning corroborating testimony permitted an accomplice to an abortion to corroborate an abortee. In effect such contention is an indirect attack upon the opinion in the case of People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, and, as the court aptly observed in People v. Malone, 82 Cal.App.2d 54, 185 P.2d 870, 879, where a similar question was raised, such an argument "* * * is a question for the Supreme Court * * *". Certainly it is not one for a district court. Additionally it should be noted that one of the instructions so attacked by appellant herein is identical in language with an instruction similarly attacked in People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333, which this court approved, and in which case the Supreme Court denied a hearing.

Appellant's remaining complaints concerning the instructions are supported by no citations of authority and are wholly without merit. Such complaints relate to the deletion by the trial court of certain words in particular instructions proposed by defendant and the refusal by the court to give other instructions likewise proposed by her.

[4] The rule is too well established to warrant citation that the entire charge to the jury is to be read as a whole in the light of a fair and reasonable construction with each instruction being considered in connection with all of the others and without

straining at any particular wording or phraseology. If, when so read and construed, it reasonably may be said that the alleged error, if it be such, appears to have been cured by the entire charge and that the jury was fully and fairly instructed, it is sufficient to defeat any claim of error predicated upon such a contention.

Appellant further contends that the court erred in admitting the testimony of a policewoman who testified to making arrangements with defendant to abort a purported pregnancy. It is defendant's complaint that at most this evidence showed only a willingness to commit an offense in the future and can be considered no more than evidence of bad character and thus not admissible under the doctrine that evidence of other crimes may be introduced to show motive, intent, premeditation, malice, or a common plan or scheme, as is contended by respondent. Specifically her testimony closely followed and was similar to that given by each of the abortees in that she testified she called at defendant's home stating she was pregnant; that defendant told her what the cost would be and named a day for her return, and that the defendant further stated she used only medicines and did not use instruments.

[5] Under the provisions of Article VI, section 4½ of the Constitution of this state, if, after an examination of the entire record, it cannot be said that the alleged error was not prejudicial and constituted a miscarriage of justice, the judgment may not be reversed on appeal. The record herein discloses abundant uncontradicted evidence in support of the verdict. The defendant did not testify in her own behalf and called but one witness, the proprietor of a surgical supply house, whose entire testimony related solely to syringe introduced into evidence by the prosecution. Hence under such circumstances and in view of such conclusive proof of defendant's guilt, it cannot be said that the admission of the challenged testimony of the policewoman constituted a miscarriage of justice within the meaning of said constitutional provision.

[6] Appellant next contends that the trial court erred in admitting into evidence a syringe which had been identified by one of the prosecuting witnesses as similar to the instrument used upon her person. According to the briefs, but without reference to the transcript, it was stipulatd that the syringe had never been in defendant's possession. The basis of appellant's attack appears to be that the trial court erroneously refused her offer of proof to show that the syringe had been obtained by the prosecution from a surgical supply house and presented to the witness for identification as an instrument similar to that used upon her person rather than the selection of an instrument by the witness from similar instruments. The record discloses that after the trial court refused defendant's offer of proof she was subsequently successful in placing such evidence before the jury. Under such circumstances she cannot now be held to have been prejudiced by the trial court's prior refusal to admit such testimony even if such refusal were erroneous, which we do not decide.

[7] In her last contention, which, after reading the transcript reminds us of the story of the pot and the kettle, appellant charges that the district attorney was guilty of gross misconduct throughout the entire trial and particularly in his closing argument to the jury. No reference is made to the record other than to the said closing argument wherein the district attorney asserted that the defendant committed "countless" abortions; that the defendant failed to sterilize the instruments used in performing the abortions and that counsel for defendant had failed to stipulate to the admission of certain evidence. Appellant asserts and respondent admits that there was no evidentiary basis for the foregoing comments. In each instance the comments of the district attorney were assigned as misconduct and the court admonished the jury to disregard the arguments of counsel. Moreover, the alleged misconduct likewise was assigned in defendant's motion for a new trial which was denied. The rule is well established that the trial court possesses a large discretion in considering such a contention upon a motion for a new trial, Cope v. Davison, 30 Cal.2d 193, 202, 180 P.2d 873, 171 A.L.R. 667, and where the evidence of guilt is substantial an appellate

court will not consider the alleged misconduct as prejudicial. People v. Seely, 75 Cal.App.2d 525, 171 P.2d 529.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 459

MEHERIN v. MEHERIN et al.

No. 13964.

District Court of Appeal, First District, Division 1, California.

Aug. 24, 1949.

Hearing Denied Oct. 20, 1949.

1. Partnership 🔑62, 310

Evidence that partnership had an insurance broker's license expiring on same date as office lease and that partnership was obligated to perform continuous services in connection with several policies running for term up to five years authorized finding that partnership was one for a fixed term and withdrawing partner causing dissolution thereof before expiration of term was not entitled to value of good will of business. Civ.Code, §§ 2425, 2432, 2435, 2436.

2. Appeal and error 🔑173(6)

Defense that oral partnership agreement was within statute of frauds could not be raised for first time on appeal.

3. Partnership 🔑310

Evidence sustained finding that plaintiff became dissatisfied with association with copartners and caused dissolution of partnership prior to expiration of term, so that plaintiff was not entitled to be compensated for good will in determining his share of partnership assets. Civ.Code, §§ 2425, 2432, 2435, 2436.

4. Partnership 🔑328(3)

In action for dissolution of partnership to determine whether plaintiff was entitled to be compensated for good will of business, evidence of remaining partners' interest was not conclusive on question whether plaintiff had abandoned partnership business prior to expiration of term during which partnership was to run.

5. Partnership 🔑310

Evidence that at time withdrawing partner left partnership he was classified 1-A under Selective Service Act, and subsequently joined Merchant Marine, did not establish, as a matter of law, a supervening fortuitous event rendering performance of copartnership agreement impossible to excuse nonperformance under doctrine of "frustration", so as to entitle withdrawing partner to value of good will of partnership in determining his interest therein. Civ.Code, §§ 2425, 2432, 2435, 2436.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Frustration".

6. Partnership 🔑311(1)

Where copartners submitted proposal for settlement of withdrawing partner's interest in partnership, failure of withdrawing partner to accept or reject proposal for almost a year constituted an acceptance thereof.

◆

Appeal from Superior Court, City and County of San Francisco; James C. Conlan, Judge.

Action by William P. Meherin against Mark M. Meherin, Jr., and J. Vincent Meherin, copartners transacting business under the firm name and style of Mark M. Meherin & Son, and Mark M. Meherin & Son, a copartnership, and Elsa J. Meherin, as executrix of the last will and testament of J. Vincent Meherin, deceased, for dissolution of a partnership and for an accounting. From a judgment for the defendants, plaintiff appeals.

Appeal from order denying plaintiff's motion for a new trial, being a nonappealable order, dismissed and judgment affirmed.

Courtney L. Moore, Charles R. Collins, San Francisco, for appellant.

Frank J. Mahoney, San Francisco, for respondents.

WARD, Justice.

Plaintiff in an action for dissolution of a partnership and for an accounting appeals from the judgment in favor of defendants Mark M. Meherin, Jr., and J. Vincent Meherin, copartners, transacting an insurance brokerage business under the name of Mark M. Meherin & Son, and Mark M. Meherin & Son, a copartnership. All of the questions raised on appeal relate to the correctness of the findings of fact.

Mark M. Meherin, the father of the individual defendants and plaintiff's grandfather, and his son, Patrick W. Meherin, plaintiff's father, began the insurance brokerage business of Mark M. Meherin & Son in June, 1906. J. Vincent Meherin joined them in 1910, and on January 1, 1915, the three became copartners under the name Mark M. Meherin & Son. Mark M. Meherin, Jr., joined said firm January 1, 1926. Plaintiff began working for the firm in 1934 when it was composed of his father and his two uncles. On January 1, 1936, he became a partner thereof. On April 19, 1939, Patrick W. Meherin died. The court found and plaintiff does not dispute "That William P. Meherin, plaintiff above named, and defendants Mark M. Meherin, Jr., and J. Vincent Meherin entered into an oral copartnership agreement for the purpose of acquiring and continuing an insurance brokerage business under the firm name and style of Mark M. Meherin & Son, on or about the 1st day of May, 1939." Under said agreement plaintiff owned a ten per cent interest in the copartnership. His uncles each owned, respectively, a forty-five per cent interest. Subsequently, on or about May 1, 1940, there was a readjustment of the interests in the firm, by which plaintiff owned fifteen per cent and each of the other two partners had forty-two and one-half per cent. This percentage prevailed until the dissolution out of which this action arose.

The events giving rise to the present litigation occurred towards the end of 1943. Plaintiff's interpretation of said events, as seen from the allegations of the complaint, is that on December 13, 1943, he was notified by his uncles that the copartnership was dissolved as of that date and he was thereafter expelled from participation in the assets, business and properties of the copartnership and denied the right to share in any profits of said business. Defendants, on the other hand, contend, as alleged in their answer, that "plaintiff, without justification, cause or reason therefor, became dissatisfied with his association in said copartnership, and on the 19th day of November, 1943, voluntarily ceased to be associated * * * and withdrew from and abandoned said business and all its obligations and liabilities, and declared that he was quitting said business and would no longer be associated with it."

Plaintiff testified that the last day he worked at the office of the partnership was Friday, November 19, 1943. On Sunday, the 21st, he cleared his desk, removing his personal belongings and leaving memorandums and notations with respect to his unfinished claims work. Defendants produced considerable proof of the fact that during the week end of November 20–21, 1943, plaintiff informed family friends and business associates that he was leaving because he was dissatisfied with his association in Mark M. Meherin & Son. The reasons for said dissatisfaction are expressed as follows in plaintiff's letter of November 21, 1943, to his uncle Vincent: "From my dad's death up to the present time, I have never clearly understood my position in the firm. I realize that I am a partner in name and financial participation and that is about all. I definitely feel that my presence there is sort of a forced acceptance. * * * To begin with, I have never reconciled myself to the treatment which was accorded my mother. A lousy life insurance policy plus half of my father's salary for one year. * * * There was no payment made for 'good will' for all the years that my father put into the business—Small things—the selling to my mother of Dad's car for the full market price of that time, with not even a thought that the major share in that car belonged to my father * * * I can certainly blame the firm for all the mental anguish she experienced following dad's death. She has been shamefully treated * * * For some years I have discussed with you and with Mark that I wanted some one to do the claim's work. I detested that work.

There seems to be a curse on all that work that desk. There was never anything done. Jack, who comparatively speaking, is a stranger, asked Mark once—and presto! Miss Hall. for me, a partner, that's hard to swallow, in fact, I don't swallow it at all."

The suggestion advanced by defendant J. Vincent Meherin in a letter dated November 27, 1943, that plaintiff come to the office for a discussion was refused by plaintiff in his letter of December 3, 1943, wherein plaintiff stated that he was "still a member of the partnership and will so continue unless there be further action on either your or my part." On December 13, 1943, J. Vincent Meherin wrote plaintiff that his "suspicions and lack of trust and confidence have created a condition which is intolerable among partners and leaves no alternative other than immediate dissolution. Mark and I have therefore determined to dissolve the partnership and this will serve to notify you formally that partnership is dissolved as of this date, December 13, 1943. We intend to have Mr. John Strachan prepare a statement immediately. You will appreciate that if you so desire you may at your own expense, have an accountant of your own selection and the books will be available to him at all reasonable times. As soon as this statement is prepared a copy will be sent to you which will be the basis of the settlement of our partnership affairs." In said letter it was also suggested that an automobile in plaintiff's possession of the market value of $1,150 might be kept by him as a portion of his share of the partnership assets, and that with respect to plaintiff's life insurance policies totaling $50,000, the premiums for which had been paid by the partnership, they might either be surrendered for their cash surrender value or retained by plaintiff if he so desired.

Further correspondence between the parties, principally on the subject of said insurance policies, culminated in defendants' letter of June 12, 1944, which reads in part as follows: "We are enclosing herewith balance sheet as of December 13, 1943 as prepared by John R. Strachan, Certified Public Accountant. These sheets are self-explanatory and are given, as you see, in detail and show as of the date of dissolution of your interest in capital account as being $11,026.30. We are enclosing our check No. 167 made to your order in the amount of $10,738.16. The difference between the two figures is for first quarter 1943 federal and state taxes as shown on check stub. We are also enclosing life insurance policies No. 5,715,757, No. 5,450,520, No. 5,450,116, No. 5,450,519 and No. 5,172,584, which were previously paid for by the firm. We are handing you these policies to do with as you so desire. * * * If there are any questions in the balance sheets that you do not understand do not hesitate to call on us and we will do our best to explain anything that may not be clear in your mind." Plaintiff did not cash said check for $10,738.16. At the time of the hearing of the settlement of the findings it was stipulated that the partnership would "place in an interest bearing savings account in the Bank of America * * * the sum of $10,738.16, said deposit to be made in the name of Martin Mongan, County Clerk of the City and County of San Francisco, said sum to be paid by said County Clerk to the plaintiff herein as directed by the court * * *" and that the check would be marked void by the clerk of the court upon presentation of a savings pass book evidencing the said deposit. Plaintiff testified that he did not question the correctness of Mr. Strachan's statement, and it was stipulated by plaintiff's counsel that "the figures in there are correct, we are not arguing or attempting to impeach his statement of what the books show." Following receipt of the said letter of June 12, 1944, plaintiff did not communicate with his uncles until May 7, 1945, at which time he wrote that he had employed counsel "to ascertain what monies are due me as a result of the dissolution of the partnership * * *"

[1] The basic contention advanced by plaintiff on his appeal is that the trial court erred in finding that the copartnership which commenced May 1, 1939, was a copartnership for a fixed term, instead of finding that it was a copartnership at will from which any partner might withdraw at any time without losing his legal right to receive the value of his interest,

including good will, going concern value, plus profits up to the date of dissolution. See Civil Code §§ 2425, 2432, 2435, 2436. It is urged that, as there is no evidence of any fixed term for which the partnership was to engage in the insurance brokerage business, the court's finding lacks evidential support. There is, however, evidence that the firm had an insurance broker's license which did not expire until June 30, 1944; that their lease would not expire until June 1944, and that during the lives of from one to five years of the various insurance policies which the firm had secured the members of the firm were jointly obligated to perform continuous services, such as obtaining proper coverage and rates and making adjustment of claims, as well as engineering work which includes fire prevention, fire protection and surveying work. These circumstances negative the existence of a partnership at will and serve to justify the assailed finding. Owen v. Cohen, 19 Cal.2d 147, 150, 119 P.2d 713; Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375.

[2] Plaintiff also contends that if there was a partnership for a fixed term it must have been created by an oral agreement made not later than May 1940, for a term extending through 1943, and hence would be within the statute of frauds. However, as stated in Rutland, Edwards & Co. v. Cooke, 44 Cal.App.2d 258, 262, 112 P.2d 287, 289, "the defense of the statute of frauds may not be raised for the first time on appeal." Accord, County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501.

[3] As an alternate ground for a reversal herein, plaintiff urges that even if the finding of a copartnership for a fixed term is upheld the judgment must be reversed, as the evidence establishes that the defendants dissolved the copartnership. This contention requires a determination of the sufficiency of the evidence to support the trial court's findings that on November 19, 1943, and prior to the expiration of the term of the copartnership, plaintiff became dissatisfied with his association therein and withdrew from and abandoned the business thereof, and that it is not true that his uncles expelled him from the copartnership. Rutherford v. Berick, 82 Cal. App.2d 331, 332, 186 P.2d 23.

[4] Plaintiff argues that the evidence shows that his uncles did not regard his cessation of work on November 19, 1943. and the removal immediately thereafter of his belongings from the office, as a dissolution since their letter of December 13, 1943, states that the partnership was dissolved because of plaintiff's "suspicions and lack of trust and confidence." Evidence of defendants' intent is not determinative of the question whether the above mentioned findings are supported by the record. The testimony of those who spoke with plaintiff shortly after November 19, 1943, establishes that he was "quitting" and was "through with Meherins", because he and his uncle Mark could not get along; that he felt his uncles had given his mother "a dirty deal", and that he might be taken in the Army and he did not want them to handle his affairs. Hence the trial court's findings must stand.

Dissolution of a joint venture takes place when either party to the joint venture ceases to be associated in carrying on the common business as distinguished from the winding up of the business. Section 2423, Civil Code. See also Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375; Bayer v. Bayer, 215 App.Div. 454, 214 N.Y.S. 322, [332], 340." Shearer v. Davis, 67 Cal.App.2d 878, 879, 155 P.2d 708. In this connection plaintiff further states that there is no evidence to support the finding that under the copartnership agreement each of the partners agreed to devote his entire business time to the copartnership. While it is true there is evidence that plaintiff's father spent only one or two hours a day in the office of the firm, the record also shows that after the father's death plaintiff and his uncles devoted their entire time to the work of the office, and it was plaintiff's understanding that he had to work there to earn the money which he received from the firm.

[5] Plaintiff urges that the doctrine of frustration as an excuse for nonperformance is applicable. See Autry v. Republic Productions, Inc., 30 Cal.2d 144, 180 P.2d 888. There is evidence that at the time

that plaintiff left the firm he was classified 1-A under the Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq., and that he subsequently worked at Marinship at Sausalito, California, for the period from December 4, 1943, to April 1, 1944, at which latter date he joined the Merchant Marine in which he remained for about seven months. While such evidence might justify a finding that plaintiff's cessation of the work of the copartnership was motivated by a desire to leave work which was nonessential to the war effort, under the circumstances this court is not required to hold that as a matter of law a supervening fortuitous event rendered performance of the copartnership agreement impossible. Autry v. Republic Productions, Inc., supra. Furthermore, the evidence indicates that plaintiff of his own volition left the firm because of his dissatisfaction therewith.

Lastly, plaintiff contends that the record does not support the finding "That on or about the 13th day of December, 1943, plaintiff and defendants Mark M. Meherin, Jr. and J. Vincent Meherin entered into an agreement for the settlement and liquidation of the partnership affairs, wherein and whereby it was agreed that John R. Strachan, a certified public accountant, would be employed to audit the business and affairs of said partnership for the purpose of determining the interest of each of the partners in and to the partnership assets as of December 13, 1943, which said agreement further provided that the findings of said John R. Strachan would be the basis of the settlement of said partnership affairs, and that upon such determination said plaintiff would be paid by said defendants his interest in said partnership the amount shown to be due him by said John R. Strachan."

[6] While the record is devoid of any express agreement on plaintiff's part to the proposal for settlement outlined in his uncle's letter of December 13, 1943, there is evidence that he took no action contrary thereto. On the authority of the recent case of Wood v. Gunther, 89 Cal. App.2d 718, 201 P.2d 874, the court could properly find that on or about the time plaintiff received the letter of December 13, 1943, he agreed to accept the findings of Mr. Strachan as determinative of the amount due him. In that action for dissolution of a partnership, the trial court found that the surviving partners of the partnership were owners of all of the partnership assets and that the value of the interest due plaintiff, the widow of the deceased partner, was limited to $45,000. In affirming, the appellate court pointed out that pursuant to the provisions of the partnership agreement plaintiff might sell her interest to the remaining partners, the amount thereof to be determined in accordance with a stated formula, or the partners should make an offer to plaintiff within the terms of said agreement. They made an offer, either to pay $45,000 for her interest or to have her interest evaluated according to said formula, as she might elect. She remained silent for nearly three months and then advised one of the partners to come to her home, where he was served with a copy of the summons and complaint in that action. The court stated, 89 Cal.App.2d at page 730, 201 P.2d at page 881: "This is not the case of a stranger offering to buy her interest * * *. To such a person she would owe no duty to speak at all, but in this case she was one of three fiduciary partners in a firm of persons, who had a contract with one another, under which they owed duties, one to the other; and, consequently, silence made the acceptance. * * * If, by chance, arbitrators might have set a higher figure than $45,000 on her interest, the plaintiff cannot complain because she alone was the person at fault."

The appeal from the order denying plaintiff's motion for a new trial, being a nonappealable order, is dismissed. The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

93 Cal.App.2d 417

GOEHRING v. STOCKTON MORRIS PLAN CO.

Civ. 7596.

District Court of Appeal, Third District, California.

Aug. 20, 1949.

1. Trial ⚷178

A directed verdict may be ordered only when conflicting evidence is disregarded and plaintiff's evidence is given value to which it is legally entitled, indulging all legitimate inferences that may be drawn therefrom, and the result is that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

2. Trial ⚷178

A motion for a directed verdict concedes as true all evidence given on behalf of plaintiff with all fair and reasonable inferences to be deduced therefrom, and even though court might be justified in granting new trial in event of verdict in favor of plaintiff, court would not be justified in directing verdict on the same evidence.

3. Contracts ⚷9(1), 39

No action will lie to enforce performance of a contract or to recover damages for its breach unless it is complete and certain.

4. Insurance ⚷104

Where loan company that was not an agent of any insurer procured policy insuring automobile in name of owner who thereafter sold vehicle and paid loan with proceeds and gave loan company written instructions to surrender certificate of ownership to buyer who stated that he wanted to keep the insurance, and thereafter loan company mailed policy and certificate to buyer, buyer was not entitled to recover damages from loan company on theory loan company had promised to transfer policy and to make it payable to buyer, but had failed to do so.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Eugene Goehring against the Stockton Morris Plan Company, a corporation, to recover damages on the alleged theory that defendant promised to transfer an insurance policy to plaintiff as purchaser of an automobile and failed and refused to do so. From the judgment, plaintiff appeals.

Judgment affirmed.

Mazzera, Snyder & DeMartini, Stockton, for appellant.

Lafayette J. Smallpage, Stockton, for respondent.

ADAMS, Presiding Justice.

This is an appeal by plaintiff from a judgment entered upon a directed verdict in favor of Stockton Morris Plan Company, defendant and respondent.

The facts are that early in 1946 one Joseph Blay was the owner of a 1941 Buick Century Sedanette automobile on which he had procured a loan from respondent. In connection with that transaction respondent took over Blay's certificate of ownership and procured from S. N. Potter, agent for certain insurance companies, a policy insuring Blay, as owner, and respondent, as their interests might appear, against loss from damage to the automobile. The term of the policy was from April 22, 1946, to April 22, 1947. Respondent paid for that insurance a premium of $82.95, which amount was charged to Blay's account.

On November 19, 1946, Blay sold the automobile to appellant, a part of the consideration being that appellant would pay respondent the balance owing to it on Blay's loan. On the same day, Blay and appellant went together to respondent's office in Stockton and there, at the collection counter, met Mrs. Elvyn Hill, the "cashier-teller" for respondent. Blay told Mrs. Hill he had sold his automobile to appellant who would pay the balance due on his loan, and asked her for the amount thereof. She procured the record and figured the balance due to be $331.20 on the principal of the loan, $82.95 paid for insurance premium, $5.81 interest on the money advanced for the insurance premium, and $3.70 Motor Vehicle Department fees, a total of $423.66, less a rebate, not explained, of $2.28, leaving a balance due of $421.38. Appellant handed Mrs. Hill his blank check and she filled it out for $421.38 payable to respondent, and appellant signed it and gave it to her. Thereupon Blay signed his certificate of ownership over to appellant and gave respondent written instructions to surrender and deliver to appellant the certificate of ownership and the insurance policy. Mrs. Hill advised them respondent would hold the documents until appellant's check cleared through the bank and then would mail the documents to appellant. About six days later appellant received the documents from respondent through the mail. He did not read the policy when he received it but "put it away." He testified at the trial that he thought it was in his name. However, the evidence shows, and it is not disputed, that the policy was not changed and that Blay remained as the insured named therein.

Appellant testified that when Blay and he were transacting the business with Mrs. Hill, she told appellant there was insurance on the automobile and asked him whether he wanted to keep the insurance and he replied: "I might as well"; that he then asked her if the papers would be in order when they were mailed to him and she said they would be. On the policy respondent noted that its interest was satisfied on 11/25/46. Appellant also testified that Mrs. Hill told him the policy would be transferred and sent to him. No transfer of Blay's interest in the policy was made.

On January 18, 1947, in an accident, the automobile was damaged beyond repair and appellant sold it for $300.00. Three days later he reported the loss to respondent's office in person and was there advised that respondent had no interest in the matter. He was referred to Mr. Potter, the insurance agent. He went to Mr. Potter, showed him the policy and was told that he was not insured. Thereupon Mr. Potter accompanied appellant to Brown Bros., insurance adjusters in Stockton, where a complete report of the accident was taken, and appellant made out a claim for the damage to his automobile. Thereafter he was notified that his claim for damages was denied by the insurance companies "inasmuch as neither their office or Agent S. N. Potter were notified of the assignment of interest." On May 28, 1947, appellant commenced this action to recover from respondent the amount of the damage to his automobile, on the alleged theory that respondent had promised to transfer the policy of insurance from Blay to appellant so as to make it payable to appellant, but had failed and refused to do so. In its answer respondent denied that it failed or refused to transfer the policy to appellant or to cause it to be made payable to him, and alleged that at no time did appellant request of respondent that he be substituted in the place of Blay as the insured thereunder.

[1, 2] We are mindful of the rule governing trial courts in directing verdicts, which rule, as stated in such cases as Tschumy v. Brook's Market, 79 Cal.App. 2d 556, 558, 180 P.2d 933, 934, and Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 190, 181 P.2d 935, and cases therein cited, is that: "A directed verdict may be ordered only when conflicting evidence is disregarded and plaintiff's evidence is given the value to which it is legally entitled, indulging all legitimate inferences that may be drawn therefrom, and the result is that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. A motion for a directed verdict concedes as true all evidence given on behalf of plaintiff with all fair and reasonable inferences to be deduced therefrom, and even though the court might be justified in granting a new trial in the event of a verdict in favor of plaintiff it would not be justified in directing a verdict on the same evidence."

Summarizing the evidence produced by appellant it amounts to this: When he paid off the Blay loan Mrs. Hill told him there was insurance on the car and asked him whether he wanted to keep the insurance and he replied: "I might as well." He then asked her if the papers would be in order when they were mailed to him and she replied that they would be. He thought the policy was in his name. She said the policy would be transferred and sent to him, and he received it about November 25, 1946. He did not read it, and "put it away." The accident happened nearly two months after he received the policy, and in that time he did not examine it or inquire as to whether he had been substituted as the insured in the place of Blay. In all his transactions with respondent appellant did not request that his name be substituted as the insured in the policy nor did respondent promise to cause such substitution to be made. Respondent was not an agent for the insurer or any insurance company and had no authority to make such a substitution.

[3] In view of the foregoing we are of the opinion that giving appellant's evidence all the value to which it was legally entitled, and indulging all legitimate inferences that could be drawn therefrom, it was not of sufficient substantiality to support a verdict for appellant. It does not show any contract between the parties which was sufficiently certain to entitle plaintiff to relief. This court, in Sarina v. Pedrotti, 103 Cal.App. 203, 208, 284 P. 472, 474, quoting from Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 371, 35 P. 1000, held: "It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; * * *."

This court, in Blake v. Mosher, 11 Cal. App.2d 532, 535, 54 P.2d 492, 494, quoted from 13 C.J., p. 263; 17 C.J.S., Contracts, § 31, as follows: "In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understand alike, there can be no assent, and therefore, no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode is agreed on by which it may be settled, there is no agreement, * * *." It also quoted 6 Cal.Jur., p. 43, where it is said: "There can be no contract unless the minds of the parties have met and mutually agreed. Consent is not mutual unless all parties agree upon the same thing in the same sense", and p. 216, where it states: "A contract sought to be enforced must at all events be so certain that its meaning can be ascertained. An indefinite contract cannot be enforced because the courts cannot know what the parties agreed upon."

In Reymond v. Laboudigue, 148 Cal. 691, 694, 84 P. 189, 190, the court quoted with approval the following from 26 American and English Encyclopedia of Law (2d ed.), p. 33: "The contract sought to be enforced must, at all events, be so certain that its meaning can be ascertained, as an indefinite contract cannot be enforced, because the courts do not know to what the parties agreed. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof." Also see Wineburgh v. Gay, 27 Cal.App. 603, 605, 150 P. 1003.

[4] Appellant has cited several cases claiming they support his contentions. Those cases have been examined and we find they are not applicable for the reason that each of them was founded upon a written contract between the parties and no uncertain terms were involved. In the instant case there was no previous contractual relation between appellant and respondent and there was no agreement that the automobile in question would be insured. It was insured because the respondent always insisted on insurance when a loan was made, to protect the loan. In this case the moment the Blay loan was paid off respondent ceased to have any further interest in the automobile or insurance thereon, and no further contractual relationship existed between respondent and either Blay or the appellant. Respondent noted on the policy that its interest therein was satisfied, and there is no evidence that it undertook to have Blay's interest therein transferred to plaintiff. The evidence is too uncertain to support a conclusion that a new contract was made between respondent and appellant, and there was no consideration for any such contract.

For the foregoing reasons the judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

93 Cal.App.2d 467

SASNER v. ORNSTEN.

Civ. 17047.

District Court of Appeal, Second District,
Division 1, California.
Aug. 25, 1949.

1. Bills and notes ⚷129(3)

A check regular on its face is payable on demand. Civ.Code, § 3134.

2. Bills and notes ⚷348

Where checks were negotiated and delivered by payee to third party on day following date of issuance on two, and two days after issuance of third, and all three were properly presented to bank for payment, there was no unreasonable delay such as would deprive third party of status as a holder in due course. Civ.Code, §§ 3133, 3134.

3. Bills and notes ⚷356

Where at time third party received checks from payee, payee was indebted to third party and checks were credited by third party on account of such pre-existing indebtedness for their full face value, third party became a holder of the checks for value. Civ.Code, §§ 3105, 3106, 3133, 3134.

4. Bills and notes ⚷339

When dealing with negotiable instruments, unless there is something on face of instrument or circumstances surrounding its negotiation to arouse suspicion, purchaser or pledgee is not called upon to make inquiry concerning execution or consideration for which it was given under penalty of having bad faith imputed to him.

5. Bills and notes ⚷339

Mere knowledge of facts sufficient to put a prudent person upon inquiry will not affect position of one as a bona fide purchaser or pledgee of negotiable instrument, but actual knowledge is required unless circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. Civ.Code, §§ 3133, 3134, 3136, 3137.

6. Appeal and error ⚷931(1), 989

When judgment is attacked as being unsupported by evidence, power of appellate court in passing upon question is limited to determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the judgment rendered; and not only must all conflicts in evidence be resolved in favor of prevailing party, but all legitimate and reasonable inferences must be indulged in to sustain the judgment; and where facts admit of two or more reasonable deductions, reviewing court is without power to substitute its deductions for those of the trier of facts.

7. Gaming ⚷49(3)

Evidence justified denial of recovery on three checks brought by holder against maker on ground that holder at time checks were delivered to him by payee had knowledge of fact that they were given in payment of gambling debts. Civ.Code, §§ 3105, 3106, 3133, 3134, 3136, 3137.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by E. A. Sasner against Edward B. Ornsten to recover on three checks. From the judgment, plaintiff appeals.

Judgment affirmed.

Hindin, Weiss and Girard, Los Angeles, for appellant.

No appearance for respondent.

WHITE, Presiding Justice.

This is an action by plaintiff against defendant on three checks executed by the latter, two being made payable to one Lou Stein and the third to "Cash" and delivered to Stein. The uncontroverted evidence showed that the checks were given by Ornsten to Stein in payment of gambling debts. The evidence further showed that Stein endorsed the checks and negotiated the same to plaintiff, who instituted this action to recover the amount of said checks in the total sum of $5,014.

By his answer defendant alleged that plaintiff was not a holder in due course of the checks in that he received the same with full notice and knowledge that they were given to evidence an alleged indebtedness for money lost by him to said Lou Stein at a gambling game in the county of Los Angeles.

The court found that the plaintiff was not a holder in due course of the checks and rendered judgment for defendant. From such judgment plaintiff prosecutes this appeal.

Respondent has filed no brief and appellant concedes that if there is any competent evidence in the record upon which the court could rightfully base a finding that he was not a holder in due course, then the judgment should be affirmed. The sole question presented is therefore, whether the record contains sufficient evidence to support the finding by the court that appellant was not a holder in due course.

Epitomizing the factual background which gave rise to this litigation the record discloses that at the time the checks in question were issued, April 14 and 16, 1946, plaintiff was manager of the Coral Isle Cafe in Los Angeles County. At that time the cafe was owned by plaintiff's brother and Phillip and Lou Stein, the last named being the payee on the checks in question. With reference to the circumstances under which he received the checks from the payee thereof plaintiff testified that eleven months prior to receipt of the checks "I loaned, about eleven months prior to that, $7400 to Mr. Stein. The checks were handed me in payment." That the balance then due on the foregoing loan was $6,300. There was introduced into evidence a cancelled check showing payment thereby from plaintiff to Lou Stein of the foregoing sum of $7,400.

Respondent testified that on three successive days during which period the checks were issued he played gin rummy with Lou Stein and one Cosgrove. That in the games he lost the amount of money represented by the total of the aforesaid three checks. That the checks were given in payment of such gambling losses. That the games were played in the upstairs portion of the Coral Isle Cafe. Respondent also testified with reference to the presence of appellant in and about the premises, that he had seen him there and, "I definitely know I saw him. I had words with him. I recall seeing him behind the bar and upstairs watching us play."

Appellant further testified that the upstairs room was not used exclusively for card playing, that he had seen respondent playing gin rummy in tournaments conducted at the cafe, that he had observed him playing cards in the upstairs room but had never seem him play for money.

The four requisites necessary to qualify a person as a holder in due course are: (1) The instrument must be negotiable, complete and regular on its face; (2) the holder must have received the instrument before maturity, and without notice that it had been previously dishonored, if such was the fact; (3) the holder must have received the instrument in good faith and for value; and (4) the holder must not have had notice of any infirmity in the instrument or defect in the title of the person negotiating it. Civ.Code, sec. 3133.

[1, 2] The uncontradicted evidence in the instant case clearly shows that each check was regular and complete on its face. Appellant acquired the checks before maturity because a check regular on its face is payable on demand, and it is only when an instrument payable on demand is negotiated an unreasonable length of time after its issue that the holder is not deemed a holder in due course. Civ.Code, sec. 3134. The evidence herein is clear that the checks were negotiated and delivered to appellant on the day following the date of issuance on two of them and two days after issuance of the third check. That all three checks were promptly presented to the bank for payment. There was no unreasonable delay such as would deprive appellant of his status as a holder in due course.

[3] It must also be held that appellant received the instruments here in question for value. Section 3105 of the Civil Code provides that a negotiable instrument is presumed to have been given for value, and section 3106 of the same code declares that an antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand or at a future date. See also Robb v. Cardoza, 110 Cal.App. 116, 122, 293 P. 851; Robb v. Cardoza, 127 Cal.App. 588, 590, 16 P.2d 325. The evidence in the case at bar is without contradiction that at the time appellant received the checks from Lou Stein the latter was indebted to the former in the sum of $6,300, representing the unpaid bal-

ance of an original indebtedness in the sum of $7,400 incurred about August 20, 1945, and that the checks herein were credited by appellant on account of such pre-existing indebtedness for their full face value.

We come now to a consideration of the fourth requisite necessary to establish that appellant was a holder in due course, viz., at the time the checks were negotiated, did he have notice of any infirmity in the title of Lou Stein, and which question is determinative of this appeal. If appellant had actual knowledge at the time he received the checks that the same were given in payment of a gambling debt, then he was not a holder in due course because the consideration for the instruments was illegal and the title of the person negotiating them was defective. Civ.Code, sec. 3136.

As to what constitutes notice of defect in a negotiable instrument as distinguished from a non-negotiable instrument, section 3137 of the Civil Code provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge* of the infirmity or defect, or *knowledge of such facts that his action in taking the instrument amounted to bad faith.* (Emphasis added.)

[4, 5] In Barthelmess v. Cavalier, 2 Cal. App.2d 477, 487, 38 P.2d 484, 489, it is said: "It is, no doubt, the rule that when dealing with negotiable instruments—unless there be something upon the face of the instrument, or the circumstances surrounding its negotiation, to arouse suspicion—the purchaser (or pledgee) is not called upon to make inquiry concerning its execution or the consideration for which it was given, under penalty of having 'bad faith' imputed to him. And it may be stated as the accepted rule, at the present time, that mere knowledge of facts sufficient to put a prudent person upon inquiry will not affect the position of one as a bona fide purchaser [or pledgee]. More is required, actual knowledge unless 'the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith.' 8 Cor.Jur. 501." See also Witty v. Clinch, 207 Cal. 779, 783, 279 P. 797; Allenberg v. Rapken & Co., Ltd., 108 Cal.App. 99, 103, 291 P. 281; Appel v. Morford, 62 Cal.App. 2d 36, 40, 144 P.2d 95.

Conceding that the record contains no direct evidence of actual knowledge on the part of appellant as to any infirmity or defect in the checks, the question remains as to whether, under the evidence, the court was justified in concluding that the surrounding circumstances were so cogent and obvious that for him to remain passive and make no inquiry amounted to bad faith on his part.

[6] When a judgment is attacked as being unsupported by the evidence the power of an appellate court in passing upon this question is limited to a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered. And not only must all conflicts in the evidence be resolved in favor of the prevailing party but all legitimate and reasonable inferences must be indulged in to sustain the judgment. Furthermore, where the facts admit of two or more reasonable deductions, the reviewing court is without power to substitute its deductions for those of the trier of fact, Harms v. Reed, 73 Cal.App. 2d 853, 860, 167 P.2d 747; Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486.

[7] The evidence in the case at bar has hereinbefore been narrated and it is unnecessary to here repeat it. Suffice it to say that the appellant was manager of the Coral Isle Cafe while Lou Stein, payee on the checks, was one of the owners of the cafe. Respondent testified that appellant actually watched the gin rummy games in which the former within three days lost the sizable sum of money here in question. And as observed by the trial judge in his summation of the evidence at the conclusion of the trial, "Also, another extraordinary feature of this is that instead of Mr. Stein depositing these and giving his own check to Mr. Ornsten to apply on the $7400, he takes well-known means of attempting to make valid a check which is otherwise invalid, that is, by handing it over to a third party."

When the facts and circumstances surrounding the relationship of the parties to this litigation and the circumstances under which the checks were given were regularly proven, the court was entitled to draw therefrom such deductions as were warranted by a consideration of the usual propensities of people, and the course of business, and to ground thereon such inferences as reason would dictate. Code Civ.Proc., secs. 1958, 1960. The fact, if it be a fact, that by reason of the conflict in the evidence had a judgment been rendered in favor of appellant it would be sustained is not the test on appeal. We therefore conclude that there is substantial evidence herein to support the court's finding that appellant "at the time that the checks were delivered to him had knowledge of the fact that these checks were without any consideration and were the result of an indebtedness for money lost at a gambling game in the County of Los Angeles, State of California."

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

93 Cal.App.2d 435

KARSTENSEN et al. v. WESTERN TRANSP. CO. et al.

Civ. 7588.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

1. Trial 🔑165

On defendant's motion for nonsuit at termination of plaintiff's evidence, plaintiff is entitled to full credit for all favorable evidence together with reasonable inferences which may be drawn therefrom, and trail court may not weigh evidence or discredit witnesses, and if evidence is conflicting, trial court must accept testimony which is most favorable to plaintiff.

2. Trial 🔑165

On defendants' motion for nonsuit at termination of plaintiffs' evidence, court has nothing to do with any apparent disagreement as to the facts among plaintiffs' witnesses, nor with any conflicts between evidence brought out on direct and cross examination.

3. Trial 🔑165

On defendants' motion for nonsuit at termination of plaintiffs' evidence, testimony of defendant who was called for examination by plaintiff, would be treated as evidence so far as it was favorable to plaintiffs. Code Civ.Proc. § 2055.

4. Trial 🔑165

Upon motion by defendants for nonsuit at close of plaintiffs' evidence, plaintiffs were entitled to presumption that deceased motorist exercised due care, unless presumption was dispelled by testimony of plaintiffs' own witnesses showing as matter of law that decedent was contributorily negligent.

5. Automobiles 🔑245(14, 61)

In action for death of motorist from injuries sustained in collision at night with truck at highway intersection, where there was evidence that truck driver had blinked his spot light to signal a left turn, whether flashing of spot light was negligence, whether motorist's attention was thus diverted or his vision blinded and whether such blinding or distraction was proximate cause of motorist's failure to heed stop sign and of ensuing collision, was for the jury.

6. Automobiles 🔑245(78)

In action for death of motorist from injuries sustained in collision at night with truck at highway intersection, where there was evidence that truck driver had blinked his spot light to signal a left turn, whether motorist's vision was blinded by spot light, and motorist was contributorily negligent in allegedly proceeding with unabated speed, if so blinded, was question for jury.

◆

Appeal from Superior Court, Solano County; Harlow V. Greenwood, Judge.

Action by Elizabeth A. Karstensen and others against the Western Transportation Company and others to recover damages for the alleged wrongful death of the named plaintiff's husband. From judgment of nonsuit, plaintiffs appeal.

Reversed.

McGuire & Lahanier, San Francisco, for appellants.

Brown, Rosson & Berry, Oakland, for respondents.

PEEK, Justice.

This is an action to recover damages for the alleged wrongful death of Alvin M. Karstensen instituted by his widow and minor children who alleged in their complaint that a truck owned by the defendant Western Transportation Company was driven in such a negligent manner by the defendant Charmley as to cause it to collide with the automobile driven by the decedent at the intersection of highways number 40 and 29 near the City of Vallejo, and that as a result thereof the decedent sustained injuries resulting in his death. Defendants' answer admitted ownership of the truck and that defendant Charmley was operating it in the course and scope of his employment but denied the allegations as to their negligence and alleged that the collision was the proximate result of decedent's own negligence. The case was tried by a jury. At the conclusion of plaintiffs' case the defendants move for a nonsuit, which motion was granted and judgment entered thereon from which this appeal is taken.

It appears from the record that the decedent was driving a 1941 Buick sedan in a southerly direction on highway 40 and crashed into the side of defendants' truck and trailer which were proceeding north on highway number 40 and making a diagonal left turn from said highway on to highway number 29 in order to proceed toward the City of Vallejo.

Appellants concede that decedent disregarded stop signs at the point where highway number 29 joins highway number 40, which protected vehicles making left turns from highway number 40 on to highway number 29, and struck the truck and trailer approximately in the middle thereof as it was negotiating the turn. At the time of the accident highway number 40 was a four lane highway and was divided for a short distance both north and south of the "Y" where said highway 29 joined said highway 40.

Jack W. Gates, a witness called by appellants, testified that he, the decedent, and Harold Hicks, in the course of a business trip had driven to Elk Grove from San Francisco. The car which was owned by Hicks was being driven by decedent at Hick's request. The parties concluded their business in Elk Grove near midnight on the 30th day of October 1945, and began the return trip to San Francisco via highway 40. The night was black and although it had rained intermittently it was not raining at the time of the accident but the windshield wipers were working. Just prior to the accident the car was traveling approximately 40 to 45 miles per hour. When the car reached the crest of a hill estimated by Gates to be 700 to 800 feet from the point where highway 29 merges with highway 40, a short distance south of Vallejo, he noticed the flashing of a spotlight. Gates further testified that when he observed the flashing he thought the vehicle had broken down. He also testified that he saw the light flash four or five times, that it was bright and shone into the car enough to cause him to sit up from his position in the back seat. Specifically he stated that "from the last time it flashed there was about a second and then there was—you couldn't see anything then, it looked like a blank wall in front of us and it was a truck", that the effect of the flashing light was such that "You couldn't see anything for, as I say, for a second or two", and that the collision occurred about four or five seconds after he first observed the flashing light. He himself did not see the stop sign at the intersection because his attention was attracted to the flashing light nor did he see any other lights or any vehicular traffic in either direction. He further testified that "it felt like" decedent had taken his foot off the gas pedal just prior to the accident. On cross examination Gates testified that the speed of the car at the time of the collision was approximately 40 to 45 miles per hour; that there was a slight slackening of speed before the car collided with the truck and that the car traveled approximately 70 feet between the time he observed the last flash of the light and the occurrence of the collision, while in his deposition he estimated the distance to be 400 to 500 feet.

John I. Charmley, the driver of the truck, was called by appellants as an adverse witness under section 2055 of the Code of Civil Procedure and testified that he first saw the car which decedent was driving as it came over the crest of a hill to the north side of the intersection of highways 40 and 29 at which time he was in the intersection and proceeding at a speed of approximately 25 miles per hour. He admitted that he turned his spotlight on and blinked it before he saw the car come over the crest of the hill but not afterward. He also testified that the spotlight threw its beam up in the air at an angle well above the horizon and well above the road. He further testified that the car approached the intersection at a high rate of speed and struck his truck and trailer in the middle thereof.

No other witnesses were called by the appellants and at the conclusion of the foregoing testimony the court granted respondents' motion for nonsuit.

[1-4] This court stated in Connors v. Southern Pacific Co., 91 Cal.App.2d 872, 206 P.2d 31, 34 that "The rule with respect to the granting or denial of a motion for non-suit upon the termination of plaintiff's evidence is well established. The plaintiff is entitled to full credit for all favorable evidence together with the reasonable inferences which may be drawn therefrom. The trial court may not weigh the evidence upon that motion, nor discredit witnesses. If the evidence which has been adduced is conflicting the trial court must accept that testimony which is most favorable to the plaintiff." It is also well settled that "On such motion the court has nothing to do with * * * any apparent disagreement as to the facts among plaintiff's witnesses, nor with any conflicts between the evidence brought out on direct and cross-examination." 9 Cal.Jur. 552-3; See Williams v. Freeman, 35 Cal.App.2d 104, 107, 94 P.2d 817. The testimony of the defendant given under section 2055 of the Code of Civil Procedure comes within this rule and is to be treated as evidence in the case insofar as it is favorable to plaintiffs. Crowe v. McBride, 25 Cal.2d 318, 319, 153 P.2d 727. Additionally plaintiffs are entitled to the presumption that decedent exercised due care unless such presumption is dispelled by the testimony of plaintiffs' own witnesses showing as a matter of law that decedent was contributorily negligent. Anthony v. Hobbie, 25 Cal. 2d 814, 155 P.2d 826.

An application of the foregoing rules to the circumstances revealed by the record herein makes it clear that the only evidence which could be considered by the trial court in ruling upon the motion for nonsuit was the testimony of the witness Gates, disregarding any conflicts between his direct and cross-examination as well as any conflict between his direct examination and his deposition, and those parts of the testimony of the defendant truck driver given under the provisions of section 2055 of the Code of Civil Procedure as were favorable to appellants.

Thus the question so presented for determination is whether or not such testimony and the reasonable inferences deducible therefrom is sufficient to establish defendants' negligence and decedent's freedom from contributory negligence as to entitle appellants to its submission to a jury for its verdict. If so, the motion for nonsuit was improperly granted.

[5] The act of the defendant truck driver in flashing his spotlight into the oncoming car which decedent was driving is a sufficient evidentiary basis for the jury to have found that such act was negligent. The jury could reasonably have concluded that decedent's attention was diverted or his vision blinded and that decedent was thereby prevented from observing either the stop sign or the truck as it turned in front of him. In this regard it is to be noted that the highway was divided immediately to the north and south of the intersection. The jury could have concluded that the flashing of the spotlight across such divided highway was not a reasonable method for the defendant driver to have signaled his intention to make a left turn, and that the blinding or distraction of de-

cedent's vision was the proximate cause of decedent's failure to heed the stop sign and of the ensuing collision.

[6] Likewise, the foregoing evidence affords sufficient basis for the jury to have found that the decedent was not contributorily negligent. While it may be argued, as respondents do, that decedent was negligent in proceeding with unabated speed while his vision was blinded, such argument assumes that the decedent could have stopped in time to avoid the accident after he was blinded. Whether he could or not was a question of fact to be determined by the jury. In making such determination the jury could have considered the presumption that decedent was exercising due care since such presumption is not dispelled by the testimony of plaintiffs' own witnesses.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

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93 Cal.App.2d 414

GILBERT et al. v. ASHLEY et al.

Civ. 3964.

District Court of Appeal, Fourth District, California.

Aug. 19, 1949.

1. Municipal corporations 🔑108.10

Ordinarily, when an ordinance which has been suspended by a referendum has been repealed by the city council, council cannot enact another ordinance in all essential features like repealed ordinance, but council may deal further with subject-matter of suspended ordinance by enacting an ordinance essentially different from ordinance protested against if not done with intent to evade effect of referendum petition.

2. Municipal corporations 🔑108.10

In determining whether city council enacted new business licensing ordinance with intent to evade effect of referendum defeating old licensing ordinance so as to invalidate new ordinance, existence of bad faith on part of members of city council could be determined only from language of new ordinance, where such ordinance was not ambiguous in its terms.

3. Municipal corporations 🔑122(2)

Every presumption is in favor of validity of a city ordinance.

4. Municipal corporations 🔑108.10

Language of new business licensing ordinance did not show bad faith on part of city council in enacting such ordinance with intent to evade effect of referendum defeating old licensing ordinance so that validity of new ordinance which was essentially different would be upheld.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by H. L. Gilbert and others to enjoin Guy B. Ashley, City Clerk, City of Escondido, and others from enforcing a business licensing ordinance. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

Kenneth C. Wiseman, Escondido, for appellants.

Colin M. Gair, Jr., City Atty., of Escondido, Gray, Cary, Ames & Driscoll, John M. Cranston, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs have appealed from a judgment rendered against them in an action to enjoin the City Clerk, the Chief of Police and the City Council of the City of Escondido from enforcing a Business License Ordinance, known as Ordinance No. 409. Plaintiffs contend that this ordinance is void because it is substantially a re-enactment of a previously enacted ordinance, No. 385, which was defeated by the voters of the city at a referendum election.

Ordinance No. 385 was adopted and passed by the City Council on June 25, 1947, and by its terms was made effective on and after August 1st, of that year. A referendum petition was circulated, and, pursuant thereto, an election was held on April 13, 1948, at which time the ordinance was defeated.

On December 15, 1948, Ordinance No. 409 was adopted by the City Council. It contained a recital that inasmuch as it provided for a tax levy for the usual current expenses of the city it was to take effect immediately, but that no tax should be collected for any period commencing before January 1, 1949.

Both ordinances were designed to raise revenue for municipal purposes by the imposition and collection of license fees or taxes, for the privilege of transacting and carrying on businesses, trades, professions, callings and occupations in the City of Escondido, and the moneys collected were to be deposited in the general fund of the city. However, the two ordinances differ from each other in substance relating to items of importance. Ordinance 409, unlike Ordinance 385, contains a provision that the tax levy is for the usual current expenses of the city. The ordinance is therefore not subject to referendum, as ordinances providing for tax levies or appropriations for the usual current expenses of a city are excepted from the referendum provisions of Article IV, Sec. 1, of the State Constitution. Hunt v. Mayor and Council of City of Riverside, 31 Cal.2d 619, 623, 191 P.2d 426. The tax rate imposed in Ordinance 409 is not the same as in Ordinance 385 and each enactment deals with a different tax year. The ordinances also differ from each other in exemption and enforcement provisions and in numerous other particulars which impel the conclusion that Ordinance 409 is not similar to Ordinance 385 in all its essential features and provisions.

[1] In Re Stratham, 45 Cal.App. 436, 439, 440, 187 P. 986, 988, it was said "that, ordinarily, when an ordinance which has been suspended by a referendum has been repealed by the council, the council cannot enact another ordinance in all essential features like the repealed ordinance; * * *." It was also held therein that, "The council may, however, deal further with the subject-matter of the suspended ordinance by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause."

[2–4] The existence of bad faith on the part of the members of the City Council can only be determined from the language of the ordinance, as there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in their words. Ex parte Goodrich, 160 Cal. 410, 416, 417, 117 P. 451, Ann.Cas.1913A, 56. There is no ambiguity in the terms of the ordinances before us and we cannot here inquire into the motives of the members of the City Council in enacting Ordinance 409, except as such motives appear in the language of the statute itself. In re Sumida, 177 Cal. 388, 390, 170 P. 823. We find nothing in the language of the questioned ordinance establishing bad faith, and every presumption is in favor of its validity. In re Porterfield, 63 Cal.App.2d 518, 536, 147 P.2d 15.

The trial court in the instant case sustained an objection to the introduction of any evidence upon the grounds that the complaint, as amended, failed to state facts sufficient to constitute a cause of action, and that extrinsic evidence was not admissible to prove any allegation of the complaint concerning the motives or intentions of the members of the City Council. Since no request was made for leave to amend, a judgment for dismissal of the action was entered. We conclude that the judgment was proper under the circumstances shown by the record before us.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

93 Cal.App.2d 444

In re PFUND'S ESTATE.

CAPITAL LODGE NO. 87 OF INDEPENDENT ORDER OF ODD FELLOWS v. PFUND et al.

Civ. 7617.

Sac. 5991.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

1. Perpetuities ⚷7(1)

A bequest to fraternal organization for perpetual care and upkeep of cemetery lot was void because providing for a "perpetuity." Const. art. 20, § 9.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Perpetuity".

2. Perpetuities ⚷8(1)

The word "eleemosynary" as used in constitutional provision that no perpetuities shall be allowed unless gift is for "eleemosynary" purposes, means "charitable." Const. art. 20, § 9.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Eleemosynary".

3. Perpetuities ⚷8(7)

A trust for the promotion of purposes which are of a character sufficiently beneficial to the community in general does not violate the constitutional prohibition against perpetuities. Const. art. 20, § 9.

4. Perpetuities ⚷8(5)

If persons who are to benefit from a gift are not of a sufficiently large or indefinite class so that community is interested in the enforcement of the trust, it is not "charitable" and is void if it involves a perpetuity. Const. art. 20, § 9.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Charitable".

5. Perpetuities ⚷8(7)

In view of statutory provision specifically excluding any public cemetery from statutory provisions relating to private cemeteries authorized to accept and establish perpetual care funds, bequest by testator of money to fraternal organization to erect a marker on his cemetery lot in public cemetery and for perpetual care and upkeep of the lot was not exempt from application of rule against perpetuities. Health and Safety Code, §§ 8250, 8725, 8730, 8737; Const. art. 20, § 9.

6. Pleading ⚷129(2)

Where allegation in petition of executors for distribution that fraternal organization to which testator bequeathed sum of money for erection of a marker on cemetery lot and for perpetual care of the lot was not a cemetery authority entitled to receive such a bequest, was not controverted, and it was not affirmatively alleged by fraternal organization that it was a cemetery authority, allegation was required to be accepted as true, and therefore finding of probate court that fraternal organization was not a cemetery authority was proper. Health and Safety Code, §§ 8250, 8725, 8730, 8737; Const. art. 20, § 9.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Proceeding in the matter of the estate of William Henry Pfund, also known as William H. Pfund, and also sometimes known as W. H. Pfund, deceased. From order of distribution declaring a certain bequest void, Capital Lodge No. 87 of the Independent Order of Odd Fellows, opposed by Edwina Virginia Pfund and the Capital National Bank of Sacramento, executors, appeals.

Order affirmed.

Busick & Busick, Sacramento, for appellant.

White & Harber and Lawrence A. Schei, Sacramento, for respondents.

PEEK, Justice.

This is an appeal upon the judgment roll alone from that portion of the decree of distribution declaring void a bequest of $1,000 upon the grounds that the legatee was not a cemetery authority within the meaning of Chapter 4, Articles 2 and 4, Division 8, Part 3 of the Health and Safe-

ty Code; that the trust attempted to be created was not a charitable use and is void in that it purports to create a perpetuity in violation of Section 9, Article XX of the Constitution of this state.

The particular provision of the will provided as follows:

"To Capital Lodge No. 87 of the Independent Order of Odd Fellows, Sacramento, California, I give and bequeath the sum of One Thousand Dollars ($1,000.00), but in trust, nevertheless, for the following uses and purposes:

"To supply and erect a headstone or marker for myself and wife (if she chooses to be buried beside me) on my cemetery lot in the City Cemetery of Sacramento City, said marker to be similar to and uniform with the four markers already in place and which cost Seventy Five Dollars (75.00) a piece, and to be of Barrie Vermont Granite which is now handled in Sacramento by Carlaw Bros. The income from the balance of said One Thousand Dollars ($1,000.00) after deducting the expenditure aforesaid shall be used by said Trustee for the perpetual care and upkeep of my said cemetery lot in said cemetery."

Appellant's contentions are (1) that the evidence is insufficient to sustain the findings, (2) that the trust is authorized by section 8738 of the Health and Safety Code and (3) that as no evidence was introduced to show that said lodge is not a charitable institution or a cemetery association within the meaning of the applicable provisions of said code, the judgment is not supported by the evidence.

[1, 2] It is readily apparent that the bequest to the appellant fraternal order specifically providing for "perpetual care and upkeep" of the testator's cemetery lot must be held to be void since "no perpetuities shall be allowed * * *" art. XX, sec. 9, Const., unless it can be said (and it is our conclusion that it cannot) that such bequest comes within the stated exception in the concluding portion of said constitutional provision as being for "eleemosynary purposes", which term has consistently been held to be synonymous with the word "charitable". Estate of Wirt, 207 Cal. 106, 277 P. 118; Collier v. Lindley, 203 Cal. 641, 266 P. 526. Necessarily the constitutional provision is broad in scope since the question of what is a charitable use can only be answered by recourse to present day conditions generally. It is obvious that the very nature of the subject matter precludes the adoption of any formula or standard for its determination. People v. Cogswell, 113 Cal. 129, 45 P. 270, 35 L.R.A. 269.

Assuming then for the purposes of this discussion, but not so deciding, that the appellant was competent to receive a charitable bequest, that is not to say, as appellant contends, that it was therefore competent to receive the particular bequest here in issue.

[3, 4] However, it may be said generally that a trust for the promotion of purposes which are of a character sufficiently beneficial to the community in general does not violate the constitutional prohibition against perpetuities. Stated otherwise, if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust, it is not charitable. See Rest. Trusts, sec. 375; McCartney v. Jacobs, 288 Ill. 568, 123 N.E. 557, 4 A.L.R. 1124.

Without question it was this factor which the reviewing court had in mind in Fay v. Howe, 136 Cal. 599, 601, 69 P. 423, 424, where, in passing upon the validity of a bequest, the income of which was to be used for the aid of needy persons born in a certain city, the court stated: "In the case of a private trust there must be certainty as to the beneficiaries, but in charitable trusts individuals are not named, for the reason that, if named, the gift becomes a donation to individuals, and, losing the character of indefiniteness as to persons (which is of the essence of a charitable trust), it is no longer a charitable trust. Inherent in every charitable trust is the * * * indefiniteness of beneficiaries." See also Collier v. Lindley, supra.

The general rule above noted is well illustrated by a case very similar to the present, In re Estate of Gay, 138 Cal. 552, 71 P. 707, 94 Am.St.Rep. 70, where it was held that an attempted bequest, the income of which was to be used for the perpetual care of decedent's grave, did not establish a charitable use and was void as creating a perpetuity in violation of said constitutional provision. The court in so holding stated such a bequest was purely private and personal and in no way did the perpetual care of the testator's grave benefit the public generally.

Counsel for appellant further argues that under the provisions of the Health and Safety Code, particularly section 8737 thereof, it is specifically provided that any person may make a valid bequest to a designated individual for the purposes set forth in the specified paragraph of the will here in question, and that such contribution will not be invalid as violating the rule against perpetuities. However, it should be noted that the section upon which appellant mainly relies, 8737, falls within Division 8, Cemeteries, Part 3, Private Cemeteries, Chapter 5, Perpetual and special care, Article II, specifically relating to "Care of Active Cemeteries", and that the only agency named in any of the sections in said Division 8 of said code which may receive a bequest for such purpose is the "cemetery authority" provided for in said sections or its directors or trustees appointed by the said authority, sec. 8725, and that the statutory provision giving to said authority the right to take funds, sec. 8730, as well as the provision that such a bequest or other contribution shall not be invalid as violating any law against perpetuities, sec. 8737, relates solely to the perpetual care fund established in accordance with the said provisions by such cemetery authority. Also that the provisions relative to the right of said authority to accept funds by way of proportionate contributions of the various plot owners and the fund resulting therefrom must be used in the particular cemetery which the authority is operating and in which the plot is located.

[5] Furthermore since it is admitted by appellant that the Sacramento City Cemetery, wherein testator's plot is located, is a public cemetery, and since by section 8250 "Any public cemetery" is specifically excluded from the provisions of said Part three relating to "Private Cemeteries", which are the only cemeteries authorized to accept and establish perpetual care funds, it would seem to follow that by reason thereof appellant's argument concerning the applicability of said section 8737 is not well founded.

[6] Additionally, the record before us shows that respondents' petition for distribution specifically alleged that appellant was not a cemetery authority within the meaning of the provisions of said Health and Safety Code. However, the objections of appellant to said petition are merely that it has accepted the trust; that it has ordered the prescribed headstones; that there is no uncertainty in the subject matter of the trust; that the intention of the testator is definite and certain, and that the trust does not violate the rule against perpetuities. Thus it is apparent that the allegation in the petition that appellant is not a cemetery authority is not controverted nor is it affirmatively alleged that it is a cemetery authority, hence said allegation must be accepted as true, and therefore the finding of the probate court that appellant was not a cemetery authority within the meaning of said applicable sections was proper and should be sustained.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 408

FIREMAN'S FUND INDEMNITY CO. v. STATE COMPENSATION INS. FUND.

No. 14033.

District Court of Appeal, First District,
Division 1, California.

Aug. 19, 1949.

Proceeding by Fireman's Fund Indemnity Company against State Compensation Insurance Fund to recover amount of award which plaintiff paid to beneficiary of employee pursuant to award by Industrial Accident Commission.

The trial court directed that judgment be entered in favor of plaintiff and the defendant appealed.

The District Court of Appeal, First District, Ward, J., affirmed the judgment on the ground that plaintiff had received no compensation for accepting hazard of liability for injury or death to deceased employee, and was entitled to equitable subrogation for amount of payments made.

1. Workmen's compensation 🔑1704, 1707

Ordinarily, determination as to an employee's employer and the designation of the employer's insurance carrier are questions of fact.

2. Workmen's compensation 🔑1791

Where Industrial Accident Commission made joint and several award in favor of widow of employee against plaintiff as insurance carrier of special employer and defendant as insurance carrier of general employer and plaintiff paid one-half of the award, but neither insurer appealed from award, Commission's determination was not res judicata of plaintiff's right to maintain proceeding for equitable subrogation. Civ.Code, § 1428.

3. Workmen's compensation 🔑1072

Where Industrial Accident Commission made joint and several award to widow of employee against insurance carriers of general and special employers, an insurer paying more than it should have been required to pay was subrogated to rights of beneficiary to maintain action for equitable subrogation against other insurer. Labor Code, § 3201 et seq.

4. Subrogation 🔑1

"Subrogation" is an arm of equity that may guide or even force one to pay a debt for which an obligation was incurred but which was in whole or in part paid by another.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Subrogation".

5. Workmen's compensation 🔑1072

Where Industrial Accident Commission made joint and several award to widow of employee against plaintiff as insurance carrier of special employer and defendant as insurance carrier of general employer, plaintiff carrier who had paid half of the award but had received no premium to compensate it for accepting liability for death or injury of employee was entitled to equitable subrogation against general employer's insurer. Civ.Code, §§ 1427, 1432; Insurance Code, § 11663.

Appeal from Superior Court, City and County of San Francisco; Preston Devine, Judge.

Donald Gallagher, San Francisco, Royle A. Carter, San Francisco, for appellant.

Leonard, Hanna & Brophy, San Francisco, Edmund D. Leonard, San Francisco, John A. MacDonald, San Francisco, for respondent.

WARD, Justice.

This is a proceeding by plaintiff Fireman's Fund Indemnity Company, a corporation, instituted under the doctrine of equitable subrogation, although defendant State Compensation Insurance Fund, a California state agency, assumes and argues that plaintiff is asking for contribution and that the rights and liabilities of the parties are governed by Civil Code sections 1427 to 1432, defining and interpreting joint and several obligations. The court directed that judgment be entered in favor of plaintiff.

Prior to filing the amended complaint, the California Industrial Accident Commission, upon proceedings instituted by Ruth C. Smith, widow and sole defendent of Joseph Jay Smith, made an award in favor of the widow against plaintiff and the defendant, jointly and severally, as insurance carriers of Moore Dry Dock Company and Joe Gerrick & Company, respectively. See Div. IV, Calif. Labor Code.

The facts, as to which there is no dispute, are that on March 7, 1943, Joseph Jay Smith, while employed at Oakland "by Joe Gerrick & Company as general employer and by Moore Dry dock Company as special employer," was killed, as the evidence shows, in the course of said general and special employment. Smith was a member of the crew of a truck crane hired by Moore from Gerrick at an hourly rate, which rate included the rental of equipment, cost of operation wages of the crew, the social security and unemployment benefit charges payable to government agencies, and the full workmen's compensation insurance premium charge upon the wages of the crew. The widow recovered benefits of $6,150 against the carriers, jointly and severally. Neither party sought a review of the award. Each carrier paid one-half of the award, in installments, as ordered by the Industrial Accident Commission. Prior to the date of filing this proceeding the entire award had not been paid, but before the entry of judgment in the present case the award had been fully paid, plaintiff's part of which was $3,075.

Defendant in its argument submits that parties to a joint and several obligation may be liable only from a contract or by operation of law, Civ.Code, § 1428, that the only right of action by plaintiff must be based upon an obligation arising through operation of law from the award of the Industrial Accident Commission, and that plaintiff is entitled to recover only such amount as plaintiff may have paid in excess of the amount contributed by defendant. In addition to its claim of equality of liability it is defendant's position that the action and award of the Industrial Accident Commission constituted an adjudication which may not subsequently be disturbed.

Defendant cites Ocean Accident & Guarantee Corporation, Limited, v. United States Fidelity & Guaranty Co., 63 Ariz. 352, 162 P.2d 609, as to equality of liability and as authority in res judicata. The facts of the cases, but not the bases of appeal, are similar. If the holding therein that the question is res judicata is applicable to the facts of this case, the present proceeding is at an end. The award of the state commission was approved in that case by the Arizona Supreme Court on appeal. Therein it was determined that the respective principals, the insurance carriers, as employers were primarily liable for the payment of the award. United States Fidelity & Guaranty Co. v. Industrial Comm., 42 Ariz. 422, 26 P. 2d 1012. On the appeal, repeated in 162 P.2d 609, the Arizona Supreme Court took the position that the correctness of the award or the propriety of the previous affirmance could not be attacked in that proceeding or on an appeal resulting therefrom. On the first appeal in 26 P.2d, the court commented upon the fact, at page 1017, that since the Ocean Accident & Guarantee Company, Limited, did not present before the Supreme Court the question whether the award was a legal and proper one it was necessary that the award of the Industrial Commission be affirmed. In the second case on appeal, 162 P.2d 609, the exact language used in the first decision is the basis of the determination that the question was res judicata. Other reasons appear in the opinion for the decision reached by the court, but those reasons are not presently pertinent.

[1, 2] In this proceeding it is admitted that there was no appeal from the commissioner's award and no prior decisions of an appellate court that the award is res judicata, and therefore in the present proceeding any claim of res judicata by defendant must be based on the commission's award. The primary purpose of compensation in industrial accident matters is the protection of the employee. In some instances it is necessary to hold an employer's insurance carrier liable where although no premium has been received the carrier has expressly or impliedly contracted to insure the employer against loss covering the liability in dispute. The determination as to an employee's employer and the designation of the employer's carrier ordinarily are questions of fact. The appellate courts seldom have occasion to interfere with such determination. The commission is often required to hold all employers jointly liable in order to protect the employee's rights, but the question of the relative liability between employers should be adjudicated in a superior court action. It must be held that in this case the award of the commission was not res judicata of the rights to maintain this proceeding for equitable subrogation. American Motorists Ins. Co. v. Industrial Acc. Comm., 8 Cal.2d 585, 67 P.2d 103; Hartford Acc. & Indemnity Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105; State Compensation Ins. Fund v. Industrial Acc. Comm., 20 Cal.2d 264, 125 P.2d 42.

The complaint alleges, the evidence proves, and the court found that Smith, the deceased employee, "was not on March 7, 1943, or at any other time mentioned in plaintiff's second amended complaint carried on the payroll records of Moore Dry Dock Company as one of its employees; that Moore Dry Dock Company paid no wages to said Joseph Jay Smith and never reported the wages of said Joseph Jay Smith to plaintiff, nor did plaintiff at any time compute, charge or collect any premium from said Moore Dry Dock Company upon the wages of said Joseph Jay Smith; that plaintiff received no premium whatsoever to compensate it for accepting the hazard of liability for injury to or death of said Joseph Jay Smith under the provisions of Division IV of the Labor Code of the State of California."

If plaintiff's proper remedy is equitable subrogation, then the trial court's action in overruling certain objections to the admission of evidence tending to sustain plaintiff's position was correct in each instance. Likewise the claimed erroneous rulings on the question of immateriality and irrelevancy, together with defendant's motion to strike certain paragraphs of the second amended complaint and the motion for nonsuit, as a matter of course were properly denied. It may be that the finding that all "denials and allegations set forth in defendant's answer" are untrue is technically incorrect, but the trial court qualified such finding by adding the phrase "inconsistent with the findings of fact herein". The findings show that the trial court's determination was one for equitable subrogation and not for contribution.

The distinction between contribution and equitable subrogation as being separate and distinct remedies is set forth in 13 American Jurisprudence 5–6 and 18 C.J.S., Contribution, § 1, pages 2–3, wherein the broader right of subrogation is emphasized.

[3] For the purpose of maintaining the action, the beneficiary of the deceased employee is the creditor of each obligor insurance carrier as determined by the Industrial Accident Commission. To the extent that one carrier may have been required to pay more than it legally should have been required to pay, the rights of the beneficiary, to the extent of such amount, are subrogated to that carrier.

[4] Tucker v. Nicholson, 12 Cal.2d 427, 84 P.2d 1045, a case of contribution, illustrates defendant's view that the question in this case is whether obligors under a joint award are proportionately liable, and must be accepted as good authority for only that point. In the Tucker case there were nine joint obligors. In United States Fidelity & Guaranty Co. v. Naylor et al., 8 Cir., 237 F. 314, it was held that as between two sureties on separate indemnity bonds for the same person there was an equal liability although one was for compensation and the other for accommodation. In the Naylor case the court disregarded the reason for the contract of indemnity. In the above and other cases cited by defendant, the sureties had contracted to protect the obligor in some form with respect to the obligation that arose. In the present case the carriers act not only for different insureds but plaintiff was made a co-surety without present or prospective compensation. Ocean Accident & Guarantee Corporation, Limited, v. United States Fidelity & Guaranty Co., supra, previously has been mentioned on the question of res judicata. It is also cited on the question of equality of liability and some language therein may appear to be helpful to defendant, but the rule invoked by the trial judge to dispose of the law on the facts of this case is eminently fair. Subrogation is an arm of equity that may guide or even force one to pay a debt for which an obligation was incurred

but which was in whole or in part paid by another. In Offer v. Superior Court, 194 Cal. 114, at page 118, 228 P. 11, 13, it was said that the right of subrogation applies not only to cases of suretyship but to all cases in which "one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter (quoting from Sheldon on Subrogation, p. 2)", and held that an insurance carrier is subrogated to the insured's right of action and is enforceable at law. "The doctrine of subrogation * * * has been held available to those who, not acting voluntarily, * * * pay in the performance of a legal duty imposed by contract or rules of law, to those who pay for the purpose of protecting their own rights or interests, and to those whose payment is favored by public policy." Fresno Investment Co. v. Brandon, 79 Cal.App. 387, 389, 249 P. 548, 549. In Hartford Accident & Indemnity Co. v. Worden-Allen Co., 238 Wis. 124, 297 N.W. 436, the court stated, at page 440: "Where, however, by reason of the agreement between the sureties or by reason of the general equities of the situation one surety or insurer ought, as against other sureties or insurers, to bear the whole loss, he becomes the principal surety, and all the other insurers or sureties become sub-insurers or sub-sureties. That is the situation here." Also see New Amsterdam Casualty Co. v. Commercial Casualty Ins. Co., 129 Misc. 466, 222 N.Y.S. 701; Taylor v. Willett, La.App, 14 So.2d 298.

[5] This may be the first case on appeal in this state in which subrogation, independent of contract, has been sought between carriers jointly held, arising out of and forming the basis of an accident over which the Industrial Accident Commission holds original jurisdiction. The ruling in this case, based upon an accident in 1943, is in accord with subsequently enacted legislation. Insurance Code, section 11663 now provides: "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his pay roll at the time of injury, in which case the insurer of the special employer is solely liable. For the purposes of this section, a self-insured or lawfully uninsured employer is deemed and treated as an insurer of his workmen's compensation liability." See Stats.1947, ch. 1466, § 1.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

FEDERAL FARM MORTGAGE CORPORATION v. SANDBERG et al.

Civ. 17002.

District Court of Appeal, Second District, Division 1, California.

Aug. 25, 1949.

Hearing Granted Oct. 24, 1949.*

1. **Executors and administrators** 🔑315(1)

Property may be distributed in probate subject to liens.

2. **Executors and administrators** 🔑315(6)

Erroneous decree of distribution from which no appeal was taken nor any proceeding instituted to set it aside, became final.

3. **Executors and administrators** 🔑315(6)

Where realty subject to two trust deeds was distributed under a decree of distribution without limitation, escrow holder was required to pay notes secured by trust deeds in order to convey clear title to purchaser.

4. **Executors and administrators** 🔑241

Allowance of a claim in probate puts it among acknowledged debts of estate, but an allowance is not equivalent in effect to a judgment.

5. **Executors and administrators** 🔑315(5, 6)

A decree of distribution in probate in most respects has same force and effect as a judgment in a civil action and is not subject to collateral attack.

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* Subsequent opinion 215 P.2d 721.

6. Executors and administrators ⚷315(6)

Under statute providing that when decree of distribution becomes final, it is conclusive as to rights of heirs, devisees and legatees, rights of persons coming within the three categories are conclusively adjudicated even though decree violates terms of will of decedent. Probate Code, § 1021.

7. Executors and administrators ⚷315(5)

Decree of distribution is a judgment in rem in a proceeding in the nature of one in rem.

8. Judgment ⚷668(2)

A creditor is a person interested in a decedent's estate and when notice directed by statute has been given such interested persons are before the court and are bound by any decree of distribution rendered.

9. Constitutional law ⚷110
Executors and administrators ⚷315(5)

Where jurisdiction of probate court to make a decree of distribution is not questioned, the decree is a muniment of title of highest value and its purpose is to give security to title to property and vested rights thereunder will be protected.

10. Executors and administrators ⚷315(6)

Where unsecured loan was allowed against estate of deceased debtor but decree of distribution failed by mistake to declare a lien on realty distributed thereunder in favor of creditor and no appeal was taken therefrom, decree of distribution was conclusive and subsequent purchaser of realty had title thereto free of debt.

11. Appeal and error ⚷1010(1)

Findings of trial court will not be disturbed if supported by substantial evidence.

12. Executors and administrators ⚷315(4)

In order to secure relief in equity for fraud or mistake in making a decree of distribution, claimant or purported distributee must have been kept in ignorance of his rights by some act of person to whom distribution was made.

13. Declaratory judgment ⚷384

In action for declaratory relief, an involuntary trust could, as a matter of law, be imposed upon proceeds of sale of realty if circumstances justified such relief.

14. Declaratory judgment ⚷384

In declaratory relief, court has broad and comprehensive powers of a court of equity.

15. Trusts ⚷110

Evidence sustained finding that failure to subject realty distributed under decree of distribution to lien in favor of creditor against decedent's estate was not due to fraud or mistake attributable to distributees so that constructive trust on proceeds from sale of realty distributed thereunder would not be imposed in favor of creditor. Civ. Code, § 2224.

◆

Appeal from Superior Court, Los Angeles County; F. Ray Bennett, Judge.

Action by Federal Farm Mortgage Corporation against Marion G. Sandberg, Marie von Piontkowski, E. S. Von Piontkoyski, D. G. Vedder Company (a limited co-partnership), Tejon Ranch Co. (a corporation) (sued as El Tejon Ranch Company, Inc.) and Dwight G. Vedder Co. (a limited partnership) (sued as First Doe), for declaratory relief adjudging that certain realty was subject to a probate lien. From a judgment for the defendants, plaintiff appeals.

Affirmed.

Richard W. Young, Morton G. Hoffmann, both of Berkeley, Daniel Schnabel, of Beverly Hills, for appellant.

W. T. Stockman, Los Angeles, for respondents Piontkowskis.

Arch H. Vernon, Earl E. Johnson and Albert B. Harris, Los Angeles, for respondents Tejon Ranch Co., Dwight G. Vedder Co. and D. G. Vedder Company.

DRAPEAU, Justice.

January 1, 1934 Harold Sandberg and Marion Grant Sandberg, husband and wife, executed and delivered to the predecessor in interest of plaintiff their promissory note for $5,000.00. The note was secured by a trust deed, pledging real property described therein. This real property will be referred to as the Los Angeles county property. And this loan will be referred to as Loan A-5894.

At the time of these transactions the Los Angeles county property was subject to a first and prior trust deed. October 10, 1938, a sale of the property was made in accordance with the provisions of the first trust deed. This, in effect, made Loan A–5894 an unsecured loan, the security having been eliminated through foreclosure of the first trust deed.

In addition to the note above mentioned, Mr. and Mrs. Sandberg, together with other parties, executed two other notes secured by trust deeds. The property pledged as security for these two notes will be referred to as the Kern county property. Ownership in the Kern county property, pledged as a unit, was in several interests: in Mr. and Mrs. Sandberg and these other parties. For purposes of this opinion further reference to the other parties is not necessary. These two loans will be referred to as Loan 30136 and Loan A–17745.

July 9, 1939, Harold Sandberg died, testate. His estate was probated in Los Angeles county. Letters testamentary were issued to Mrs. Sandberg, and she was appointed and qualified as executrix. During the course of administration of the estate, and in 1939, claims were presented for the three loans: Loans A–5894 and A–17745 by plaintiff and Loan 30136 by The Federal Land Bank of Berkeley.

In November, 1940, Mrs. Sandberg, as the sole legatee and devisee of her deceased husband, assigned all of her right, title, and interest in the estate to the defendants, Marie von Piontkowski and her husband, E. S. von Piontkowski. Mrs. von Piontkowski is a sister of Mrs. Sandberg. This assignment was approved by the court.

It was testified: (a) That the assignment was in full payment and cancellation of a note signed by Marion G. Sandberg in favor of the von Piontkowskis, upon which was due including interest, $25,000.00. (b) That further consideration for the assignment was the making by the von Piontkowskis of certain payments due to plaintiff on Mrs. Sandberg's obligation to plaintiff. These payments were upon a note and trust deed held by plaintiff; they were made by the von Piontkowskis upon condition that they would become owners of the Kern county property; and plaintiff knew of them and the condition upon which they were made.

Then, July 29, 1944, Mrs. Sandberg filed a waiver of account, report, and petition for distribution. The waiver stated: "* * * that there are no claims presented or allowed in the within entitled Estate that remain unpaid or unsecured at the present time," and prayed that a decree be made for the distribution of the entire estate to Marie von Piontkowski and E. S. von Piontkowski, husband and wife, as joint tenants. In truth, however, none of plaintiff's claims had been paid.

[1] And then, August 24, 1944, the probate court ordered distribution of the estate to the assignees above named. The decree was without limitation, and included the Kern county property; in other words, no lien was declared in favor of plaintiff upon the Kern county property, or any other property of the estate. Property may be distributed in probate subject to liens. Title Ins. and Trust Co. v. Miller & Lux, Inc., 183 Cal. 71, 190 P. 433.

This mistake may have occurred honestly. The petition for distribution recited that all three of the loans were secured by the Kern county property, which was the only asset in the estate. Quite likely counsel for the executrix thought the property would be distributed accordingly, subject to a lien. And, quite likely, the probate court, in drawing the decree of distribution proceeded upon the assumption that there were no unpaid claims.

[2] The decree of distribution has long since become final, no appeal having been taken therefrom, nor any proceeding instituted to set it aside. Benning v. Superior Court, 34 Cal.App. 296, 167 P. 291.

The von Piontkowskis by deed granted the Kern county property to D. G. Vedder; Vedder granted by deeds from himself, and by deeds from limited co-partnerships of which he was a member, to the defendant, Tejon Ranch Co. The last deed was delivered in accordance with an escrow agreement entered into in March, 1946.

In the course of the escrow The Federal Land Bank, on its own behalf, and on behalf of plaintiff, filed with the escrow holder its demand for payment of the balance due on the three loans. One of the witnesses for plaintiff testified that at that time plaintiff was under the impression the sale was being made in the probate proceeding.

[3] Two of the loans were paid by the escrow holder: those secured by trust deeds, loans 30136 and A-17745. Undoubtedly these two loans were a lien upon the Kern county property, and to acquire clear title for Tejon Ranch Company, it was necessary for the escrow holder to pay them. In re Estate of Lyon, 163 Cal. 803, 127 P. 75.

The escrow holder also started at least to pay the balance due on the first loan, Loan A-5894. A check was mailed for payment of the three loans, but upon objection by one of the parties to the escrow payment thereon was stopped. Later, as stated, two of the loans were paid out of the escrow.

The escrow was completed by delivery of the deed to Tejon Ranch Co., without paying anything to plaintiff upon Loan A-5894. This is the junior loan secured by trust deed of the Los Angeles property, which property was sold to satisfy the senior trust deed. Insofar as the Estate of Sandberg and this case are concerned, this loan was nothing more than an unsecured indebtedness represented by a claim filed and allowed in the estate.

Plaintiff brought its action for declaratory relief against all of the persons named, asserting that the transactions above narrated constituted a "probate lien" against the Kern county property. It is plaintiff's position, as stated in its brief, that the Kern county property "is subject to a lien or charge in favor of appellant; otherwise, that the von Piontkowskis have been unjustly enriched and hold certain funds in trust for appellant."

The trial court found against the plaintiff and in favor of all the defendants, and judgment followed. In effect the judgment quieted title to the Kern county land in the defendant, Tejon Ranch Co., and adjudged that none of the other defendants were indebted to the plaintiff.

[4] The allowance of a claim in probate puts it among the acknowledged debts of the estate. Allowance is not equivalent in effect to a judgment. Hotel Park Central v. Security-First Bank, 15 Cal.App.2d 293, 297, 59 P.2d 606; In re Estate of Naegely, 31 Cal.App.2d 470, 474, 88 P.2d 715; Haub v. Leggett, 160 Cal. 491, 494, 117 P. 556.

[5] A decree of distribution in probate in most respects has the same force and effect as a judgment in a civil action. It is not subject to collateral attack. Benning v. Superior Court, 34 Cal.App. 296, 299, 167 P. 291; Bacon v. Bacon, 150 Cal. 477, 89 P. 317.

[6] Section 1021 of the Probate Code states that when it becomes final the decree of distribution "is conclusive as to the rights of heirs, devisees and legatees." Rights of persons coming within these three categories have been held conclusively adjudicated even though the decree violates the terms of the will of the decedent. Kauffman v. Foster, 3 Cal.App. 741, 86 P. 1108; and see In re Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565, and cases collected in In re Greeneway, 236 Wis. 503, 295 P. 761, 136 A.L.R. 1180.

A somewhat extended examination of California authorities discloses no case determining the rights of one whose claim has not been paid during administration of an estate in probate, and has not been made a lien upon property distributed by the decree of distribution.

[7, 8] Such claimant is, however, a person interested in the estate. The decree is a judgment in rem, in a proceeding in the nature of one in rem. Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965; Warren v. Ellis, 39 Cal.App. 542, 179 P. 544; 11b Cal.Jur. § 1292, p. 791. When the notice directed by the statute has been given, such interested persons are before the court and are bound by the decree rendered.

[9] No question is raised here as to jurisdiction of the probate court to make the decree. In these circumstances it is a muniment of title of the highest value. Its purpose is to give peace and security to title to property. Vested rights thereunder will be protected. Blair v. Hazzard, 158 Cal. 721, 112 P. 298.

[10] For the foregoing reasons the decree of distribution is conclusive, and the judgment in favor of Tejon Ranch Co. should be affirmed; and also the judgment in favor of the other defendants who conveyed the Kern county land to Tejon Ranch Co.

[11] This, then, brings us to plaintiff's contention that the von Piontkowskis ought not to be enriched at the expense of the plaintiff. The testimony heretofore stated supports the finding of the trial court that there was consideration for the assignment to the von Piontkowskis. Under the substantial evidence rule, this court is bound by the finding.

In this connection there is one other matter to be dealt with: May equitable relief be extended to plaintiff because of fraud or mistake, in view of the representation to the probate court that all claims had been paid in the estate of Sandberg? Obviously this representation was either fraud or mistake; else the court would not have made the decree.

In this respect, as we understand it, it is the position of plaintiff that no attack is made upon the decree of distribution; that the von Piontkowskis are holding property under the decree to which they are not lawfully entitled; and that equity should do justice, not by overthrowing the decree, but by declaring the von Piontkowskis involuntary trustees of the money received by them from the Kern county property, at least to the extent of plaintiff's claim. This legal principle finds support. Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008; In re Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L.R.A.,N.S., 89. On the other hand a trust may not be imposed upon property in the hands of distributees merely because of mistake in the decree of distribution, within the meaning of section 2224 of the Civil Code. Thayer v. Fish, 49 Cal.App.2d 618, 122 P.2d 358; Hewett v. Linstead, 49 Cal.App.2d 607, 122 P.2d 352.

[12] The true rule is that in order to secure relief in equity for fraud or mistake in the making of a decree of distribution, the claimant or the purported distributee must have been kept in ignorance of his rights by some act of the person to whom distribution was made. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Hewett v. Linstead, supra.

[13] We cannot agree with defendants' suggestion that in this action for declaratory relief an involuntary trust may not, as a matter of law, be imposed upon the proceeds of the sale of the Kern county property.

[14] In declaratory relief the court has the broad and comprehensive powers of a court of equity. City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 142 P.2d 289; Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484.

[15] On this issue the findings and judgment are against the plaintiff and in favor of the defendants von Piontkowskis. The record contains substantial evidence to support these findings. There was no evidence of anything done by the von Piontkowskis which would support an inference of fraud as to them. The only thing which would warrant an equitable finding of constructive trust as to them is the mistake in making the decree of distribution and there is no evidence that the Piontkowskis had anything to do with that. Therefore, again under the substantial evidence rule, we may not set these findings aside.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

JOHNSON et al. v. MARQUIS et al.

Civ. 7578.

District Court of Appeal, Third District, California.

Aug. 16, 1949.

Hearing Denied Oct. 13, 1949.

1. Automobiles 🔑239(2)

Stating on one count cause of action for injuries resulting to automobile guest passengers from alleged intoxication and willful misconduct of defendant driver did not preclude defendant from pleading contributory negligence as a defense to either or both alleged bases of liability. Vehicle Code, § 403; Code Civ.Proc. § 427, and subd. 8.

2. Negligence 🔑100

Plaintiff cannot recover for injury resulting from willful misconduct of defendant, if plaintiff was guilty of negligence of such a character that it contributed to and became a part of and the inducing cause of defendant's willful misconduct.

3. Pleading 🔑52(2)

Complaint predicating liability for injuries sustained by automobile guest passengers on alleged intoxication and willful misconduct of driver was not demurrable for statement of both bases of recovery in same count, where they were separately stated therein. Vehicle Code, § 403; Code Civ.Proc. §§ 427, and subd. 8, 430, subd. 5.

4. Pleading 🔑18

Counts of complaint alleging that while plaintiffs were riding in automobile as passengers they were injured by negligence of driver, were not demurrable for uncertainty because of failure to allege whether plaintiffs were paying passengers or guests. Vehicle Code, § 403.

5. Automobiles 🔑240(3)

Complaint alleging that while plaintiffs were riding in automobile they were injured as result of driver's intoxication and willful misconduct, adequately alleged their status as guests so that absence of evidence that they were paying passengers resulted in no fatal variance between allegations and proof, though other counts of complaint alleged plaintiffs were riding in automobile as passengers and were injured by negligence of driver. Vehicle Code, § 403.

6. Automobiles 🔑244(20, 36)

In action for injuries sustained by plaintiffs when automobile in which they were riding as defendant's guests collided with stalled truck, evidence sustained implied findings of jury that defendant was intoxicated and guilty of willful misconduct which resulted in the accident. Vehicle Code, § 403.

7. Appeal and error 🔑1010(1), 1014

Where implied findings of jury are supported by substantial evidence, such findings and order denying motion for judgment notwithstanding verdict may not be disturbed on appeal, though reasonable minds might differ regarding effect of the evidence.

8. Automobiles 🔑181(1)

Ordinary negligence of automobile driver will not support a recovery for injuries sustained by guest, which depends upon proof of intoxication or willful misconduct. Vehicle Code, § 403.

9. Automobiles 🔑181(7)

Evidence of excessive speed, standing alone, ordinarily will not constitute "willful misconduct" within meaning of automobile guest statute, but evidence of excessive speed under circumstances which imply willful, wanton, or reckless disregard for the safety of guests, may constitute such misconduct. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Willful Misconduct".

10. Automobiles 🔑244(20)

The evidence adduced or the reasonable inferences to be drawn therefrom must show deliberate, intentional wanton or reckless conduct, or omissions to perform duties, with knowledge, express or implied, that such conduct is likely to result in injury to guest, in order to establish "willful misconduct" within meaning of automobile guest statute. Vehicle Code, § 403.

11. Trial 🔑296(3)

Plaintiffs' requested instruction reciting some of the factors which might be considered by jury in determining whether defendant was guilty of willful misconduct, within meaning of automobile guest statute, was not erroneous or prejudicial where other instructions correctly informed jury of the necessary elements of such misconduct. Vehicle Code, § 403.

12. Trial ⚷235(2)

Instruction authorizing jury to infer that automobile driver conducted herself with knowledge that serious injury to a guest probably would result from such conduct, as a necessary element in finding driver guilty of willful misconduct within meaning of automobile guest statute, if such inference could reasonably be drawn from the facts in evidence, conformed to statutory definition of the term "inference" and was not objectionable as failing to state the standard from which the inference as to such knowledge should be drawn. Vehicle Code, § 403; Code Civ.Proc. § 1958.

13. Trial ⚷243

Plaintiffs' requested instructions reciting some of factors to be considered by jury in determining whether automobile driver was guilty of willful misconduct within meaning of automobile guest statute and authorizing jury to infer that driver conducted herself with knowledge that serious injury to a guest probably would result from such conduct, if such inference could reasonably be drawn from the facts in evidence, were not inconsistent with defendant's requested instructions defining willful misconduct and stating the essential elements thereof. Vehicle Code, § 403.

14. Trial ⚷295(1)

In determining whether challenged instructions are erroneous, the entire charge to jury should be read and considered as a whole.

15. Trial ⚷339(3)

Where jury returned two conflicting forms of verdict, trial court properly instructed it to retire and correct the original inconsistency of its verdict. Code Civ. Proc. § 619.

16. Damages ⚷132(1)

Awards of $50,000 and $60,000 respectively for injuries sustained by two guests in collision between defendant's automobile and stalled truck were not excessive.

17. Appeal and error ⚷1004(1)

A verdict may not be reversed on ground that it is excessive, unless it clearly appears to be the result of passion, prejudice or corrupt influence, particularly where trial court has passed on the issue.

◆

Appeal from Superior Court, Stanislaus County; H. L. Chamberlain, Judge.

Action by Catheryn Johnson and another against Christine Marquis and others for personal injuries sustained by plaintiffs in automobile-truck collision. From a judgment entered on a verdict for plaintiffs against named defendant, and from an order denying motion for judgment notwithstanding the verdict, named defendant appeals.

Judgment and order affirmed.

Cooley, Crowley & Gaither, San Francisco, Vernon F. Gant, Modesto, for appellant.

Cleary & Zeff, Modesto, C. Ray Robinson & Margaret A. Flynn, Merced, for respondents.

THOMPSON, Justice.

The defendant, Christine Marquis, has appealed from a judgment rendered pursuant to a verdict for plaintiffs in a suit for damages for personal injuries received as the result of alleged intoxication and wilful misconduct of the owner and driver of an automobile in which they were riding as guests and also from an order denying motion for judgment notwithstanding the verdict.

The action was dismissed, at the close of the evidence, as to the codefendants, W. R. Thomas and Grover S. Berg, the owner and driver respectively of a truck parked on the highway, into which the appellant's machine crashed. The appellant contends that her demurrer to the amended complaint should have been sustained and that her motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial should have been granted, for lack of evidence to show that plaintiffs were riding in her machine *as passengers* when the accident occurred, and that there is an absence of evidence to support the verdict and judgment that appellant was either intoxicated or guilty of wilful misconduct.

Christine Marquis, the appellant, is a widow who operated an apartment house in Oakland. She owned the Ford coupe which was involved in this accident. Her deceased husband had formerly owned Twain-Harte Lodge, a resort situated twelve miles from Sonora. The plaintiff, Catheryn Johnson, was the manager of appellant's apartment house. The plaintiff, John Vallortigara, was an old friend of appellant, and was living in her apartment house. All three had been invited by the new lessee and manager of the Twain-Harte resort to attend the opening of that Inn near Sonora. On November 16, 1945, after having eaten lunch they left Oakland in appellant's Ford machine to attend the opening of the resort. They stopped for about half an hour at Oakdale, where each had a 7-Up bourbon highball. They left there at 5:30 P.M. The appellant said that she would drive the car since she was familiar with the road. Vallortigara sat by her side on the front seat. Catheryn Johnson sat in the rear seat. It was dusk and misty. The paved highway was wet. At a point about nine miles beyond Oakdale, the Ford machine followed a curve of the highway and ran down an incline and then up a slight grade on a straight two-lane highway a distance of some 1100 feet and crashed into the rear end of a disabled truck which had been parked, with red clearance lights burning, on the right-hand side of the roadway, with the left wheels on the pavement from three to six feet from the center line. There is evidence that the Ford machine hit the truck with such force that it shoved the truck forward a distance of about twenty feet. There is a conflict of evidence regarding the speed at which the Ford machine was then traveling. Mr. Berg, the driver of the stalled truck, who was standing near by, saw the Ford car approaching when it was some fifty yards away, and ran toward it to warn the driver of the danger. He testified, "I kept waving and trying to flag her." The occupants of the Ford car said they did not see him. They passed him at a high rate of speed. When Mr. Berg was asked to estimate the speed at which the machine was traveling, he replied, "Well, I knew she was going fast when I first got the sound but I seen the car, I knew she was going fast. * * * I figured at that time she was doing between 90 and 100 [miles per hour], * * *. I don't believe she could have been a-doing a bit under 80. It sounded to me like at that time, from the sound of the motor, it sounded like it was wide open * * *." Neither the driver of the Ford nor the plaintiffs saw the truck until the collision occurred. Each occupant of the car was so seriously injured as to require hospitalization and medical care.

The jury returned a verdict in favor of Catheryn Johnson for $50,000 damages, and for Mr. Vallortigara for $60,000. Judgment was rendered accordingly. From that judgment and from the order denying motion for judgment notwithstanding the verdict this appeal was perfected.

The appellant contends that her demurrer to the amended complaint under Section 430, subdivision 5, of the Code of Civil Procedure was improperly overruled. The demurrer was filed on the grounds that plaintiffs' causes of action under Section 403 of the Vehicle Code, in the third and fourth counts, were "improperly joined and not separately stated." Appellant asserts that the cause based on alleged intoxication should be stated in a count separate from the one founded on wilful misconduct. She suggests that the uniting of those causes in the same count is prejudicial to her for the reason that it precludes her from pleading as a defense the contributory negligence of plaintiffs, since that defense is applicable to a charge of intoxication, while it may not be applicable to a charge of wilful misconduct. In support of the last mentioned statement, appellant cites Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662. In the case last cited the question of a demurrer to the complaint was not involved.

We are of the opinion the demurrer in this case was properly overruled. Paragraph II of the third count of the amended complaint separately states that the injuries sustained by plaintiffs were the result of Christine Marquis "being then and there in a state of intoxication," and independently of said intoxication that she was guilty of wilful misconduct in knowingly, intentionally and recklessly operating her automobile in such a manner as to cause said injuries. That count also specifies the acts and conduct of appellant which constituted the alleged wilful misconduct.

[1, 2] We are cited to no authority which holds that a cause of action for personal injuries resulting to guests from the same transaction, for intoxication and for wilful misconduct, under Section 403 of the Vehicle Code, may not be united in the same count, when they are separately stated therein. Section 403 of the Vehicle Code renders a person liable to a guest for injuries sustained as the proximate result of "intoxication or wilful misconduct." In the present case there is evidence to support the theory that the two charges of intoxication and wilful misconduct united to cause the accident; that the appellant recklessly drove her machine in the manner stated, with implied knowledge that her conduct would result in injury to her guests, and because she was then intoxicated. The appellant was not prejudiced by that ruling of the court upon the demurrer. We perceive of no reason why the appellant was thereby precluded from pleading the defense of contributory negligence to either or both charges of intoxication and wilful misconduct. In fact, the appellant did plead contributory negligence as a defense. Certainly, if plaintiffs had furnished the liquor which caused the appellant to become intoxicated, and voluntarily rode with her, knowing that she was dangerously intoxicated, they might be precluded from recovering damages. Likewise, if they observed the reckless manner in which she was operating the car, and had the opportunity of preventing such conduct, or of stopping the car and refusing to ride with her, and failed to do so, they might also be prevented from recovering damages. That is exactly what this court said in the Schneider case, supra, with respect to pleading and relying upon contributory negligence as a defense to alleged wilful misconduct. The court said, 6 Cal. App.2d at page 383, 44 P.2d at page 664: "While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: That *where the negligence of the plaintiff is of such a character that it contributes to, and really becomes a part of, and the inducing cause of the defendant's willful misconduct, no recovery can be or should be had.* * * *" (Italics added.)

Subdivision 8 of Section 427 of the Code of Civil Procedure authorizes the uniting of several causes of action in the same complaint for "Claims arising out of the same transaction, or transactions connected with the same subject of action." The last paragraph of that section provides that "causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, *and it is not required that they be stated separately.*" In the case of City Carpet Beating etc. Works v. Jones, 102 Cal. 506, 36 P. 841, 842, which was a suit for damages based upon two separate grounds, namely, a breach of warranty not to damage plaintiff's property, and a breach of contract not to carry on a competing business in that vicinity, a demurrer to the complaint on the ground that the two causes were not separately stated was overruled. The Supreme Court held that the demurrer was properly overruled, and affirmed the judgment. Commenting on the fifth subdivision of Section 430 of the Code of Civil Procedure, the court said: "This provision applies to causes of action which cannot be embraced in the same action, though separately stated, and not to causes of action which may properly be joined in the same action under section 427, but which are not 'separately stated,' as required by the last-named section."

[3] We conclude that the amended complaint in this case is not vulnerable to attack by demurrer on the ground that the different causes of intoxication and wilful misconduct were not separately stated, and that the demurrer was therefore properly overruled. The appellant was not thereby prejudiced.

The appellant contends that her motions for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, should have been granted because there was a failure to prove that plaintiffs were riding in the automobile as "passengers". It is also argued that the demurrer to the first and second counts of the amended complaint, on the ground of uncertainty, should have been sustained because it could not be determined whether the plaintiffs were riding as paid passengers or as guests. The amended complaint was couched in four counts. The first two alleged that plaintiffs were riding as passengers. The last two counts merely alleged that while they were *riding* in defendant's automobile they were injured as the proximate result of the driver's intoxication and wilful misconduct. The appellant assumes there was a fatal variance between the allegations of the complaint and the proof with respect to the status of plaintiffs as occupants of the machine, and that said motions should therefore have been granted. In support of that theory the appellant has cited Jenkins v. National Paint & Varnish Co., 17 Cal.App.2d 161, 61 P.2d 780.

[4, 5] We are of the opinion there is no merit in the foregoing contention under the circumstances of this case. We think the motions were correctly denied and that the demurrer was properly overruled. Originally the owner and driver of the truck, into which the automobile crashed, were made codefendants. They were charged with mere negligence in leaving their truck parked, without warning lights, on the paved portion of the highway. At the close of the evidence the action was dismissed as to the owner and driver of the truck. In separate counts the complaint charged Christine Marquis, the driver of the automobile, with causing the accident by different means. The first two counts alleged that while plaintiffs were riding in the automobile *as passengers,* they were injured by the negligence of the driver. The last two counts alleged that while they were *riding* in the car they were injured as the proximate result of the driver's "intoxication and wilful misconduct". The latter counts were clearly addressed to the liability of the driver of a machine, under Section 403 of the Vehicle Code, to a guest, which is limited to causes arising from either intoxication or wilful misconduct. Plaintiffs had the right to allege their causes of action based upon the different theories of ordinary negligence and the limited liability resulting from intoxication or wilful misconduct. The causes were separately stated. The first two causes were founded on the alleged status of plaintiffs as passengers in the car. The latter counts were clearly based on their status as guests of the driver of the machine. We may assume there was no evidence adduced to show that plaintiffs were riding as "passengers," because there is no proof they compensated the owner or driver for their transportation. We must assume plaintiffs were riding as guests as that term is defined in Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704. But their status as guests was adequately alleged in the last two counts which charged that their injuries resulted from the intoxication and wilful misconduct of the driver. There was therefore no fatal variance between the allegations and proof in this case, and the said motions were properly denied.

The Jenkins case, supra, upon which the appellant relies, is clearly distinguishable from the pleading and facts of this case. In that case the complaint merely alleged that plaintiff's husband, while riding in defendant's automobile "as a passenger," was killed as the result of the driver's *negligence.* That complaint contained no allegation of either intoxication or wilful misconduct of the driver. The evidence clearly showed that the deceased was riding in the machine as a guest, and not as a passenger. At the close of the evidence a nonsuit was granted. A hearing by the Supreme Court was not requested. The Appellate Court merely held that there was an absence of evidence to prove that the deceased was riding as a passenger, and that the uncontradicted evidence showed he was riding as a guest, but since there was no allegation of intoxication or wilful misconduct necessary to support liability to a guest, the pleaded cause based only on ordinary negligence was not supported by evidence, and the nonsuit was therefore properly granted. In the present case intoxication and wilful misconduct were pleaded. There was at least an effort to support those allegations by proof of both intoxication and wilful misconduct. The Jenkins case has no application to the situation in this case on account of the difference in the pleadings and proofs. We may assume that if there had been any evidence in the Jenkins case that the deceased was riding as a *passenger* who had compensated the owner or driver of the car for his transportation, that issue would have been submitted to the jury for determination. We assume the nonsuit was granted in that case because there was no conflict on that issue.

Moreover, the present case was tried by all parties on the theory that plaintiffs were riding as guests, and that they could not recover damages unless they proved that their injuries resulted proximately from the alleged intoxication or wilful misconduct of the driver, Christine Marquis. The jurors were examined on that theory. The case was tried and argued on that theory. The jury was instructed *at appellant's request* that, "*It is admitted* the plaintiffs were riding with the defendant Marquis as her guests." Defendant's instruction number 8 properly defined the term "guest." The jury was further instructed with respect to what constitutes intoxication and wilful misconduct. During the trial there was necessarily much evidence adduced with respect to ordinary negligence which was applicable to the defendants, Thomas and Berg, the owner and driver, respectively, of the truck. But, at the close of the evidence the cause was dismissed as to those codefendants. The jury was so instructed, and the court advised the jury that it could not render judgments in favor of plaintiffs unless it determined that the driver of the car, Marquis, was either intoxicated or guilty of wilful misconduct. The jury could not have been misled with respect to the limitation of liability as provided by Section 403 of the Vehicle Code. We conclude there was no variance between the pleadings and proof in this case, and that the demurrer was correctly overruled, and that the said motions were properly denied upon the grounds previously stated.

The serious question in this case is whether there is sufficient evidence to support the implied findings of the jury that the injuries sustained by plaintiffs were the result of the intoxication or wilful misconduct of Mrs. Marquis, the driver of the car in which they were riding as her guests. Upon that subject the evidence is conflicting. We have concluded there is substantial evidence to support those findings.

The plaintiff John Vallortigara drove the machine from Oakland to Oakdale. Mrs. Marquis testified that she had a sandwich and a cup of coffee in Oakland, but did not eat anything after that; that they arrived at Oakdale about 5 o'clock P. M., where they stopped at the Live Oak Cafe to telephone to the proprietor of the Twain-Harte resort; that she was familiar with the highway, having frequently driven over it for several years past, and that the two-lane highway, in the vicinity of the place where the accident occurred, contained sharp curves and grades; that, at a point about 1,200 feet from the point where the truck was parked the highway curved sharply and then ran down into a considerable depression and upgrade on the opposite side, near the top of which the truck was parked. It was then dark. The atmosphere was full of moisture. The pavement was wet. Mrs. Marquis was driving the car after they left Oakdale. The lights were burning, and the windshield wiper was operating. She said they were then traveling at the rate of about 50 or 55 miles per hour, and that she did not see the truck parked on the highway at any time before her machine crashed into it.

Mrs. Marquis admitted that she drank one 7-Up bourbon highball, on an empty stomach, at the Live Oak Cafe, a few minutes before the accident occurred. She testified that she did not realize that the liquor affected her driving of the car. When she was asked if she had been conscious of having been affected previously as the result of one drink of liquor she replied, "* * * I don't say that I usually—one drink would affect me that way, but I have —at times, one drink has affected me." In that regard she testified as follows: "Q. You would feel different [after a drink of liquor] than you normally would, wouldn't you? A. Yes. Q. Your reactions would be different than they normally were, wouldn't they? A. Yes. * * * Q. Now, Mrs. Marquis, have you noticed in the past an experience that you have had in taking a drink of we will say, a highball, that the question of whether you had had anything to eat, had any bearing upon the effect that it would have upon you? A. Yes, I would say great effect."

She conceded that the effect upon her of one bourbon highball had been far greater and more apparent if she drank it without food or a substantial meal. The witness had testified they had nothing to eat except a sandwich and a cup of coffee before they left Oakland. While there is a conflict with respect to the effect of that bourbon highball upon her ability to drive the machine safely, there is evidence that she was in fact driving in a reckless manner and at an excessive rate of speed immediately before the accident occurred. Vallortigara drove the car from Oakland to Oakdale. After Mrs. Marquis had the drink of liquor at Oakdale, she took control of the driving. She knew that two-lane highway contained sharp curves and substantial grades. It was dark and misty. The pavement was wet. It was difficult to see distinctly. Her windshield wiper was in operation. Mr. Berg, the driver of the stalled truck (who was an experienced truck operator), hearing her machine approaching, ran back to warn her of the danger of his parked truck. As she came around the curve and down the grade, he said that "she was going fast. * * * I figured at that time she was doing between 90 and 100 [miles per hour]. I don't believe she could have been a-doing a bit under 80. It sounded to me like at that time, from the sound of the motor, it sounded like it was wide open."

[6, 7] We are persuaded there is substantial evidence to support the implied findings that Mrs. Marquis was operating her machine while she was under the influence of intoxicating liquor, and that she was guilty of wilful misconduct which resulted in the accident from which the plaintiffs suffered the injuries complained of. Even though reasonable minds may differ in that regard, this court is not warranted on that account in reversing the findings of the jury and the judgment of the court in denying appellant's motion for judgment notwithstanding the verdict. Foerster v. Direito, 75 Cal.App.2d 323, 330, 170 P.2d 986.

[8-11] In determining the liability of the operator of an automobile toward a guest, each case necessarily depends upon the particular facts involved. It is true that evidence of ordinary negligence of the driver will not support a judgment for damages in this case because it depends upon proof of intoxication or wilful misconduct. It is also true that evidence of excessive speed of the automobile, standing alone, ordinarily will not constitute wilful misconduct under Section 403 of the Vehicle Code. But evidence of excessive speed under circumstances which infer wilful, wanton or reckless disregard for the safety of guests may constitute wilful misconduct which will support a judgment upon that issue. Allen v. Robinson, 85 Cal.App.2d 617, 621, 193 P.2d 498; Van Fleet v. Heyler, 51 Cal.App.2d 719, 726, 125 P.2d 586; DeLoss v. Lewis, 78 Cal.App.2d 223, 225, 177 P.2d 589. It has been frequently held that wilful misconduct depends upon the facts of each particular case, but that the evidence adduced, or the reasonable inferences to be drawn therefrom, must show deliberate, intentional, wanton or reckless conduct, or omissions to perform duties, with knowledge, express or implied, that such conduct is likely to result in injury to the guest. Cope v. Davison, 30 Cal.2d 193, 180 P.2d 873, 171 A.L.R. 667; Candini v. Hiatt, 9 Cal.App.2d 679, 683, 50 P.2d 843; Allen v. Robinson, supra; DeLoss v. Lewis, supra; Van Fleet v. Heyler, supra; Norton v. Puter, 138 Cal.App. 253, 258, 32 P.2d 172; 60 C.J.S., Motor Vehicles § 399(4)c, p. 1001.

In the present case, assuming that Mrs. Marquis, with full knowledge of the hazards of the two-lane highway with its sharp curves and grades deliberately and recklessly drove her automobile on a dark and misty night which required the use of windshield wipers, at the grossly excessive rate of 80 miles per hour, around a curve and down a grade, and that she crashed into the rear end of a parked truck, which had red warning lights burning, without seeing it, as substantial evidence indicates that she did, we conclude there is sufficient evidence of wilful misconduct to preclude this court from reversing the findings of the jury and the order of the court upon that issue. That evidence supplies adequate proof charging her with knowledge that such wanton and reckless conduct was likely to result in injury to her guests.

The appellant challenges, as erroneous, three instructions on wilful misconduct given to the jury at the request of the plaintiffs, towit, numbers 11, 16 and 17, and asserts they are inconsistent with instructions numbered 13 and 15 which were given at the request of appellant. We have read the entire charge to the jury and are of the opinion it was very fully and fairly instructed on all essential issues of the case.

In considering the instructions it should be recalled that, at the close of the evidence, the cause was dismissed as to the codefendants Thomas and Berg, who were respectively the owner and driver of the stalled truck into which the appellant's machine crashed. The last-mentioned defendants were merely charged with ordinary negligence.

The appellant pleaded contributory negligence of the plaintiffs as a bar to their recovery. The jury was clearly instructed that even though it found that appellant was guilty of either intoxication or wilful misconduct, plaintiffs could not recover if the jury found that they were also guilty of negligence which proximately contributed in any degree to the injuries received by them. The jury was elsewhere properly instructed regarding the essential elements which constitute negligence, contributory negligence, intoxication and wilful misconduct. At the request of the appellant, the jury was charged in instruction number 8 that, "It is admitted the plaintiffs were riding with the defendant Marquis as her guests," and the term "guest" was therein properly defined. At the request of the appellant the jury was charged in her instruction number 13 that wilful misconduct includes more than the mere intentional or conscious doing of wrongful acts, and that such conduct must also show that the acts were performed with "either knowledge express or implied, that serious injury to the guest probably will result," or it must appear that there was "wanton and reckless disregard of the possible results." Appellant's instruction number 15, which was given to the jury, also states that "A guest may not recover against his or her host-driver," unless her "intentional, wrongful conduct [is] done either with knowledge, express or implied, that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results."

[11] We think plaintiffs' instruction number 11 is not erroneous or prejudicial. It does not purport to give all of the necessary elements which constitute wilful misconduct. The jury was elsewhere correctly informed of the necessary elements of wilful misconduct. It merely recites *some of the "factors"* which may be considered by the jury in determining whether the appellant was guilty of wilful misconduct. It reads: "I instruct you that in considering the question as to whether or not the defendant Christine Marquis was guilty of wilful misconduct you may take into consideration all the factors bearing on that question, *such as,* the width and surface of the highway; the extent it curved or angled; the presence or lack of traffic upon it; the time of day or night, the factor of visibility, the rate of speed with respect to the matters just narrated; and the intent of the defendant Christine Marquis as gathered from the surrounding circumstances and from the evidence with respect thereto." (Italics added.)

[12] The appellant challenges plaintiffs' instruction number 17 as erroneous, chiefly because it leaves the question as to whether knowledge of the appellant that her conduct would likely result in injury to her guests might be inferred by the jury, without stating any standard from which it should so determine. The appellant says in that regard: "The error to be considered arises from the words: 'The jury has a right to infer that the driver had such

knowledge * * * if the judgment of the jury so directs.'" But the foregoing quotation deletes the important part of that instruction which clearly supplies the very standard of reasonable inference to be drawn by the jury from the evidence. The instruction is not defective in that regard. It reads: "I instruct you that when there is a question whether a driver conducted himself with knowledge that serious injury to a guest probably would result from his conduct, proof of such knowledge does not have to be by direct evidence. The jury has a right to infer that the driver had such knowledge, *if such inference may reasonably be drawn from the facts in evidence,* and if the judgment of the jury so directs." (Italics added.)

The appellant evidently overlooked the importance of the preceding italicized language. That instruction clearly states that the knowledge that injury will probably result from the wrongful acts of the driver *may be inferred only when such inference may reasonably be drawn from the facts in evidence.* The language of the instruction conforms to the definition of the term "inference" as it is given in Section 1958 of the Code of Civil Procedure, as follows, "An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 69, 77 P. 2d 1059; Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 374, 168 P.2d 457; 10 Cal.Jur. 735, sec. 58; 20 Am.Jur. 165, sec. 162. There appears to be no merit in the criticism of the foregoing instruction.

For the same reason we also conclude that plaintiffs' instruction number 16 is a proper statement of the law.

[13, 14] Nor do we find any inconsistency between the preceding instructions of plaintiffs and appellant's instructions numbered 13 and 15, which merely purport to be definitions of the term "wilful misconduct" containing correct statements of the essential elements of that term. In determining whether the challenged instructions are erroneous the entire charge to the jury should be read and construed as a whole.

[15] When the jury first returned to the court two conflicting forms of verdicts, they were properly informed by the judge in open court that "You have returned two verdicts here and they are not the proper form. You are to return one verdict either in favor of the plaintiffs * * * or a verdict in favor of the defendant." Without objection on the part of either litigant, the jury was instructed to retire and reconsider its verdict. The jury then retired and subsequently returned a verdict in favor of plaintiffs for the sum of $50,000 for Johnson, and the further sum of $60,000 for Vallortigara. That verdict was accepted, filed and entered without objection. The jury was polled and stood eleven to one for the verdict. The court was authorized by Section 619 of the Code of Civil Procedure to instruct the jury to retire and correct the original inconsistency of its verdict. There was no error in that procedure.

[16, 17] We are unable to hold as a matter of law that the amounts of the verdict are excessive. Indeed, the appellant suggests no specified reason why she deems the amounts to be excessive. We think the amounts are reasonably supported by the evidence. At least they are not so excessive as to indicate that they were the result of passion or prejudice. It has been frequently held that a verdict may not be reversed on the ground that it is excessive, unless it clearly appears to be the result of passion, prejudice or corrupt influence. That rule is particularly applicable where the trial court has passed on that issue, as it did in the present case, when the motion for judgment notwithstanding the verdict and the motion for new trial were denied. Mahar v. MacKay, 55 Cal.App.2d 869, 878, 132 P.2d 42; Tyson v. Romey, 88 Cal.App. 2d 752, 199 P.2d 721.

For the foregoing reasons the judgment and order denying motion for judgment notwithstanding the verdict are affirmed.

PEEK, J., and ADAMS, P. J., concur.

RHODE ISLAND INS. CO. v. DOWNEY et al.

No. 14210.

District Court of Appeal, First District,
Division 1, California.
July 18, 1949.*

1. Pleading ⇔214(8)

Demurrer to petition admitted truthfulness of allegations of petition for purposes of demurrer.

2. Insurance ⇔44

Statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application of insurance commissioner showing enumerated conditions, does not authorize making of conservator order without notice only in situations of urgent emergency. Insurance Code, § 1011.

3. Insurance ⇔44

Fact that insurance commissioner was aware of complained of matters for some time, did not preclude commissioner from applying without notice and pursuant to statute for an order vesting title of assets of insurance company in insurance commissioner because of dangerous conditions made by statute a ground for issuance of such order. Insurance Code, § 1011.

4. Insurance ⇔44

Under statute authorizing court to vest title of assets of insurance company in insurance commissioner, insurance commissioner need only determine in good faith the existence of one of the dangerous conditions enumerated in statute, and a showing that an enumerated condition exists in fact is not necessary, and commissioner is not required to act only where existence of one of the conditions is beyond dispute. Insurance Code, § 1011.

5. Insurance ⇔44

Fact that insurance company could make available within a reasonable time sufficient moneys to meet promptly any demand which in ordinary course of events be properly made against it, did not preclude insurance commissioner from proceeding under statute authorizing his appointment as conservator, where audit made by commissioner's auditor showed statutory insolvency of insurance company. Insurance Code, §§ 706.5, 1011.

6. Insurance ⇔3

Insurance companies, like banks and building and loan companies, are charged with a public interest.

7. Insurance ⇔44

Statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application showing one of enumerated dangerous conditions, is applicable to foreign insurance corporations doing business in state and subject to examination by insurance commissioner and required to obtain a certificate of authority to do business. Insurance Code, § 1011.

8. Constitutional law ⇔305

Although requirements of due process of law often involve a full prior hearing, where public necessity requires, there can be action followed by a hearing without violation of requirement of due process of law.

9. Administrative law and procedure ⇔13
Constitutional law ⇔318
Insurance ⇔4

Statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application without notice showing one of enumerated dangerous conditions is not unconstitutional as violating due process of law requirement, in view of statute providing for a hearing after seizure by insurance commissioner. Insurance Code, §§ 1011, 1012.

10. Insurance ⇔44

Under statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application showing one of enumerated dangerous conditions, court cannot transfer title to assets which are outside of state. Insurance Code, § 1011.

11. Constitutional law ⇔42

Where insurance company, the assets of which had been transferred to insurance commissioner upon application pursuant to statute by commissioner showing dangerous conditions, did not allege that state was attempting to transfer title to out of state assets, company could not complain that statute was unconstitutional because purporting to authorize transfer of title to out of state assets. Insurance Code, § 1011.

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* Subsequent opinion 212 P.2d 965.

12. Constitutional law 🔑48
Municipal corporations 🔑120

Where statute or ordinance is susceptible of one of two constructions, only one of which will render it constitutional, the construction rendering it constitutional will be adopted although other construction which would render it unconstitutional is equally reasonable.

13. Constitutional law 🔑48
Municipal corporations 🔑122(2)

It is presumed that legislative body in enacting statute or ordinance intended not to violate the Constitution, but intended to make a valid statute or ordinance within scope of its constitutional powers.

14. Insurance 🔑4

Statute authorizing court to vest title of assets of insurance company wheresoever situated, in insurance commissioner upon application of commissioner showing one of enumerated dangerous conditions, is not unconstitutional as being applicable to assets of insurance company outside of state. Insurance Code, § 1011.

15. Constitutional law 🔑46(1)

Court will ordinarily inquire into constitutionality of a statute or ordinance only to extent required by case under consideration.

16. Constitutional law 🔑42

Generally one cannot complain of a possible unconstitutional application of an ordinance if he is not a party thereby aggrieved.

17. Commerce 🔑5, 13

For constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation.

18. Commerce 🔑81

Statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application showing one of enumerated dangerous conditions, is not unconstitutional as imposing an unreasonable burden upon interstate commerce. Insurance Code, § 1011.

19. Insurance 🔑44

Action of insurance commissioner in proceeding under statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application showing enumerated dangerous conditions, rather than pursuing alternative remedies, was not arbitrary as a matter of law under the evidence. Insurance Code, §§ 700, 704, 706.5, 981, 1011, 12928.6.

20. Insurance 🔑44

The policy of law of California is that whenever insurance commissioner deems the condition of an insurance company hazardous, commissioner should take over the company while questions are being threshed out in court, rather than take chance that, should statements in audit showing insolvency of company prove to be true, and company in the meantime continued to take on new policyholders, great loss would result to them as well as to original policyholders.

21. Insurance 🔑44

Fact that insurance company had filed application for declaratory relief, seeking adjudication of status and legal relations under insurance code, and injunction restraining insurance commissioner from interfering with business of company pending final adjudication, did not preclude insurance commissioner from proceeding against insurance company under statute authorizing court to vest title of assets of insurance company in insurance commissioner upon application showing one of enumerated dangerous conditions. Insurance Code, § 1011.

22. Insurance 🔑44

The insurance code contemplates that when an insurance company is in a position creating danger to policyholders and creditors, even though danger may not be imminent, insurance commissioner may use his judgment as to which of several statutory remedies to select. Insurance Code, §§ 700, 704, 706.5, 981, 1011, 12928.6.

23. Insurance ⚷44

Under insurance code, insurance commissioner must try to remove the causes leading to difficulties of an insurance company, the condition of which is hazardous to policyholders and creditors, and if removal of causes cannot be accomplished, commissioner must attempt to rehabilitate business of company, and if rehabilitation cannot be accomplished, liquidation must follow. Insurance Code, §§ 700, 704, 706.5, 981, 1011, 12928.6.

24. Insurance ⚷10

The insurance commissioner cannot for personal reasons cause elimination of individual connected with insurance company, but where a course of conduct by individual has caused serious loss to insurance company, commissioner can require abandonment of practices causing loss.

25. Mandamus ⚷3(8)

A mandamus proceeding cannot be used as a substitute for hearing before trial court provided by statute in case of seizure by insurance commissioner of assets of insurance company pursuant to statutory authority, for conditions hazardous to policyholders and creditors. Insurance Code, §§ 1011–1013.

WARD, J., dissenting.

◆

Petition by Rhode Island Insurance Company against Wallace K. Downey, individually and as Insurance Commissioner of the State of California, Superior Court, of the State of California, in and for the City and County of San Francisco, and Honorable Melvyn I. Cronin, presiding judge thereof, for a writ of mandate directing Superior Court to vacate its order appointing conservator, and restraining order, in a proceeding brought against petitioner by respondent Insurance Commissioner of the State of California.

Demurrer sustained, alternative writ discharged, and petition for peremptory writ denied.

Peart, Baraty, & Hassard, San Francisco, Bronson, Bronson, & McKinnon, San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., T. A. Westphal, Jr., Harold B. Haas, Deputy Attys. Gen., for respondent.

BRAY, Justice.

Petition for a writ of mandate directing the superior court to vacate its "Order Appointing Conservator and Restraining Order" in a proceeding brought against petitioner by respondent Insurance Commissioner of the State of California. The questions involved concern the validity of the acts of respondent in seizing, by virtue of said court order, the California business and assets of the petitioner.

Record.

On May 17, 1949, said commissioner filed an application in the superior court under section 1011 of the Insurance Code, for an order making him conservator of the petitioner, directing him to take possession of all of its assets, records, and property, vesting title thereto in him, and enjoining it from transacting further business in California, etc. The application, as permitted by section 1011 of the Insurance Code, was made ex parte and without notice. The order was granted forthwith. The application and order were served upon petitioner simultaneously with the seizure by the commissioner under the order, of all of its California assets. On June 1, petitioner filed its petition in this court for a writ directing the superior court to vacate its order. Respondents demurred to the petition on the ground that it does not state a cause of action against them and also filed returns. We will first consider the sufficiency of the petition.

Petition.

[1] The demurrer, of course, admits the truthfulness of the allegations of the petition. The material allegations may be summarized as follows:

Petitioner was organized under the law of Rhode Island, is lawfully doing business in 34 states, a number of foreign countries and territories, and has been duly licensed to do business in California since 1912. Wallace Downey is the duly appointed Insurance Commissioner of California.

As of December 31, 1948, petitioner's total assets exceeded the total liabilities (excluding capital and surplus) by about two and one-half million dollars. After deducting certain non-admitted assets, there was still a capital stock of one million dollars and a surplus of over one million dollars. During 1948 petitioner wrote insurance in gross premium value of about thirteen million dollars, and about one and one-half million dollars in California alone. Business in California has shown a healthy increase. Petitioner has 142,000 policies in force in the state, and is represented by over 2500 duly qualified and licensed agents.

The superior court order appointed the commissioner conservator of petitioner's business, gave him title to its assets "wheresoever situated," and restrained petitioner from carrying on its business. The commissioner, on taking over, has prohibited the issuance of any further policies in California, and, in effect, has stopped petitioner from doing business here.

The grounds given by the commissioner in his application are all disputed by petitioner, and it is contended that for more than a year most of them were known to him. They rest on the determination of legal questions, accounting problems, questions of valuation of assets, and similar questions, all of which are debatable. On many of these issues the commissioner has a difference of opinion with 33 other state insurance commissioners. The only recent development is in connection with an agreement between petitioner and Pioneer Equitable Insurance Company of Indiana, dated March 21, 1949. The commissioner's interpretation of that agreement is that (a) it amounted to a merger or consolidation without the commissioner's consent (the company denies that it does or that the commissioner's consent can be required); and (b) it would cause a properly adjusted financial statement to show the company's capital impaired to approximately 73 per cent. This causes a technical, statutory insolvency, and is based on determinations opposed to those of the insurance commissioners of the domiciliary and other states. The commissioner concedes that there is an excess of assets over true liabilities, so that no actual insolvency exists.

From August, 1948 on, the commissioner had conferences with officers and attorneys of petitioner regarding matters of internal management, making various complaints about the management and asking the company to withdraw from business in California. Further conferences were held. Although petitioner did not believe the commissioner had power to demand internal changes, it made several of the requested changes—put in directors who were not employees, cut down the volume of its business, adopted a policy of investing only in securities traded on a national exchange, etc. Petitioner did not remove Stewart Hopps, chairman of the board, from his position as officer and director, as suggested by the commissioner, but transferred power from the chairman of the board to the president. The commissioner, although not contending he had the right to insist on such change, still insisted Hopps should be eliminated entirely.

Early in November, 1948, the commissioner met in New York with the insurance commissioners of Rhode Island, Pennsylvania and Indiana, and some officers of petitioner. This was followed by a meeting of the insurance commissioners alone, who took no action nor did any of the commissioners in other states.

On November 8, petitioner received a letter from the commissioner purporting to require it to cease business in California. Under authority given in the Insurance Code, petitioner asked the Attorney General of California for an opinion as to the legality of the commissioner's order in the November 8 letter, and was later advised that the commissioner's order had been withdrawn. On November 18, petitioner filed in the superior court an application for declaratory relief against the commissioner, seeking an adjudication of status and legal relations under the Insurance Code, and an injunction restraining the commissioner from interfering with the company's business pending final adjudication. An order to show cause for a preliminary restraining order issued November 18, returnable November 26. It was continued from time to time by mutual consent, and was to be heard on June 13, 1949.

Immediately after the declaratory relief action had been filed by petitioner, the commissioner, under authority of the Insurance Code, began investigating petitioner. Hearings were held in New York and petitioner's books were examined in Philadelphia. Hearings were adjourned on December 23rd, for the Christmas holidays, on the understanding that they would be resumed again on notice from the commissioner. On February 23rd the Attorney General of California wrote petitioner about completing questioning of officers. The company replied that they would be available in about one week. The attorney general made no objection and was to notify petitioner of the date. No further word was received from the attorney general or the commissioner, and no further request for resumption of the investigation was ever received by petitioner.

The National Association of Insurance Commissioners is an organization of all state insurance commissioners, having as one purpose to secure uniformity of insurance regulation among the states. At the convention of the N.A.I.C. in New York in December, 1948, the commissioner made a motion that the executive committee, of which he was a member, act together in the matter of petitioner. The motion was not seconded. On January 17, 1949, the commissioner advised the N.A.I.C. that he did not desire to act alone and requested the N.A.I.C. to join in uniform action. The commissioner was thereafter advised that the N.A.I.C. suggested a "convention examination," conducted by examiners from the state insurance departments, one examiner from each zone in which the company does business. For the purpose of these examinations, the United States is divided into six zones. Such examinations are made of all insurance companies as often as required by the law of the domiciliary state. Rhode Island requires such an audit every four years. The last examination of petitioner was in 1945. California is in zone 6, and the commissioner accepted the invitation to be the examiner representative of that zone.

The convention examination and audit of petitioner began on May 2, 1949. On May 10th, the commissioner notified the convention examiners that he would advise regarding his participation at the earliest moment. To date no representative of the commissioner has appeared to participate in the audit, although it has been going on for a month by the representatives of the other five zones, and will be finished in about 90 days.

On May 17th, one week after the commissioner communicated with the convention examiners, the commissioner filed his application for a conservator. The commissioner stated to the trial judge that application had to be made ex parte because if notification were given, petitioner would have a chance to withdraw all of its assets from California, and that petitioner's agent in California would pay it money due for premiums.

At the time of filing his application, the commissioner knew (a) that petitioner's agent in California forwards premiums to petitioner monthly, as they are collected from subagencies; (b) that on May 17th, the agent held only about $45,000 due petitioner; (c) that premiums receivable for the 60–90 day period proceeding May 17th were in an amount less that $200,000, and that only 50 per cent or less of that would be paid agents, due to a notice sent by the commissioner to all agents and brokers; (d) that the commissioner would come into possession of only $145,000 or less, and that petitioner has little or no other assets in California; (e) that the assets to be received by him "were at least $300,000 less than the amount required to pay the normal losses on insurance in force, without taking into consideration any provision for return premiums on policies which would be cancelled as a result of the commissioner's action and also without taking into consideration the expenses of his administration. Of $1,300,000 unearned premium reserve on California insurance in force at least $450,000 would be paid out in losses in the normal course."

The commissioner's determination that continuation of business in California would be hazardous is highly debatable and in conflict with the determination of 33 insurance commissioners and convention examiners from Florida and Rhode Island who have signed affidavits that they do not believe the company to be on the verge of insolvency. The commissioner, on May 17th, notified the 2500 agents of the company and Pioneer Equitable, and all brokers, about 7500 in number, that he was taking the company over in this state; that no further business was to be written with the company, and that he was going to audit all accounts of agents and brokers. Petitioner is ready, willing and able to pay all losses for which it is not liable to residents in California, and to pay the return premiums on any policies cancelled by residents, but is prevented from so doing by the commissioner and the court's action. The commissioner, owing to the fact that the main assets of petitioner are in Rhode Island, cannot rehabilitate it in this state; he can only liquidate, or force it to discontinue business here. The seizure has caused petitioner irreparable injury.

Attached to the petition for a writ of mandate is the application of the commissioner for the superior court order appointing him conservator, which had attached to it Exhibit A, which is a report or audit of petitioner dated April 22, 1949, made by the commissioner's auditor, purporting to show the condition of petitioner as of December 31, 1948, and which is the basis upon which the commissioner claims his right to act. This audit shows petitioner to be insolvent within the meaning of article 13, chapter 1, part 2, division 1 of the Insurance Cod

Contentions.

Petitioner's principal contention is that the circumstances as known to the commissioner on May 17th did not justify a seizure of petitioner in California, without a previous hearing, and therefore the commissioner acted arbitrarily in so doing. It concedes that the situation of petitioner as shown in the report (although it denies the correctness of the report) justified the commissioner in submitting to a court the question of the effect of that condition and whether petitioner was actually insolvent under the Insurance Code, but did not justify a seizure, without first such court determination. Put differently, the main issue here is that the commissioner takes the position that while the question of petitioner's condition is being threshed out in court, the commissioner should have charge of its assets, while petitioner contends that during such time it should be permitted to possess and operate its business.

Urgent Emergency.

[2] Petitioner contends that section 1011 authorizes the court to make the conservator order without notice *only* in situations of urgent emergency. There is nothing in the section which justifies this interpretation. The section provides: "The superior court * * * shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order [similar to the one made in this case] * * * (c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person. (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public * * * (j) That the last report of examination of any person to whom the provisions of this article apply shows such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this Code."[1]

[3] This contention is closely related to its argument that because the commissioner was aware of most of the matters com-

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[1] It may be noted here that petitioner is making no point of the failure of the commissioner to comply with section 1038 which provides that any application under section 1011 "shall be served upon the person named in such application in

plained of some time back he should not have used the procedure provided by the statute, without a hearing either before the commissioner or the court. Similar contentions have been heretofore considered by the courts and denied. In Caminetti v. State Mutual Life Ins. Co., 52 Cal.App.2d 321, page 325–326, 126 P.2d 165, 168, the court said: "Appellant presents the further argument that the state is estopped from taking over this insurance company because the commissioner and his predecessors in office knew of the practices which the commissioner determined, and the court in this proceeding concluded, to be hazardous; that, knowing of these practices in years gone by, the commissioner failed to take over the company and permitted it to continue its business.

"To state the contention is to state its impossibility. To govern themselves, the people act through their instrumentality which we call the State of California. The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary committed the night before."

[4] **The statute** itself does not limit its use to times of sudden emergency. The statute, as construed by the California courts, requires only that the commissioner file a verified application stating that he has found one, or more, of the statutory grounds to exist. "In making his application under section 1011 of the Insurance Code, *the commissioner does not seek a judicial appointment and a judicial ruling that the company is in fact delinquent.* By his application the commissioner merely represents that he has found certain conditions to exist and has made his official administrative determination to proceed as authorized by the statute. In obtaining his original ex parte order, *the commissioner is not required to show* to the court *that the company was in fact in a hazardous condition,* but only that he, as a state officer, invested by legislative authority with the power, has so 'determined' and 'found.' The insurance code provides that the order or determination of the commissioner to take over the affairs and assets of the company shall continue in force and effect until, upon application by either the commissioner or of the company, it shall appear to the court, after a full hearing, that the ground for said order does not exist or has been removed and that the company can properly resume title to and possession of its property and the conduct of its business." Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 487, 139 P.2d 681, 687; emphasis added. Under section 1011 nothing is required beyond the good faith determination by the commissioner of the existence of one of the conditions enumerated in the section.

Petitioner has emphasized that the matters involved were disputable. It is not a requirement of the statute, however, that such matters not be disputable. The Legislature undoubtedly assumed that in most cases the company involved would dispute the commissioner's contentions, and accordingly provided, in section 1012, for a full hearing before the trial court, at which the company could show that the conditions claimed by the commissioner did not exist. There is no implied restriction in the statute that the commissioner act only where the existence of the dangerous condition is beyond dispute.

That the company's contention that an emergency must exist is not well founded is further shown by the provisions of section 1013 of the Insurance Code, which provides for a seizure by the commissioner without any hearing or any court order. It reads: "Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the com-

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the manner prescribed by law for personal service of summons * * *" —probably because Neblett v. Pacific Mutual Life Ins. Co., 22 Cal.2d 393, 139 P.2d 934, holds that notice is not essential.

missioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court * * *."

Section 1012 provides for a hearing in case of seizure either under section 1011 or 1013: "Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

In Caminetti v. Guaranty Union Life Ins. Co., 52 Cal.App.2d 330, 126 P.2d 159, the court discusses the term "hazardous" as used in section 1011(d) and holds that even though an insurance company can be solvent its condition may still be hazardous and justify the seizure by the commissioner. The court said, 52 Cal.App.2d page 332, 126 P.2d page 162: "The company was solvent; it had grown under the family management; but the commissioner determined, and the court approved his determination, that the withdrawal from the funds of the mutual policy holders of these monthly salaries made it hazardous for it to continue in business. * * *

"Did the withdrawal of these funds constitute a hazardous condition as defined by the Insurance Code? To follow to its conclusion appellant's argument that there could be no hazard to policyholders so long as the business is solvent, would be to sanction the withdrawal of policyholders' money in the payment of excessive salaries without restriction. This is not the law. Excessive withdrawal of policyholders' funds continued long enough will eventually render any company insolvent, and thus destroy the very purpose of the payment of insurance premiums. The people of the state and interested policyholders have a vital interest in this. *There is no requirement of our Insurance Code that the insurance commissioner must wait until an insurance company is insolvent* before he takes action to protect the policyholders. To so hold would be to apply the ancient aphorism about locking the barn door after the horse is stolen."

"* * * If the management of the insurance company so conducts its business that there is loss, *or risk of loss* to the policyholders, it becomes the duty of the insurance commissioner to take possession of the company's assets and to conduct its business as conservator. This is the meaning of the word 'hazardous' as used in the statute." 52 Cal.App.2d page 333, 126 P.2d page 163; emphasis added.

[5, 6] Petitioner contends that because the company was in a position "to make available within a reasonable time sufficient moneys to meet promptly any demand which might in the ordinary course of events be properly made against" it, Sec. 706.5, Insurance Code, the commissioner was not entitled to proceed under section 1011. However, under the Insurance Code a company may be in that position and yet be insolvent. Such was the situation in Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761. It must be remembered that insurance companies, like banks and building and loan companies, are charged with a public interest, and hence, the price of doing business is the fact that whenever a condition exists which the insurance commissioner feels is hazardous, he may take over the company and the question of whether he was justified in doing so is thereafter threshed out. "It is no longer open to question that the business of insurance is affected with a public interest. The state has an important and vital interest in the liquidation or reorganization of such a business. [Citing cases] Neither the company nor a policyholder has the inviolate rights that characterize private contracts. * * * Sections 1010 et seq. of the Insurance Code * * * deal with rehabilitation and liquidation of insurance companies in financial difficulties, and with the reinsurance of their business. This phase of state control is extremely important. Insurance is a public asset, a basis of credit, and a vital factor in business activity. Obviously, if an insurance company gets

into financial difficulties, something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated. The public has a grave and important interest in preserving the business if that is possible. Liquidation is the last resort." 10 Cal.2d page 329, 74 P.2d page 774.

"Under the statutory plan thus embodied in the Insurance Code, the state, acting under and within its police power, has provided that the commissioner, when an insurance company is in financial difficulties, shall first be appointed by the court as conservator." 10 Cal.2d page 331, 74 P.2d page 775.

In Andre v. Beha, 1925, 211 App.Div. 380, 208 N.Y.S. 65, the New York superintendent of insurance had taken over the assets of a Russian insurance company. Plaintiff there made the same contentions of irreparable loss and injury as are made here, and also the contention that the company was actually solvent. In refusing plaintiff's application for relief the court said, 208 N.Y.S. page 79: "The Attorney General, in his first point, argues that the proper procedure in this case calls for action on the part of the superintendent of insurance under section 63 of the Insurance Law (see McKinney's Consol.Laws and Supp.), which, he says, provides an exclusive remedy for the protection of the corporation and its shareholders. The plaintiff claims that this section has no application to a solvent company, which, he says, is the case here. I cannot agree with the learned counsel for the plaintiff in his narrow view of the section. It is not only insolvency that is made the basis for action on the part of the superintendent, but under the section he may act where the company is found, after an examination, to be in such a condition that 'its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public.' See Insurance Law, § 63 * * *

"In construing this very section of the law, the Court of Appeals in a recent case (Matter of People [City Equitable Fire Ins. Co.] 238 N.Y. 147, at page 156, 144 N.E. 484, 486) said:

" 'The superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders in this state or in the United States, but for the interest of all its policyholders, creditors, and stockholders wherever they may be.' "

Petitioner has cited, and we have found, no case involving insurance companies, banks, or building and loan companies, affected, as they are, with a public interest, supporting the position it takes with reference (1) to necessity for urgent emergency; (2) abuse of discretion in selecting the remedy under similar circumstances; (3) or requirement for hearing before seizure.

Petitioner refers to the insolvency as a "technical" one. The code has defined "insolvency." It has fixed the 75 per cent figure as a minimum figure below which it is dangerous for a company to go. Although the impairment shown here by Exhibit A is only approximately 2 per cent, it is below what the state has determined to be a safe point. Coupled with the fact that the company appears to have been losing over one million dollars per year for the past three years, and has changed in that time from a company with ample capital and surplus to one having no surplus and an impaired capital,[2] it cannot be held to be strictly a technical situation. In North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221, the court rejected a similar contention concerning the impaired capital of a building and loan association. There the statute allowed taking over, if the commissioner found that capital was impaired *to any extent,* and the court rejected the argument that this was a mere "technical impairment," not sufficient ground for a seizure (an argument made in this case by petitioner): "This language is so plain and clear that any attempt to interpret it would be almost an absurdity. It is apparent that the Legislature intended by this provision that if any impairment whatever existed, the commissioner might in his discretion take over the business, property, and assets of the association showing such impairment." 6 Cal.2d page 98, 56 P.2d page 1224.

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[2] Wherever in this opinion we have referred to the financial condition and conduct of the business of the company, we are referring merely to the situation as appears in the audit and are not holding that such situation actually exists. To determine that fact will require a long hearing, for which the superior court, in proceedings under section 1012, is better equipped than this court.

Statute Applies To Foreign Corporations.

[7] Petitioner argues that section 1011 of the Insurance Code should be construed as not applying to foreign corporations. This argument is untenable. Article 14 of the Insurance Code, dealing with proceedings in cases of insolvency and delinquency, contains sections 1010 to 1062 inclusive. Article 14 begins with section 1010 which provides as follows: "The provisions of this article shall apply to all persons subject to examination by the commissioner, or purporting to do insurance business in this State, or in the process of organization with intent to do such business therein, or from whom the commissioner's certificate of authority is required for the transaction of business, or whose certificate of authority is revoked or suspended." Petitioner admittedly is doing business in this state and subject to examination by the commissioner and required to obtain a certificate. The entire article, including section 1011, is applicable to persons in the enumerated, independent categories. There is no requirement that corporations be domiciled in California. Moreover, prior to 1931, proceedings against foreign insurance corporations were provided for in sections 5, 6, Stats. 1919, Chap. 178, p. 265, while those against California corporations were provided for in section 2. In that year the provisions were combined by amendment of section 2 and repeal of section 5. See Stats.1931, Chap. 1123, p. 2375. These provisions in 1935 were codified in the Insurance Code in sections 1018 to 1022, Stats.1935, Chap. 145, p. 553. Thus, petitioner is within the intended scope of the statute. The original sections required a proceeding under order to show cause, but in the codification in 1935, this requirement was eliminated.

Due Process.

[8, 9] Section 1012 provides for a hearing, after seizure by the commissioner, either under section 1011 or 1013. Although the requirements of due process often involve a prior full hearing, it has long been recognized that where public necessity requires, there can be action *followed* by a hearing. Familiar examples include the right to examine cattle for tuberculosis, slaughtering those found diseased, Affonso Bros. v. Brock, 29 Cal.App.2d 26, 84 P.2d 515, the power to seize vehicles carrying narcotics, Health and Safety Code, sec. 11611, and other situations where the public welfare requires prompt action.

The same principles have consistently been applied to institution dealing with the financial affairs of the public. In the early case of State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, 756, L.R.A.1915E, 675, the state superintendent of banks had seized a bank under a statute providing as follows: "Whenever the superintendent of banks shall have reason to conclude that any bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue business, the superintendent of banks may forthwith take possession of the property and business of such bank, and retain such possession until such bank shall resume business, or its affairs be finally liquidated, as herein provided." (The act also provided for an injunction proceeding to determine the merits, *after* seizure. Application for such an injunction had to be made within ten days.) It will be noted that a really "summary" procedure was involved, since there was not even an application for a court order.

The California Supreme Court considered all possible constitutional arguments and held the legislation, and action thereunder, not violative of any constitutional right: "The state owes to the public the duty not only of providing for supervision and examination of banks, but the added duty as a matter of public policy, if the conditions warrant, of summarily closing them up and terminating their existence. When the management thereof has brought them into a condition of unsafety or insolvency, the public interest demands that on this condition being ascertained they should not be permitted to further hold themselves out as responsible institutions or be permitted to remain in a position to do so. Police regulations are only effective when provision is made for their prompt and summary execution and summary seizure and liquidation of unsafe banks can fairly and reasonably be justified on the ground of immedaite danger to the public welfare in further permitting their business continuance.

"In this view it cannot be said that initial seizure is not a fair and reasonable measure to be adopted to effect the protection of the public welfare which is designed by it, and as the only limitation on the power of the state imposed under the constitutional amendment is that the regulations it makes shall be of that character, no constitutional right of the appellant has been impaired by such legislation.

"Nor is the due process of law clause violated because such summary seizure is authorized to be made without action brought and judicial warrant for the taking. Due process of law does not necessarily imply a regular proceeding in a court of justice or after the manner of such courts. * * *

"While the initial seizure is authorized under the act without suit brought and is justified as a matter of public policy for the reasons here given, it cannot be said that the bank is thereby deprived of its property without due process of law as heretofore defined. An opportunity is given the alleged delinquent bank to invoke the aid of a court of competent jurisdiction as to the validity of the seizure and right of the superintendent to hold the property; and, if that opportunity is a reasonable one, then the right which the Constitution guarantees has been in substance preserved to it." 165 Cal. pages 446, 448, 132 P. page 759.

The United States Supreme Court affirmed the holding by a per curiam decision. 238 U.S. 611, 35 S.Ct. 792, 59 L. Ed. 1488.

In North American Building & Loan Ass'n v. Richardson, supra, 6 Cal.2d 90, 56 P.2d 1221, the court held constitutional similar action, under a similar statute dealing with building and loan associations.

The legality of the Insurance Code was considered in a number of cases involving the Pacific Mutual Life Insurance Company. The California Supreme Court held that even though a court order might have been void, through disqualification of the judge, the action of the commissioner could be upheld under the summary seizure provisions, section 1013, of the Code, and that such provisions were legal: "Section 1013 of that Code * * * confers on the commissioner, whenever it shall appear to him that any insurance company is in such condition that its further transaction of business will be hazardous to its policyholders or creditors, the power to take summary possession 'without notice and before applying to the court for any order.' Similar provisions for summary seizure exist in the Bank Act * * * and Building and Loan Act * * *. These sections have uniformly been sustained against the claim of illegal seizure. State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L.R.A.1915E, 675; North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221." Carpenter v. Pacific Mutual Life Ins. Co., supra, 10 Cal.2d 307, 324, 74 P. 2d 761, 772. See also Holabird v. Richardson, 3 Cal.2d 299, 44 P.2d 530, sustaining a summary seizure under the building and loan statute.

On appeal to the United States Supreme Court, it was held that questions concerning the validity of the seizure and whether it was valid by ratification or by the summary seizure provisions "concern matters of state law and amount at most to alleged erroneous constructions of the

State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment." Neblett v. Carpenter, 305 U.S. 297, 302, 59 S.Ct. 170, 173, 83 L.Ed. 182.

It is not surprising that the Supreme Court found no due process issue, since it had approved a similar procedure, by per curiam opinion, twenty-five years earlier. State Savings & Commercial Bank v. Anderson, supra, 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488. Following the Neblett case it has been assumed that the validity of the Insurance Code was beyond doubt, with respect to the provisions for summary seizure, and, a fortiori, seizure *with* court order. Thus in Caminetti v. State Mutual Life Ins. Co., supra, 52 Cal.App.2d 321, 126 P.2d 165, the court said: "There is no merit in the further contentions presented on this appeal: that the application of the commissioner for the ex parte order is deficient; that the court was without jurisdiction to make the order; and that the proceeding as a whole is based upon an unconstitutional statute. They are all covered by and disposed of, either directly or by analogy, in the Pacific Mutual cases." 52 Cal.App.2d page 325, 126 P.2d page 168.

In Title Guaranty & Surety Co. of Scranton, Pa., v. Allen, 240 U.S. 136, 36 S.Ct. 345, 60 L.Ed. 566, contentions similar to those made in this case were made concerning the seizure by the superintendent of banks of an Idaho bank. The banking act was challenged as unconstitutional. The court held, 240 U.S. page 141, 36 S.Ct. page 346: "But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the 14th Amendment because power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. [Citing cases.]"

Application Of The Statute To A Foreign Corporation Does Not Render it Unconstitutional.

(a) *Extraterritoriality:*

[10, 11] Petitioner argues that if the statute applies to foreign corporations it attempts to exercise power over assets not in the state, and calls attention to the broad language in the order concerning vesting title to all of the assets of petitioner, "wheresoever situated." It argues that this must refer to assets outside of the state and that the court lacks power to change title to such property. Admitting the lack of power in California courts to transfer title to assets outside of the state, there are two answers to the contention: (1) Petitioner has not alleged that the state is attempting to transfer title to out of state assets, and therefore has no standing to complain. (2) The statute can reasonably be construed as valid, the phrase "wheresoever situated" meaning within the state where the court has power to act.

[12-14] A similar point was involved in Franklin v. Peterson, 87 Cal.App.2d 727, 197 P.2d 788, involving the validity of a municipal ordinance imposing a license for revenue purposes upon an attorney at law. There the appellant contended that the terms of the ordinance were broad enough to include persons outside the municipality. The court said: "It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the constitution, but to make a valid statute or ordinance within the scope of its constitutional powers. Read in the light of this rule, the ordinance here in question must be held as intended to operate only upon those subject to the jurisdiction of the City of Los Angeles.

[15, 16] "Furthermore, a court will ordinarily inquire into the constitutionality of a statute or ordinance only to the extent required by the case under consideration. In the case at bar the stipulated facts show that appellant maintains a law office within the City of Los Angeles and carries on his law practice there. The construction given the ordinance by appellant would not, therefore, work any injustice upon him or violate his rights. He is therefore confronted with the general rule that one cannot complain of a possible illegal application of an ordinance if he himself is not a party thereby aggrieved." 87 Cal.App.2d page 730, 197 P.2d page 790.

There are cases from other states in which the taking over by a state official of the assets of a foreign insurance company has been upheld. See People ex rel. Potts v. Continental Beneficial Ass'n, 289 Ill. 40, 124 N.E. 352 and cases cited therein.

(b) *Unreasonable burden on interstate commerce:*

[17, 18] Petitioner argues that insurance has been held to be interstate commerce, and that the regulations in the Insurance Code, particularly, that allowing seizure if a foreign corporation enters into a merger, etc., without consent of the California commissioner, constitute an unreasonable burden on interstate commerce. In the case of United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440, it was held that for the purposes of the Sherman antitrust laws, 15 U.S.C.A. §§ 1–7, 15 note, insurance was "commerce" and, in that case, interstate commerce. In making this holding, however, the court specifically denied that all state regulation of insurance must be found invalid. "Another reason advanced to support the result of the cases which follow Paul v. Virginia has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. * * *. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid." 322 U.S. page 547, 64 S.Ct. page 1170.

To avoid any ambiguity which might still exist, the "McCarran Act" was passed shortly thereafter by Congress, declaring that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C.A. §§ 1011, 1012.

Following the South-Eastern case, there were a number of cases (in some of which the acts occurred prior to passage of the McCarran Act) in which insurance companies argued that state regulatory provisions previously valid had become invalid as unreasonable burdens on interstate commerce, when applied to foreign corporations. The cases are annotated at 164 A.L.R. 500. In all the cases there discussed, including two Supreme Court decisions, the state taxes and regulations were upheld.

In Robertson v. People of State of California, 328 U.S. 440, 66 S.Ct. 1160, 90 L. Ed. 1366, the court held valid sections of the Insurance Code which in effect allowed the state to exclude a foreign insurance company or its agents from doing business within California if the company failed to meet California's reserve requirements. Without relying on the McCarran Act, the court answered the argument about interstate commerce as follows: "It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result." 328 U.S. page 459, 66 S.Ct. page 1170.

The court also stressed the fact that the statute did not *discriminate* against interstate commerce, but required only that foreign corporations meet the same requirements as domestic insurers. 328 U.S. page 461, 66 S.Ct. page 1171. The above reasoning is applicable to the present case. The provision allowing seizure by the commissioner applies equally to domestic or foreign corporations and is not discriminatory. Furthermore, it affects the sound financial condition of the company, and is therefore related to doing business in California.

Petitioner argues with reference to subdivision (c) of section 1011, that it would be burdensome, practically, to get the permission of all 48 commissioners to such a transfer of assets, if the company were doing business in all states. It is difficult to see why that would be more burdensome than submitting to examination in every state where the company does business, as the price of doing business in such state. Petitioner has cited no case in which state regulation of insurance, as applied to foreign corporations, has been held an unreasonable burden on interstate commerce, and as shown, there are numerous cases to the contrary.

Was The Commissioner Arbitrary In The Selection Of The Remedy?

Petitioner contends that the commissioner was arbitrary in his selection of the remedy for the conditions shown in the audit. The audit shows the capital to be reduced to approximately 73 per cent of the aggregate par value of its issued capital stock. (Section 981 of the Insurance Code defines insolvency as a condition where the capital falls below 75 per cent of the capital stock.) The result of the seizure, it is argued, is that the commissioner cannot rehabilitate or reorganize a foreign corporation whose main assets are outside this state, but only liquidate the company, and therefore, such a seizure is too heroic for a condition which it describes as "technical insolvency." The application and its exhibit show that there were, among others, three conditions upon which the application was made: (1) a "merger" of petitioner and the Pioneer Equitable Insurance Company without the commissioner's consent; (2) conditions hazardous to the policyholders and the public; (3) insolvency.

Petitioner contends that the commissioner had other powers and remedies which were equally effective and less drastic than the remedy provided by section 1011, and hence it was arbitrary of him to select the latter method.

[19] People v. One 1941 Chrysler Sedan, 81 Cal.App.2d 18, 183 P.2d 368, cited by petitioner, dealt with an entirely different set of facts. There, this court held that where there are alternative methods of giving notice under constructive service, a complainant may not select one which he knows will not notify the other party when he also knows that one of the alternatives, if selected, would notify him. Here, even though we might find that other remedies were open to the commissioner, we are required to go one step further and find that *as matter of law* the commissioner was arbitrary in proceed-

ing as he did, instead of using another method. Under the circumstances of this case, we do not feel we can do so

[20] The other remedies suggested will be taken up seriatim. (1) Section 12928.6 of the Insurance Code provides that "Whenever the commissioner believes, from evidence satisfactory to him, that any person is violating or about to violate any provisions of this code or any order or requirement of the commissioner issued or promulgated pursuant to authority expressly granted the commissioner by any provision of this code or by law, the commissioner may bring an action" in the superior court for an injunction enjoining the continuance of such violation, etc. To hold that he should have used this remedy, or any of the others suggested and hereafter set forth, instead of the one he did use, means that we must hold, as matter of law, that during the long delay in which all the complicated matters would have to be heard or litigated in order to determine the correctness of the matters stated in the audit, the operation and affairs of the company should be in its hands instead of those of the commissioner. However, it appears from the decision in Caminetti v. Imperial Mut. Life Ins. Co., supra, 59 Cal.App.2d 476, 139 P. 2d 681, and from an examination of the Insurance Code, that it is the policy of the law in this state that whenever the commissioner deems the condition of a company hazardous, he should take over the company while these matters are being threshed out, rather than take the chance that, should the statements in the audit prove to be true, and the company in the meantime continue to take on new policyholders, great loss would result to them, as well as to the original policyholders. An examination of section 12928.6 shows that it is not broad enough to cover the situation disclosed in the audit. It is directed primarily to the stopping of certain acts occurring in this state, rather than to a situation which requires restoration of capital, or to acts occurring outside the state, where a California injunction could not apply. Moreover, an injunction complaint alleging the matters charged in the commissioner's application in this case, would have most of the serious effects on petitioner's business which it charges occurred as a result of the seizure here. (2) Section 700 of the Insurance Code provides for an administrative hearing under the provisions of the State Administrative Procedure Act. (3) General less drastic steps. This is rather an indefinite suggestion. (4) The commissioner's Bulletin 50 sets up a procedure by which the report of the examination staff is to be sent to the company involved, giving it 10 days to file objections thereto. These rules primarily are for intradepartmental regulation and do not necessarily require that this proceeding be taken before court proceedings are started. (5) Section 706.5 of the Insurance Code provides that the commissioner, whenever "in his judgment, the investments of such insurer are not so made as to make available within a reasonable time sufficient moneys to meet promptly any demand which might in the ordinary course of events be properly made against the insurer" may "order such insurer to cease to effect new contracts of insurance until its financial circumstances are changed sufficiently to remove such condition" and may suspend or revoke the certificate of authority of the insurer if he fails to comply with such order. This remedy would probably result in most of the evils which petitioner complains of here, injury to the company's reputation, surrender of policies, and loss of its agents, brokers, etc. (6) A notice to petitioner to make good within a limited time the deficiency in its capital followed by a proceeding under section 12928.6, (1) above. (7) Section 704 of the Insurance Code provides a method for the suspension of the certificate of authority of the company. (8) The general power appearing throughout the Insurance Code to revoke, cancel or suspend certificates of authority. Just how the effects of proceeding under either (7) or (8) would be less drastic from the company's standpoint than the procedure taken does not appear. Any suspension of the right to do business in California would bring about the same injury to the company as occurred here, without

a corresponding protection to the policyholders in the safeguarding of its assets, small as those assets are.

Taking all the alternative methods suggested by petitioner, they either are practically as drastic as the one used, and therefore would be as injurious to petitioner, or they do not provide the protection to the policyholders and the public which the situation disclosed by the audit could have required.

[21] Petitioner contends that the controversy should have been determined in the declaratory relief action instead of under section 1011. That action was started by petitioner. The commissioner's failure to join issue in it has been acquiesced in by petitioner. While the condition of the company could have been ascertained by hearings in that case, the fact that it existed did not bar the commissioner from proceeding as he did. It, also, was subject to the objection that the interests of the public could not be fully protected by a proceeding which did not give the commissioner the control of the company's assets.

[22] The test to be applied to the action of the commissioner is, was the selection arbitrary as matter of law? Many of the proposed remedies would have been as disastrous to the petitioner as he claims is the one chosen. But the prime consideration is the protection of not only the policyholders of the company but also the public. The matters set forth in the audit are serious. They show that the company has been losing over a million dollars a year for the last three years. The time required to have a complete hearing of the truth of these charges (which petitioner says is debatable) would be very great. If they are true, it is probable that long before a hearing could be concluded, unless petitioner repaired its capital and changed its practice in the meantime, the company would be in such a condition as to place its new, as well as old, policyholders in a precarious situation. The refusal of the insurance commissioners of 33 states to join with the commissioner in action against petitioner; the commissioner's refusal to join in the convention audit, or to await its outcome; the fact that the commissioner had known of much of petitioner's situation for the past year; and the other matters stressed by petitioner, do not overcome the fact that when he received the audit and saw the actual hazardous situation of the company as of December 31, he was justified in taking immediate action. The law contemplates that when that danger exists (even though it may not be immediate) the commissioner may use his judgment as to which remedy to select. If we assume, as we must from the face of the audit, that the condition of the company was hazardous and insolvent (even though the results of that condition would not be felt immediately), the commissioner selected the best remedy. It would be a breach of his duty to the public to permit the company to go on writing business.

Liquidation.

[23] Petition has contended throughout that the effect of the seizure of a foreign corporation means almost automatic liquidation and no possibility of rehabilitation. This is not necessarily so. Whether there is conservation and rehabilitation or liquidation depends upon the attitude of petitioner. If it refuses to send into California sufficient moneys to meet claims for losses and returned premiums on cancellation of policies (even under company management there is not kept in this state sufficient funds for these purposes), if it refuses to cooperate with the commissioner in his endeavors to rehabilitate the company, then the commissioner will have to apply to the court for a liquidation order under section 1016. It is the conservator's duty to try to remove the causes leading to the company's difficulties. If this cannot be done, he must attempt to rehabilitate its business, and if this cannot be done, liquidation will have to follow. Carpenter v. Pacific Mutual Life Ins. Co., supra, 10 Cal.2d 307, 74 P.2d 761.

So far as the effects of seizure are concerned, there is not so much difference between a foreign and a California corporation. The effect of the seizure is practically the same, a bad reputation for the company, cancellation of policies, the loss of its brokers and agents. But the Legislature must have had those results in mind when adopting sections 1011 and 1013. So far as rehabilitation of the company is concerned, it is easier, of course, to rehabilitate a local company because the entire assets are within the state and in the hands of the conservator. However, rehabilitation requires the consent and cooperation of even the local company's stockholders. If they are not forthcoming, the commissioner cannot rehabilitate the company. Perhaps not to the same degree, but to a large extent, the foreign company can be rehabilitated if its stockholders cooperate. This difference in degree is one of the conditions which a foreign corporation must necessarily face as the price of doing business in a state other than its home state.

Assuming, as claimed, that the commissioner will not come into possession of over $145,000 and the normal loss on policies in force is at least $450,000, that there will be a large number of policies cancelled because of the seizure and the unearned premiums will have to be refunded, the commissioner was entitled to feel from the conditions disclosed in the audit that, in spite of such results, the protection of the public as well as of the then policyholders required such action. While this court might have concluded otherwise, were the decision, in the first instance, up to us, still we cannot find, as matter of law, that his action was an abuse of discretion.

[24] Petitioner alleges that the commissioner, although conceding that he has no power to cause the removal of Hopps, the chairman of the Board of Directors of the company, was actuated in bringing this proceeding because of the failure of petitioner to remove Hopps entirely. Were the financial condition of the company beyond question, and did it not appear that Hopps was, at least, partially responsible for the impairment of the company's assets, this might be important. The commissioner has no power, for personal reasons, to cause the elimination of any individual connected with an insurance company. But, where a course of conduct by that individual has caused serious loss to the company, the commissioner has the right to require that those practices be abandoned. See Caminetti v. Guaranty Union Life Ins. Co., supra, 52 Cal.App.2d 330, 126 P.2d 159. A reasonable conclusion can be drawn from the facts stated in the audit, that petitioner has been dominated by Hopps, and, to some extent, run, for the benefit of himself and other companies in which he was interested, to the detriment of petitioner. Such a fact, if it is a fact, coupled with the other circumstances of the case, would make the commissioner's objection to the practices of Hopps justifiable.

[25] Assuming the allegations of the petition to be true, in view of the matters set forth in the audit which is a part of the petition, petitioner has failed to set forth facts sufficient to show that as matter of law the commissioner was arbitrary in his action. To determine as matter of fact whether the matters set forth in the audit are true will require a hearing as long and involved as one under section 1012. This court is not equipped to pass upon such factual matters, nor can a mandamus proceeding be used as a substitute for the hearing before the trial court provided by that section. Therefore, the demurrer is sustained, the alternative writ is discharged, and the petition for a peremptory writ is denied.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

The pleadings are set forth fairly in the majority opinion, although portions of an exhibit made a part of the petition for the present writ upon the request of the Insurance Commissioner should be emphasized.

The question before this court, in view of the demurrer to the petition, is whether, from the contents of the petition, may it be said, *as a matter of law*, that the commissioner acted in violation of the due process clause of the federal and state Constitutions. The application filed by the commissioner under section 1011 of the Insurance Code was an application made without notice to the real party in interest, the Rhode Island Insurance Company, and service of the notice of appointment of the commissioner and seizure of the company was made at the same time.

The order of seizure made upon the application of the commissioner, filed in the trial court, which petitioner herein seeks to set aside, was based upon an alleged merger of petitioner and the Pioneer Equitable Insurance Company, without approval by the commissioner, the alleged hazardous condition of the company, and alleged insolvency.

It is admitted that there is no *actual* insolvency, but only a technical insolvency of *less* than *two* per cent. The less than two percent technical insolvency is only based upon the alleged "merger."

The alleged "hazardous condition" is based upon the alleged "merger" and the alleged "technical insolvency." The term "hazardous condition" is used in reference to that part of the public who are policyholders. There is no allegation that any policyholder has lost one cent. Exhibit A, attached to the application for the appointment of a conservator, is a report of the examiner, appointed by the commissioner to investigate the petitioner herein. He reported that a "hazardous condition" might arise—that is—that there might be some possible risk or loss to the policyholders, based upon the "merger." On the present petition the commissioner argues that there was in fact a merger, but in the application filed in the superior court it is alleged that Rhode Island "without first obtaining the consent in writing of the said Commissioner, has entered into a transaction the effect of which is to merge and consolidate substantially its entire property and business in or with the property and business of another insurance company, to wit: Pioneer Equitable Insurance Company of Indiana."

The real question herein may be resolved into the matter of the alleged "merger" without the consent of the California commissioner. Exhibit A, the report, indicates that an agreement was executed to the effect that the petitioner herein, Rhode Island, "reinsures and takes over the entire insurance business of Pioneer Equitable" as shown by "Rhode Island's 1948 annual statement, showing its financial condition" and that the report "has been adjusted to reflect the effect of this reinsurance agreement." In turn, Rhode Island reinsured "with an underwriter at Lloyds." The report states: "We have been *advised* that" under the Lloyd contract "This commission rate of 46% was based upon an *assumed* loss ratio of 50%." (Italics added.) "Rhode Island, by this action, took credit for a profit not yet realized at December 31, 1949. There follows in the report a statistical summary of various adjustments. The report states: "No effect was given in the adjustment financial statement due to legal aspects and insufficiency of data." Based upon "We have been advised" without definite reference to the source of the information, the conclusion is reached that Rhode Island's capital "is below 75% of its issued capital stock." This has reference to the *less* than 2% figures previously mentioned. In this manner the application for appointment of the commissioner attempts to justify the allegations of "insolvency" and "hazardous condition."

The "merger" is not a present consolidation of the two companies, but is merely a reinsurance contract, approved by the Insurance Commissioner of Indiana, upon the deposit of Rhode Island securities of an agreed valuation as a pledge of Rhode Island's faithful and prompt performance of the obligations of payment of possible liabilities. Pioneer Equitable in its independent and no wise consolidated aspect also agreed to make a deposit of certain securities with the Indiana commissioner. Under the terms of the reinsurance contract, not a present but a future discontinuance of business of Pioneer Equitable may occur. "In the event that such steps [the performance of the reinsurance contract] require the dissolution and/or liquidation of Pioneer, Pioneer agrees promptly to take steps to dissolve and/or liquidate."

I agree with the majority opinion that "The statute can reasonably be construed as valid, the phrase 'wheresoever situated' meaning within the state where the court has power to act." Franklin v. Peterson, 87 Cal.App.2d 727, 197 P.2d 788. Likewise the action of the commissioner must be confined to California where the commissioner has power to act. The commissioner may not direct the disposition of either assets or liabilities outside of California.

Assuming that under a strained construction the reinsurance contracts could be declared to constitute a possible temporary merger, the contracts were executed outside of the jurisdiction of the California commissioner and therefore his consent was not necessary, and if given would be without purpose or effect. The seizure, under Insurance Code section 1011 and the facts as pleaded, was an infringement upon the property rights of the petitioner in California and its stockholders and the policyholders.

I disagree with the holding in the majority opinion that "The provision allowing a seizure by the commissioner applies equally to domestic or foreign corporations and is not discriminatory." The present application for seizure is based upon merger without permission. So far as the company's financial condition in California is concerned, if a remedy is necessary, the Insurance Code provides many less drastic operations. Upon the allegations in the present petition, based upon the application of the commissioner for seizure, a contrary determination to that reached in the majority opinion should be made.

The foregoing conclusion, as suggested above, does not leave the commissioner without remedy, if a hazardous condition should occur in the future. The commissioner without seizure may protect policyholders if the Rhode Island company fails to meet California reserve requirements. Robertson v. People of State of California, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366. Petitioner herein does not challenge the right to act in a legal and reasonable manner, but it strenuously contests the power to destroy arbitrarily. The letter dated November 8, 1948, directing the company to cease business, would have been sufficient as a basis to test in court the propriety and legality of such order. That method was abandoned by the commissioner.

Up to this point the petition for writ of mandate to compel the trial court to dispose of the commissioner's application for appointment as conservator, with the order of seizure attached, has been considered with the allegations of the application filed in the superior court and the petition filed in this court, as the ground work for the test of the merits of the demurrer, that is, as a demurrer might be considered to the allegations of "merger," "hazardous condition," or "insolvency," the three points stressed by the commissioner. As a matter of law the demurrer should be sustained and the trial court directed to vacate and set aside its order of seizure upon the pleadings in this proceeding, unless a further test may be considered on the merits of the demurrer.

It may be that Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 139 P.2d 681, has set forth a rule, astounding as it may seem, that controls the disposition of the demurrer in this proceeding. In that case it was held that in filing the application for seizure it is not necessary that a "hazardous condition" *exists,* but merely that the commissioner believes it to exist. In brief, as held in the majority opinion herein, the question to decide is the good faith of the commissioner. This language is based upon the holding in the Imperial Mutual Life Ins. Co. case, 59 Cal.App.2d 476, 139 P.2d 681, 687, that the commissioner "has so 'determined' and 'found.'"

To make the matter plain—it is not whether a merger occurred, or a hazardous condition actually existed, or that Rhode Island was less than 2% insolvent, but whether the commissioner believed that any of such conditions existed.

It will be necessary to examine the pleadings, the written stipulations, and the admissions made by the respective sides in open court during oral argument, to determine the good faith of the commissioner in obtaining the order of seizure. The facts may be mentioned and considered for one purpose, namely, must it be said from those facts as a matter of law that the commissioner acted with lack of good faith.

The commissioner had known most of the facts in reference to Rhode Island's condition for almost a year, except the reinsurance of Pioneer with Rhode Island and Rhode Island's reinsurance with Lloyds.

Every suggestion, request or demand made by the commissioner upon Rhode Island had been complied with except the demand to cease business in California (which the commissioner subsequently withdrew) and the demand that a certain Mr. Hopps should be removed as chairman of the board. Even this demand was technically complied with —petitioner amended its by-laws to the end that the executive powers were transferred from the chairman of the board to the president of the company, and the chairman of the board's powers from executive to advisory.

That the commissioner's attitude toward Hopps has not changed is apparent from a remark of the attorney general representing the commissioner at the oral argument, referring to Hopps and his removal: "Well, I think the commissioner felt that that was the seat of the trouble." The following day the position of the commissioner was changed to the extent that a rehabilitation could occur if the company complied with all of the commissioner's directions. In the commissioner's supplemental memorandum of points and authorities, on page 41 the following appears: "He [the commissioner] further insists that any rehabilitation of the company must include riddance of Mr. Hopps."

I do not purport to commend or to condemn the activities of Hopps. The point is that the commissioner may direct the change of policies and practices in the operation of an insurance company, so far as California has jurisdiction; but the commissioner may not direct the change of the officers of a company. If the commissioner has the authority to "fire" he likewise has the authority to "hire." This could lead to political dictatorship in insurance matters. The authorities on this subject, that is, where personnel is concerned, are directed to change of "practices" and not the removal of officers. The strange feature of this phase of the case is that the commissioner knows that he does not possess the authority to demand the removal, but still persists in the "riddance" of Hopps. To my mind this shows lack of good faith as a matter of law, and the trial court is not called upon to pass upon the good faith issue as a matter of fact.

I am convinced that (1) on the merits of the demurrer as tested in an ordinary case, and (2) on the "good faith determination of the commissioner" as set forth in the majority opinion, an order should issue from this court directing the setting aside of the order of seizure and that the commissioner be relegated to some other remedy that does not mean that "seizure" without a hearing in advance in synonymous with destruction.

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93 Cal.App.2d 247

FABBRO v. DARDI & CO.

Civ. 13939.

District Court of Appeal, First District, Division 2, California.

Aug. 5, 1949.

1. Contracts 🔑10(1)

Mutuality is absent when one party to contract reserves absolute right to cancel or terminate it at any time.

2. Contracts 🔑10(4)

An instalment sale contract, subject to cancellation by one party at any time, is binding only to extent that it has been performed and is revocable by either party as to portion not yet performed.

3. Contracts 🔑10(4)

Where contract for future delivery of personal property confers on either party arbitrary right to cancel contract before delivery, contract is lacking in mutuality and will be held binding on parties only to extent that it has been performed.

4. Evidence 🔑448

Where written contract is ambiguous on its face, extrinsic evidence is admissible to aid in its construction.

5. Pleading 🔑350(1)

A motion for judgment on pleadings performs office of general, not special, demurrer.

6. Pleading 🔑345(1.3)

Where answer, fairly construed suggests that defendant may have good defense, plaintiff's motion for judgment on pleadings should not be granted.

7. Pleading 🔑350(3)

Granting of plaintiff's motion for judgment on pleadings, without leave to amend answer, is error, where it appears reasonably probable that defendant can raise bona fide issue. Code Civ.Proc. § 472c.

8. Pleading 🔑345(1)

A document reciting corporation's receipt of specified sum from named person as deposit for offer to purchase 500 cases of whiskey in instalments of not less than 14 cases per month was sufficiently ambiguous to preclude judgment for buyer on pleadings in his action to recover amount of deposit.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by George Fabbro against Dardi & Company, a corporation, to recover the amount of a deposit by plaintiff for an offer to purchase whiskey from defendant. From a judgment for plaintiff on the pleadings, defendant appeals.

Reversed with directions.

Keil & Connolly, San Francisco, for appellant.

Hardy, Carley & Brenner, Palo Alto, for respondent.

DOOLING, Justice.

On March 15, 1945 the parties signed a document containing the following provisions:

"Received of Fabbro's Cafe
(Firm Name)
Geo. Fabbro
(Owner's Name as per State License)
2915 El Camino Real Redwood 578
(Address) (Phone Number)
Redwood City Calif. C-6689-H
(City) (State) (State License Number)
The Sum of $1500 — Fifteen Hundred Dollars

as deposit for an offer to purchase 500 cases of Calvert, Old Poindexter, Kinsey, Waterfill & Frazier or other advertised brands of straight or blended whiskey.

"Interest will be allowed to the buyer on such deposit at the rate of five per cent (5%) per annum from the date of the deposit to the date of complete termination or refund of deposit.

"The Buyer agrees to accept not less than 14 cases of whiskey per month.

"This offer to purchase is made at the Office of Price Administration's ceiling price at the time of delivery, plus actual cost of transportation.

"Seller is accepting this offer to purchase, subject to the arrival of the merchandise, with no responsibility for failure to make delivery due to laws, rules or regulations, war, strikes or any other conditions beyond its control.

"The total sales price shall not exceed O.P.A. ceiling price at time of delivery in California. In the event governmental regulation of prices on commodities shall cease, then the purchase price of the whiskey hereby contracted for shall be the prevailing market price of such whiskies in this area. Any increase in Federal, State or Municipal taxes after the execution of this agreement shall be added to sales price. Purchaser shall pay any balance due for merchandise within five days after notification of its arrival and shall receive merchandise immediately upon payment of such balance due. Failure to make such payment as herein provided shall relieve seller of responsibility for delivery and deposit may be retained by seller as liquidated damages.

"This offer is subject to any and all Federal, State, and Municipal regulations in effect or put into effect in the future.

"Further, this deposit shall be considered an offer to purchase from Dardi & Company and therefore the right is reserved to return the above mentioned deposit should any condition arise which would make it necessary to do so."

On December 24, 1947, plaintiff filed a complaint in three counts. The second count may be disregarded since plaintiff admits that it did not state a cause of action. The first count pleaded the making of an agreement whereby plaintiff deposited $1,500 "as a deposit for an offer to purchase whisky" and the agreement to pay 5% interest on said deposit "to the date of complete termination or refund of deposit." This count alleged in paragraph IV:

"That by the terms of said agreement, said deposit was to be considered an offer by plaintiff to purchase from defendant corporation."

Paragraph V alleged that on or about February 8, 1947, plaintiff revoked said offer and demanded the return of the deposit with 5% interest which was refused.

The third count was a common count, therefore takes its color from count one, Steffen v. Refrigeration Discount Corp., 91 Cal.App.2d 494, 205 P.2d 727, and may for that reason also be disregarded in considering this appeal.

Defendant filed an answer denying the allegations of paragraph V of the first count of the complaint, but containing an express admission "that plaintiff demanded the repayment to him of the Fifteen Hundred Dollars." For a second ground of defense defendant alleges the delivery and acceptance of "that certain offer to purchase and agreement" of March 15, 1945, and sets it forth in haec verba. The answer then alleges that "notwithstanding due demand therefor * * * plaintiff has accepted and paid for a total of only one hundred seventy-three (173) cases of the whiskey * * * and thereby plaintiff became and is in default * * *." The answer then alleges that defendant "has fully and faithfully performed each and all of the obligations" of said agreement and that the $1,500 was paid to defendant pursuant to its terms.

Plaintiff moved for judgment on the pleadings which was granted and judgment followed for $1,500 with interest, from which judgment defendant appeals.

[1] It is plaintiff's theory that the deposit of $1,500, by the express terms of the agreement, constituted an offer which could be rejected at any time by defendant by returning it to plaintiff and the obligations of defendant could thereby be arbitrarily put at an end. For this reason plaintiff insists defendant's promise was illusory and no binding contract resulted. If plaintiff's construction of the document is correct his conclusion follows as a matter of law. "Mutuality is absent when one party to a contract reserves an absolute right to cancel or terminate it at any time." (4 Cal. Jur., 10 yr.supp., 1943 Revision, Contracts, sec. 139, p. 96).

[2, 3] In the case of an instalment contract, like this one, the contract if subject to cancellation by one party at any time is binding only to the extent to which it has been performed and is revocable by either party as to the portion not yet performed. "The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed." Motor Car Supply Co. v. General Household Utilities Co., 4 Cir., 80 F.2d 167, 170; E. I. Dupont De Nemours & Co. v. Claiborne-Reno Co., 8 Cir., 64 F.2d 224, 89 A.L.R. 238; Bendix Home Appliances v. Radio Accessories Co., 8 Cir., 129 F.2d 177, 181; Zelen v. Domestic Industries, 135 Neb. 456, 282 N.W. 387; Baker Co. v. Ballentine & Sons, 127 Conn. 680, 20 A.2d 82, 137 A.L.R. 916; Bernstein v. W. B. Mfg. Co., 238 Mass. 589, 131 N.E. 200; 1 Williston on Contracts, Rev.Ed., sec. 104, p. 352; 17 C.J.S., Contracts, § 100(d), p. 450. In view of the fact that the time for full performance at 14 cases per month had not expired defendant's allegation of performance can only mean performance as to accrued instalments.

Plaintiff points to the provision of the document that $1,500 is received "as deposit for an offer to purchase"; and more particularly to its last sentence: "Further, this deposit shall be considered an offer to purchase * * * and therefore the right is reserved to return the * * * deposit should any condition arise which would make it necessary to do so." These make it clear, says plaintiff, that the deposit was only an offer subject to rejection by defendant at any time before the 500 cases had all been delivered. This was the view taken by the trial court which resulted in the judgment for plaintiff on the pleadings.

But, says defendant, this is not the meaning of the document. It expressly provides: "Seller is accepting this offer to purchase, subject to the arrival of the merchandise, with no responsibility for failure to make delivery due to laws etc. or any other conditions beyond its control." It thereby clearly indicates an acceptance of the offer creating a binding contract to deliver 500 cases of whiskey. It also contains an agreement to pay interest on the $1,500 deposited "to the date of complete termination or refund of deposit." The alternative "or" sets off "refund of deposit" as something different from "complete termination" and indicates that the refund of the deposit would not operate to terminate the contract. Also the document if it was the intention to provide that the return of the deposit should terminate the seller's obligations could have said so in express terms. Therefore the correct construction is that it, as seller, is bound to deliver 500 cases of whiskey absolutely, but may relieve itself of the obligation to pay 5% interest by returning the deposit.

[4] If the document is ambiguous on its face, and we think enough has been said to demonstrate that it is, extrinsic evidence is admissible to aid in its true construction. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761 et seq., 128 P.2d 665; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 560 et seq., 147 P.2d 84; 4 Cal.Jur., 10 yr.supp., 1943 Revision, Contracts, sec. 171, pp. 119-120.

[5-8] By granting the motion for judgment on the pleadings the trial court has deprived defendant of the opportunity to present extrinsic evidence to support its construction of the writing. Plaintiff points out that defendant did not deny his allegation: "That by the terms of said agreement, said deposit was to be considered an offer * * * to purchase * *." This allegation only paraphrased the language of the writing and defendant may have deemed even a qualified denial unnecessary in view of its pleading of the writing in haec verba in its answer. The issues would have been sharpened if defendant had expressly pleaded its construction of the writing. But a motion for judgment on the pleadings performs the office of a general, not a special, demurrer, Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; MacIsaac v. Pozzo, 26 Cal.2d 809, 812, 161 P.2d 449, and where the answer, fairly construed, suggests that defendant may have a good defense, a motion for judgment on the pleadings should not be granted to plaintiff. Patterson v. Pacific Indemnity Co., 119 Cal.App. 203, 206-207, 6 P.2d 102. At the very least since the enactment of Code of Civil Procedure section 472c it is error to grant such motion without leave to amend the answer where it appears reasonably probable that defendant can raise a bona fide issue. MacIsaac v. Pozzo, supra, 26 Cal.2d 809, 816, 161 P.2d 449.

We are satisfied that the writing, depending on the showing made by way of extrinsic evidence, is sufficiently ambiguous to permit either construction suggested.

Judgment reversed with directions to permit defendant to amend its answer.

GOODELL, J., concurs.

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93 Cal.App.2d 473

PEOPLE v. HOLT et al.

Cr. 4363.

District Court of Appeal, Second District, Division 1, California.

Aug. 25, 1949.*

1. Indictment and Information ⇨109

An indictment or information need only charge essential elements of statutory offense and when this is done accused is fairly apprised of what he is called upon to meet at the trial.

2. Indictment and Information ⇨60

Except when the particular mode or means employed in commission of crime are of the essence thereof, they need not be alleged.

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* Subsequent opinion 211 P.2d 917.

3. Criminal law ⚷991

An information charging in language of statute offense of kidnapping for purpose of robbery authorized trial court to fix penalty at life imprisonment without possibility of parole where it developed on guilty plea that victim suffered bodily injury, notwithstanding that information did not allege that victim suffered bodily injury. Pen.Code, § 209.

4. Criminal law ⚷1144(17)

Where defendants pleading guilty to kidnapping for purpose of robbery did not appeal from judgment of life imprisonment without possibility of parole pursuant to finding that victim suffered bodily harm, and official reporter had destroyed his shorthand notes when defendants appealed some ten years later from order denying their motion to set aside sentence of imprisonment "without possibility of parole", reviewing court would presume in support of judgment and in absence of contrary showing that evidence was introduced or that defendants admitted that victim suffered bodily harm. Code Civ.Proc. § 269a; Pen.Code, § 209.

5. Criminal law ⚷998

Victim's letter written eight years after kidnapping for purpose of robbery, stating that in his opinion he received no bodily injuries, was insufficient to show such absence of bodily harm as would entitle defendants to have set aside their sentences of life imprisonment without possibility of parole entered after their plea of guilty and after trial court found that victim suffered bodily harm. Pen.Code, § 209.

6. Criminal law ⚷998

Motion to vacate judgment, to be effective, must be made within a reasonable time after judgment has been rendered.

7. Criminal law ⚷998

Unexplained delay of ten years in moving to set aside portion of judgment-sentence warranted denial of motion.

8. Criminal law ⚷1023(12)

An appeal from order made after judgment is not warranted where judgment is not void on its face and when same questions presented on such appeal could have been fairly and properly raised in an appeal from judgment.

9. Criminal law ⚷1023(12)

Ordinarily and in absence of exceptional circumstances a party who has right to appeal cannot forego that right and move to vacate and then appeal from order denying his motion.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Paul Lee Holt and Manuel Govia were convicted of robbery of the first degree and kidnapping for purpose of robbery. From an order denying defendants' motions to set aside that part of sentence directing imprisonment for offense of kidnapping for purpose of robbery, "without possibility of parole", the defendants appeal.

Order affirmed.

Paul Lee Holt and Manuel Govia, in pro. per.

Fred N. Howser, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

On January 19, 1939, the District Attorney of Los Angeles County filed an information in the Superior Court wherein defendants were charged in Count I with the crime of kidnapping for the purpose of robbery in violation of Section 209 of the Penal Code, allegedly committed on or about December 21, 1938; that at the time of the commission of said offense the defendants were armed with a deadly weapon. Count II charged the defendants with the crime of robbery alleged to have been committed on or about December 21, 1938, and that defendants were armed with a deadly weapon. In Count III defendants were accused of the crime of kidnapping for the purpose of robbery in violation of Section 209 of the Penal Code, and that the defendants were armed with a deadly weapon. Count IV charged the crime of robbery and alleged the defendants were armed with a deadly weapon. Count V alleged the commission by the defendants of the crime of kidnapping for the purpose of robbery, in violation of Section 209 of the Penal Code, and that the defendants were armed with a deadly weapon. In Count VI defendants were accused of the crime of robbery and it was alleged that they were armed with a deadly weapon.

The information also charged each defendant with a prior conviction of a felony for which defendant Holt served a term of imprisonment in a state prison, and defendant Govia in a state reformatory.

On January 23, 1939, defendants were duly arraigned and each entered a plea of not guilty to the offenses charged in Counts 1, 3, and 5 of the information. To the offenses charged in Counts 2, 4, and 6 each defendant entered a plea of guilty, admitted being armed with a deadly weapon at the time of the commission of the offenses, and also admitted the prior conviction as charged.

The court found the crimes charged in Counts 2, 4, and 6 to which defendants had pleaded guilty to be robbery of the first degree, pronounced judgment sentencing each defendant to state prison for the term prescribed by law, and directed that the sentences run consecutively.

Subsequently, on March 31, 1939, each defendant withdrew his plea of not guilty theretofore entered to Count 5 of the information and entered a plea of guilty thereto. Each admitted being armed with a deadly weapon at the time of the commission of said offense. On motion of the District Attorney Counts 1 and 3 were dismissed in the interest of justice.

Prior to pronouncing judgment upon the last-mentioned pleas of guilty to Count 5 charging kidnapping for the purpose of robbery in violation of Section 209 of the Penal Code, the court took testimony from the victim of the kidnapping and from defendant Govia. When, on April 4, 1939, the matter of pronouncing judgment and sentence as to Count 5 was called, each defendant made a motion to withdraw the pleas of guilty entered as to Counts 2, 4, and 6 and enter pleas of not guilty thereto. This motion was denied. The court, however, modified the prior order that the sentences pronounced on the last named three counts should run consecutively and directed that they be served concurrently.

As to Count 5, the court found that the person subjected to the kidnapping alleged therein suffered bodily harm and pronounced judgment sentencing each defendant to state prison for the term prescribed by law, directing that the sentences run concurrently with those theretofore pronounced on Counts 2, 4, and 6. Having found that the person subjected to the kidnapping charged in Count 5 had suffered bodily harm, the court directed that the imprisonment imposed under Count 5 be served without possibility of parole. Penal Code, sec. 209.

On January 19, 1949, defendants moved the trial court to annul, vacate, and set aside the portion of the judgment-sentence, to-wit: "Without Possibility of Parole" as to Count 5 (kidnapping for the purpose of robbery) of the information, on the ground that the court was without jurisdiction to impose sentences of life imprisonment without possibility of parole. This motion was denied and from such order defendants prosecute this appeal.

The first ground urged for a reversal of the order is that Count 5 of the information did not allege that the victim of the kidnapping, Donald Foltz, suffered bodily harm and that the court was therefore without jurisdiction to pronounce judgment and sentence of life imprisonment *without possibility of parole.*

[1-3] It is now established law in this state that an indictment or information need only charge the essential elements of the statutory offense. When this is done the accused is fairly apprised of what he is called upon to meet at the trial. Except when the particular mode or means employed in the commission of a crime are of the essence thereof, they need not be alleged The essence of the offense denounced by Section 209 of the Penal Code as a felony is the seizing, confining, kidnapping, etc., of the victim. Where, as in the case now before us, it developed upon the plea of guilty that the victim suffered

bodily harm the court was justified in the exercise of its discretion to fix the penalty at life imprisonment without possibility of parole. In the instant case the information charged the offense in the language of the statute. This was sufficient not only to inform appellants of the charge they were expected to meet but also, of the several punishments prescribed therefor, any one of which, upon conviction or plea of guilty, might be imposed upon them, depending upon the circumstances surrounding the commission of the offense, People v. Britton, 6 Cal.2d 1, 4, 5, 56 P.2d 494; People v. Britton, 6 Cal.2d 7, 8, 56 P.2d 497; People v. Britton, 6 Cal.2d 8, 9, 56 P.2d 493; People v. Haley, 46 Cal.App.2d 618, 624, 116 P.2d 468. Appellants' contention and argument that their situation is analogous to the situation presented wherein an increased punishment may not be imposed for a prior conviction unless the latter is alleged in the indictment or information charging the later substantive offense is answered by the Supreme Court in People v. Britton, supra, 6 Cal.2d at page 4, 56 P.2d at page 494.

[4] Appellants second and final contention is that the victim of the kidnapping charged in Count 5 did not suffer bodily harm. The clerk's transcript, however, discloses that following the pleas of guilty and prior to the pronouncement of judgment and sentence the court took testimony from the victim, Donald Foltz, and from appellant Govia. Subsequently, the court made its finding that the victim suffered bodily harm and in the exercise of its discretion denied to appellants the possibility of parole. No appeal was taken by either appellant from the judgment pronounced pursuant to the foregoing finding. A transcript of the testimony given by the foregoing witnesses has not been brought here on this appeal and our efforts to obtain one through an order directing the clerk of the Superior Court to furnish the same proved futile because of the length of time that has elapsed since the judgment and sentences were rendered. In the absence of an order of court to the contrary, a court reporter may destroy his reporting notes five years after the taking thereof. Code Civ.Proc., sec. 269a. In the instant case more than ten years have now passed and the official reporter has destroyed his shorthand notes. Through no fault of their own, but equally through no fault of the prosecuting officials, appellants have been forced to appeal on a record of what amounts to a judgment roll. Under such circumstances it is the law that in support of the judgment, and in the absence of a contrary showing, this court must presume that evidence was introduced or appellants admitted that the victim of the kidnapping suffered bodily harm.

In support of their contention that the victim did not suffer bodily harm appellants submit a letter dated October 24, 1946, signed by the victim, Donald Foltz, and addressed to the Governor of California. In this letter appears a statement by Mr. Foltz as follows: "* * * I will say that as far as I know I have suffered ~~no~~ bodily harm that could (be) trace(d) to either of their actions at the time they held me up, kidnapped and robbed me * * * My op*p*inions as the victim are unimportant other than the fact that I received no bodily injuries due to either of these men's actions on the ni*te* in question."

[5] This letter was written approximately eight years after the commission of the crime and as its contents indicate, was written because the writer was informed that appellant Holt "is seeking executive clemency in the near future." While such a communication might prove persuasive in an effort to obtain executive clemency, it can not aid appellants in this judicial proceeding. What the victim's state of mind as to whether he received bodily harm might be eight years after his kidnaping is not controlling. The court's finding was predicated in part on the testimony of the victim himself concerning the treatment received by him at the hands of appellants and whether he, eight years later considered such treatment as having inflicted "bodily injuries" is immaterial.

[6, 7] There are other reasons which support the denial by the court of appellants' motion to vacate the judgment. Mo-

tions such as the one now under consideration must be made "within a reasonable time" after rendition of the judgment in order that they may be effective and within possibility of favorable action People v. Vernon, 9 Cal.App.2d 138, 142, 49 P.2d 326. In the case of People v. Lumbley, 8 Cal.2d 752, 761, 68 P.2d 354, 358, it was said, "The untimely delay on the part of defendant in petitioning for the writ would have been sufficient grounds for denying it." In the case just cited the delay was shorter than in the present case. In the case now before us the delay amounted to almost ten years and is wholly unexplained. This fact alone was sufficient reason for denying the motion, People v. Hammond, 22 Cal.App.2d 505, 506, 507, 71 P.2d 334; People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330; People v. Krout, 90 Cal.App.2d 205, 202 P.2d 635.

[8, 9] Furthermore, an appeal from an order made after judgment is not warranted where the judgment is not void on its face and when the same questions presented upon such appeal could have been fairly and properly raised in an appeal from the judgment. As was said in People v. Scranton, 50 Cal.App.2d 492, 494, 123 P.2d 132, quoting from 8 Cal.Jur. 495, sec. 510: " 'Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion.' " Ordinarily a party who has a right to appeal can not forego that right, move to vacate and then appeal from the order denying his motion. There are of course certain exceptional circumstances as indicated in the cited cases, under which such a motion may be entertained by a trial court and an appeal will lie from an order of denial. No showing of such exceptional circumstances is made in the case now engaging our attention, People v. Flohr, 30 Cal.App.2d 576, 579, 86 P.2d 862; People v. Scranton, supra; People v. Spalis, 56 Cal.App.2d 869, 874, 133 P.2d 679; People v. Montgomery, 51 Cal.App.2d 444, 446, 125 P.2d 108.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

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93 Cal.App.2d 391

GLUCKSTEIN v. LIPSETT.

No. 13934.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1949.

Hearing Denied Oct. 17, 1949.

1. Appeal and error ⚷989

Where judgment is attacked as being unsupported by testimony, power of appellate court in passing upon such question is limited to determining whether there is any substantial evidence which will support verdict.

2. Appeal and error ⚷930(1)

On appeal from judgment for defendant in action for negligence, all conflicts in evidence must be resolved in defendant's favor and all legitimate and reasonable inferences indulged in to uphold judgment, if possible, and, where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of jury.

3. Physicians and surgeons ⚷14(1)

A physician, though not required to guarantee results, by taking charge of a case impliedly represents that he possesses and the law requires him to possess that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing practicing in that locality and to exercise reasonable care and diligence and use his best judgment in treating patient.

4. Physicians and surgeons ⚷14(4)

The ultimate question in malpractice action is whether treatment administered indicates, suggests, or demonstrates lack of care, training, and skill ordinarily possessed by physicians and surgeons practicing in similar communities.

5. Evidence ⚷77(6)

Where plastic surgeon who examined plaintiff at defendant's request as to appearance of operation, did not testify in malpractice action, jury could infer from such fact, coupled with their own observation of plaintiff's appearance, that he was not called to testify because his testimony might be adverse to defendant.

6. Physicians and surgeons 🔑18(8)

Evidence as to method used in performing plastic surgery on woman's breasts and abdomen and the disfiguring results sustained implied finding of malpractice.

7. Physicians and surgeons 🔑18(11)

Humiliation due to mutilation of body was compensable in malpractice action.

8. Physicians and surgeons 🔑18(9)

Conflicting evidence as to whether lumps in plaintiff's breasts were malignant growths resulting from plastic surgery performed by defendant presented a question for jury in determining amount of damages to be awarded for malpractice.

9. Physicians and surgeons 🔑18(6)

In malpractice action, plaintiff had the burden of proof on question of whether lumps in breasts allegedly resulting from plastic surgery were malignant growths.

10. Appeal and error 🔑1004(1)

The test to be applied by appellate court in determining whether damages awarded are excessive is a comparison of the amount of verdict with the evidence before trial court.

11. Physicians and surgeons 🔑18(11)

Award of $115,000 to 50-year-old dress designer for disfigurement, humiliation, pain, and malignant growths in breasts resulting from plastic surgery performed by defendant on breasts and abdomen was not excessive.

12. Appeal and error 🔑1004(1)

The question on appeal is whether damages awarded are so excessive as to show passion and prejudice of jury and generally, if award is supported by substantial evidence and inferentially approved by trial judge by denial of motion for new trial without reducing the damages, appellate court is powerless to reduce them or hold award excessive.

13. Evidence 🔑18

That the purchasing power of dollar has decreased to approximately one-half what it was prior to inflation is a matter of common knowledge of which court must take judicial notice in determining whether damages awarded are excessive.

14. Evidence 🔑325, 558(11)

Medical books are not admissible as direct evidence, but where medical expert witness has based his opinion either generally or specifically on a medical book or books they may be used on cross examination to impeach or discredit the witness.

15. Appeal and error 🔑1060(1)
Evidence 🔑558(11)

Where plastic surgeon, being sued for malpractice, testified that he did not base his opinion on medical books, permitting plaintiff's attorney to read from medical textbooks in cross examination of defendant was error, but not prejudicial, where excerpts read were not contradictory of defendant's testimony.

16. Trial 🔑127

The condemnation of attempts to inform jury that defendant is insured does not extend to cases where such information comes in incidentally in attempting to prove other facts, or where record does not show that the particular answer was sought or anticipated.

17. Appeal and error 🔑207

That witness for plaintiff in malpractice action volunteered information on cross examination suggesting to jury that defendant was insured was not reversible error, particularly where defense counsel did not ask for a ruling on his assignment of such statement as misconduct or ask that it be stricken from the record.

18. Appeal and error 🔑207, 719(1)

Where remarks of counsel are not assigned as error and no request is made for instruction to disregard them, any error therein cannot ordinarily be urged on appeal.

19. Appeal and error 🔑978(2)

Trial court's conclusion, in denying motion for new trial on ground of alleged misconduct of counsel, that any such misconduct was not prejudicial should not be disturbed unless, under all the circumstances, it is plainly wrong.

20. Trial ⚷261

Refusal to give defendant's requested instruction that no insurance company was a party to action "or interested therein" was not error, particularly in view of inclusion of quoted phrase.

21. Trial ⚷217

Where jurors are asked on voir dire concerning possible interest in an insurance company and no such company is a party to action, jury should be so instructed and that they are not to speculate upon question of whether defendant is insured since such question has no bearing on any issue in the case.

22. Trial ⚷260(1)

Failure to give requested instructions, which were proper statements of the law, was not error, where their subjects were well covered in instructions given by court.

◆

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Jeanette Gluckstein, also known as Jennie Gluckstein, against Phillip J. Lipsett, M.D., to recover damages for malpractice. Verdict and judgment for plaintiff and defendant appeals.

Judgment affirmed.

Robert L. Lamb, San Francisco, Peart, Baraty & Hassard, Geo. A. Smith, Alan L. Bonnington, San Francisco, for defendant and appellant.

Melvin M. Belli, San Francisco, F. A. Devlin, San Francisco, for respondent.

BRAY, Justice.

In a malpractice action, plaintiff recovered a judgment entered upon a jury verdict, against defendant Phillip J. Lipsett, in the sum of $115,000, from which judgment defendant appealed.

Contentions.

1. Evidence is insufficient to justify the finding of malpractice. 2. Evidence is insufficient to sustain the amount of the verdict. 3. Error of court in permitting plaintiff to read from a medical textbook. 4. Alleged misconduct of counsel for plaintiff and one of his witnesses. 5. Error in refusing three proposed instructions.

1. Evidence Sufficient To Prove Malpractice.

[1, 2] In view of the many times the appellate courts have referred to the rule which binds them in considering the sufficiency of the evidence in the trial court, it hardly seems necessary to reiterate that rule here. However, in view of the fact that the determination of the principal issues in the case depends in large degree upon the credibility of the testimony of Dr. Smith, a plaintiff's witness, as opposed to that of defendant, it probably is better to refer again to the rule binding this court: "When a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183." Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487; see also Fischer v. Keen, 43 Cal.App.2d 244, 110 P.2d 693; 2 Cal.Jur. 921, § 543.

Plaintiff, a woman 50 years of age, a subject of England, where she is in business as a dress designer, contacted defendant, a medical doctor, concerning plastic surgery to her breasts and abdomen. Defendant examined her and found that her breasts were pendulous and her abdomen large, with an old scar from prior operations. For the sum of $2000, to include hospital expenses, he agreed to raise her breasts, and remove the scar and excessive skin on her abdomen. Plaintiff testified that defendant looked at her body and said, "I could make a perfect job of that"; that the required operation could have no ill effects, and could not give rise to pain, discomfort, lumps or cancer in the breast.

Plaintiff entered the hospital on July 2 and was operated by defendant the next day under general anaesthetic. She testified that when she returned to the room she was in terrific pain. Drugs were given her to quiet the pain. On July 7 she was again operated by defendant, this time under a spinal anaesthetic. She testified that on her return from surgery this time she was likewise in terrific pain and was very ill. She remained in the hospital until July 19, when a hospital attache informed her that her bill had reached the sum of $500, which was the limit the hospital had been informed defendant would pay, and from then on she would be expected to pay all hospital expenses. She then removed to a hotel, although she claims she did not feel well enough to leave. She was in bed at the hotel off and on for a week. She then called another doctor to treat her. She testified that she had a "tightness below the belt, right in the waistline and I could not breathe properly."

Prior to defendant's surgery she had no lumps in her breast. After it a small lump on the left and a large one on the right gradually developed. The pain from the latter was terrific until a doctor on two occasions within six weeks of the trial had removed the fluid from it. The pain from it is constant. In the hospital after the second operation, while defendant was dressing plaintiff's wounds, a nurse stated to defendant that plaintiff's nipples were too high, and that one breast was larger that the other; that the breasts looked terrible." Defendant took the nurse out of the room.

Photographs taken of plaintiff's breasts and abdomen before the defendant's surgery and after were exhibited to the jury. Also plaintiff herself, in the nude, was exhibited. From the photographs and from the other evidence appearing in the record, the jury well could have found that there is definitely a disfigurement of plaintiff's body; that there is an ugly, wide, jagged scar extending from the pubes to a point several inches above the waistline; that her abdomen area is distorted to the left; that one of her breasts is considerably larger than the other; that just above the lower edge of her left breast there is an ugly long and wide scar; that there is a similar scar on the lower edge of her right breast, which, however, being under the breast, is not so visible as that on the other breast; that her nipples are considerably above their normal position on the breasts and out of line, giving her breasts a most unusual, even ludicrous appearance; that the scars, the distortion of the body and the peculiar position of the nipples, give plaintiff a grotesque appearance.

[3] The law of malpractice is well stated in Hesler v. California Hospital Co., 178 Cal. 764, 766, 174 P. 654, 655: "'A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge.' Pike v. Honsinger, 155 N.Y. [201], 209, 49 N.E. [760], 762, 63 Am.St.Rep. 655. 'The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances.' Zoterell v. Repp, 187 Mich. [319], 330, 153 N.W. [692], 695."

[4] The test to be applied by the jury is set forth in Thomason v. Hethcock, 7 Cal.App.2d 634, 636, 46 P.2d 832, 833:

"* * * the question which the jury must ultimately decide is not whether the treatment administered is such as would be commonly adopted and administered by doctors of ordinary skill in the use of ordinary care, but that the ultimate question is whether the treatment administered or the method used, whether a common method of treatment or not, was such, or was given in such a manner as indicated, suggested, or demonstrated a lack of that care, training, and skill which is ordinarily possessed by physicians and surgeons practicing in the same or similar communities."

Applying such test to the evidence in the case at bar, there is substantial evidence (1) that the method adopted by defendant was not that commonly adopted by doctors of ordinary skill, and (2) even if it was, it was administered in such a manner as to demonstrate a lack of ordinary care and skill. On the first question, Dr. Smith testified that in the abdomen "too much fat was cut away"; that it was cut away when the proper method would have been to tear it away; that cutting left "minute adhesions, maybe 500 of them." (Defendant testified that he applied "several hundred ties on the breasts or over the breasts, to stop the bleeding and the oozing") Dr. Smith stated that he did not know why the abdomen scar was "ever produced that way"; that it was not good plastic surgery. As to the breasts, he testified that he did not know "what was to be accomplished" by the surgery performed there; that it "accomplished absolutely nothing, in opening the breast that way. There is no molding of the breast afterward. * * * She just has a couple of bags of degenerative fascia now." It helped "to shut off more of the circulation of the nervous system" and "prevents the lacteal fluid from the breast from circulating through." The jury were entitled to conclude from Dr. Smith's testimony that the *method* used by defendant was not a proper one. No medical men were called by defendant, and even he did not testify that the method he used was one used by other doctors, other than that there were sixteen or eighteen ways to do breast surgery. "Every surgeon has his own little tricks about the operation." It was "my own operation that I have found by experience brings the best results."

2. Assuming that the method was proper, the results were such as to demonstrate a lack of care and skill on the part of defendant. In addition to Dr. Smith's testimony, the disfigurement of plaintiff demonstrates a lack of skill. Her appearance speaks for itself. It could not have been caused by merely an error in judgment, for which the cases hold a doctor cannot be held responsible. Only a lack of care or skill could bring about the repulsive condition shown by the photographs. The defendant practically admits this. He said, "* * * it is, yes, the worse result I have gotten." "* * * at the time we do this operation, you estimate the amount of skin to be removed, and the amount of fat, and the position of the breast, and I figured incorrectly * * *" "I could do a better job." "I am not satisfied with the result."

[5, 6] At defendant's request, plaintiff submitted herself to examination as to "the appearance of the operation" by Dr. George Warren Pierce, plastic surgeon. He did not testify, however. The jury were entitled to infer from this fact, coupled with their own observation of plaintiff's appearance, that the reason he was not called to testify was that his testimony might have been adverse to defendant. There was ample evidence to sustain the jury's implied finding that defendant was guilty of malpractice.

2. The Amount Of The Verdict.

[7] One hundred and fifteen thousand dollars is a considerable sum of money. It is difficult, however, for anyone to evaluate the damages caused to a woman from such mutilation of her body as appears here. She must necessarily suffer considerable humiliation, even though her disfigurement may be concealed by her clothing; and of course, humiliation is compensable. In addition, plaintiff testified that she suffers from a tightness across the waist, causing her to be very nervous and uncomfortable, with a feeling of wanting air, and that when she turns over in bed she feels that her stomach is drawing to one side. She also claims to suffer con-

stant pain. Defendant testified, "There is no question she has pain." We are not required to pass upon the question of whether the three elements, constant pain, humiliation, and disfigurement, alone justify the amount of the verdict, for, added to these, there is evidence that, as a result of defendant's surgery, plaintiff has a malignant growth in her breasts. Defendant admits that there is a small "nodule" in her left breast, while in her right breast there is a larger nodule. These he testified were caused by clogged lacteal ducts. Dr. Pflueger, a witness called by plaintiff, testified that the lump in the right breast was about two inches in diameter, which he advised should be removed. Dr. Smith testified that in his opinion these lumps were malignant, and that there was only one thing to do, "Tear both breasts off and dissect the lymphatic system under each arm. She might live a year and a half or two years and she might not live that long." He made no tests to determine if the growths were malignant, contending that no such tests are available until the malignancy had attained a larger growth.

[8] Defendant contends that the evidence does not show that the claimed malignancy resulted from the operation. It is true that the evidence on this subject is not as direct as it might be. Plaintiff's breasts contained no nodules before defendants' surgery. Defendant testified that the nodules were caused by the operation, "very probably a reaction to a tie around the vessels and her tissues, and it has formed a little scar tissue around it" and that they were fibrous as a result of the scar tissue. Dr. Smith testified, when asked the cause of the nodules, "She has got a malignancy. Q. Why do you say that? A. Why do I say that? Q. Yes. A. Well, my experience for fifty years in general medicine and surgery, the acute pain, the sagging of the breasts, and then the pulling up of the nipples. There was that strain on the whole breast system. The breast is the second organ of the body that is susceptible to malignancy." This testimony sufficiently connects the malignancy to the operation, in spite of defendant's testimony that such an operation could not cause malignancy.

[9] As against the testimony of Dr. Smith, defendant relied solely on his own testimony that the growths were not malignant. No other medical men were called to give their opinion on the subject. He admitted that plaintiff had clogged lacteal ducts and pain extending from the lump in her right breast under the axilla of her arm. It was his opinion that the lumps, the clogging of the lacteal ducts, and the pain, would all disappear in time. We cannot say that Dr. Smith's opinion that the lumps in plaintiff's breast are malignant is inherently improbable. It is a well known fact that a woman's breasts are peculiarly susceptible to malignancy, as Dr. Smith testified. It is unusual that in a case where the serious question of malignancy is raised, defendant made no effort to present impartial testimony upon the subject. The burden of proof, of course, of proving malignancy is on the plaintiff. She produced a licensed physician and surgeon, who, if believed by the jury, met that burden. To overcome his testimony defendant relied solely upon his own testimony. It was the jury's duty and province to weigh the testimony of the one against the other. Defendant's cross-examination of Dr. Smith was for the purpose of showing that he was a professional witness against doctors. The jury had the right to consider that fact, if it were a fact, against the very evident interest of defendant in the outcome of the case, and to determine which witness to believe. They believed Dr. Smith. For us to upset their determination of the issue of malignancy, we would have to hold as a matter of law that his opinion as a medical man is unworthy of belief, and that the probability of plaintiff having a malignancy is incredible.

Defendant argues that because Dr. Smith did not make any test of plaintiff for malignancy his opinion is reduced to that of a layman and that therefore the testimony of defendant as an expert must prevail. Defendant did not make any tests, either, so it is not clear why his opinion, even though he examined plaintiff twice to Dr. Smith's once, has any greater foundation than that of the latter.

[10-13] The test to be applied in cases where it is contended that the damages awarded are excessive was stated by us in Buswell v. City and County of San Francisco, 89 Cal.App.2d 123, 200 P.2d 115, 117, to be "a comparison of the amount of the verdict with the evidence before the trial court." Taking into consideration the disfigurement, the humiliation, the pain and the malignancy, we cannot say that the award of $115,000, large as it is, is so far out of line as to show passion and prejudice on the part of the jury. It is not a question of what we would award, Nason v. Leth-Nissen, 82 Cal.App.2d 70, 185 P.2d 880, but whether we can hold that it indicates that type of action by the jury. "Generally speaking, * * * if there is substantial evidence in the record supporting the damages awarded by the jury and it is inferentially approved by the trial judge by his denial of a motion for new trial without reducing the damages, we are powerless to reduce them or to hold the award excessive." Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 52, 177 P.2d 32, 37. In considering the amount of the verdict, we must bear in mind the present day situation as expressed in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 187, 195 P.2d 427, 434: "It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citing cases]. * * *"

3. Medical Textbook.

Defendant's complaint is based on the following testimony: "Q. Now, Doctor, when we took your deposition, you expressed a familiarity with Thorek's 'Plastic Surgery of the Breast and Abdominal Wall.' A. Yes, I have read the book." At this point, plaintiff's counsel volunteered the statement that Thorek was the leading authority on this subject, which fact defendant later denied. "Q. * * * You are familiar with this book, aren't you? A. I have read the book.

"Q. Let me ask you, then, on page 359, with reference to scars and keloids, if you are not familiar with this paragraph by the author?" Defendant then objected, and the court overruled his objection. "Mr. Belli [counsel for plaintiff]:

"Q. The paragraph I refer you to, Doctor, is this: 'Any operation on the breast which subjects the patient to radial or longitudinal incisions predisposes to more or less scarring. This should be avoided.'

"Q. Do you agree with that? A. That is his opinion.

"Q. Do you differ? A. No, it does not differ, but I don't know to what he alludes in this particular case.

"Q. Let's read it again. I will read you the last sentence of it here." Again defendant objected and was overruled.

"Mr. Belli: Here is the last sentence: 'Scars are constantly reminding the patient of the operation which she has undergone, and should there be a tendency to keloid formation, matters are much worse, because of the effects produced by the keloid.' * * *

"Q. You are familiar with the book? A. I don't remember those things. I have read the book, but I don't remember any particular portion of it. * * *

"Q. Do you disagree with this particular portion? A. No, I don't disagree with it." These questions were preceded and followed by questioning of defendant concerning the scars left by the operation.

The law in California on the subject of reading from textbooks on cross-examination is not well defined. There are not many holdings and the dicta are somewhat inconsistent. In the early case of Gallagher v. Market St. Ry. Co., 67 Cal. 13, 6 P. 869, 51 Am.Rep. 680 note, the trial court had allowed counsel to establish a textbook as a standard authority and then read from it, as a means of presenting direct evidence. On appeal the holding was that this was error; that medicine not being an exact science, the contents of a recognized book could not be prima facie evidence of facts of general notoriety and interest under section 1936 of the Code of Civil Procedure.

In a dictum, however, the court stated: "This, as a general rule, is sustained by the great weight of authority; but it is subject to this exception, namely, that books referred to by an expert, to sustain the opinions which he has expressed, may be used to contradict him, or to discredit him." 67 Cal. at page 17, 6 P. at page 872.

In Fisher v. Southern Pac. R. Co., 89 Cal. 399, 26 P. 894, the trial court allowed, in cross-examination of an expert witness, statements to be read from medical works and questions asked as to whether he agreed. On appeal, the court held this error. It stated that the procedure was defended on two grounds: (1) that the witness, on direct examination, testified that his medical opinions conformed to the authority of medical works, and it was argued that if a witness relies in any manner upon the authority of medical works, generally or specifically, it is proper cross-examination to confront him with the works upon which he relies, to show that his understanding of them is incorrect, or to contradict him; and (2) that it is proper cross-examination to test the competency of the witness as an expert, or the value of his opinions. The court then said that the evidence showed (1) that the witness had not based his opinions on medical works, and (2) that the medical works were not inconsistent with the witness's testimony, and hence, the admission of the medical works upon either ground was error, "though the legal proposition be admitted." 89 Cal. at page 407, 26 P. at page 896. The concurring opinion did not agree with the majority statement that reading from medical books to test the competency of an expert or the value of his opinion, was a sound legal proposition.

In Baily v. Kreutzmann, 141 Cal. 519, 75 P. 104, the trial court had allowed an expert witness, on direct examination, to recite instances from medical treatises. The appellate court held this error, the opinion stating, in 141 Cal. at pages 521-522, 75 P. at page 105: "It has been held, without conflict and in an extended line of cases in this state, that medical works are hearsay and inadmissible in evidence, except, perhaps, on cross-examination, when a specific work may be referred to, it seems, to discredit a witness who has based his testimony upon it. * * * It must be taken as the settled rule in this state that medical books are not admissible as evidence, except in the instance already specified."

The above language was pure dictum, as it refers to a purported rule on cross examination, while the testimony given was on direct examination. In Griffith v. Los Angeles Pacific Co., 14 Cal.App. 145, 111 P. 107, a physician in giving his opinion did not refer to any medical work, but stated that he had not heard or read of a similar case to the one he treated. On cross-examination he was asked if a certain medical work did not contain a certain statement. The appellate court upheld an objection to the question on the ground that as he had not referred either generally or specifically to a medical work, any statements in such a work would not be a contradiction of his testimony. The court referred to the rule as follows: "The rule affecting the examination of an expert medical witness, which permits a showing of the contents of the books of standard authors skilled in that particular profession, is limited. It is permissible only to show what such authors have declared upon a subject, when a witness has based his opinion wholly or in part upon his reading of books of that character. Fisher v. Southern Pacific R. Co., 89 Cal. [399] 400, 26 P. 894; Lilley v. Parkinson, 91 Cal. 655, 27 P. 1091. And then only when statements found in such books are not in harmony with the testimony of the witness." 14 Cal.App. at page 147, 111 P. at page 107. This decision disapproves the second ground of admissibility suggested in the Fisher case, supra (to test the witness's competency).

In People v. Hooper, 10 Cal.App.2d 332, 51 P.2d 1131, a handwriting expert was asked a question on cross-examination touching his familiarity with a certain printed work on the subject of handwriting. The court held, 10 Cal.App.2d at page 335, 51 P.2d at page 1133: "While it is the general rule that the contents of printed books may not be brought before the jury upon examination of an expert witness, upon the theory that such action violates the hearsay rule and permits a person not under oath and not subject to cross-examination to place his opinions before the jury, Baily v. Kreutzmann, 141 Cal. 519, 75 P. 104, the rule is otherwise upon cross-examination where, as here, the witness has testified that he relies upon certain works, or where the purpose is to test the competency of the expert. Fisher v. Southern Pacific Co., 89 Cal. 399, 26 P. 894."

In Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, an expert witness had testified that he based his opinion partly on a certain textbook, but the trial court refused to allow impeaching questions on cross-examination based on it. The Supreme Court held, 12 Cal.2d at page 562, 86 P.2d at page 101: "This was improper, for the rule against admission of such works as direct evidence is subject to the qualification that textbooks relied upon by an expert witness may be used as a foundation of impeaching cross-examination. [Citing cases from other jurisdictions.]"

[14] The general rule in other jurisdictions as to the non-admissibility of medical books on direct examination is the same as that in California—they are not admissible. The general rule on their admissibility on cross-examination where the witness either on direct or cross-examination has based his opinion either generally or specifically on a medical work or medical works, is the same as that shown by the foregoing cases to be the rule in this state, namely, they are admissible. However, on the question of their use in cross-examining an expert witness who does not base his opinion on authority, the decisions elsewhere are in conflict, some taking the view that counsel may refer to the authorities for the purpose of testing the knowledge of the witness or discrediting his testimony, and others denying the right. Kern v. Pullen, 138 Or. 222, 6 P.2d 224, 82 A.L.R. 440. California, it appears from the cases above mentioned, does not permit the use of medical books on this latter ground.

[15] In our case, the defendant's testimony showed that he did not base his opinion on medical books, either generally or specifically, and therefore it was error to permit the reading of the extracts from Thorek. However, it was error without prejudice, as the extracts were in no way contradictory of defendant's testimony. Both he and Thorek agreed that scars would result from an operation on the breast. Moreover, defendant testified that he did not disagree with the quoted portions.

4. Alleged Misconduct.

[16, 17] Defendant in cross-examining Dr. Smith brought out the fact that for about 28 years he had been testifying in malpractice cases against doctors, and then the following occurred: "Q. And in these cases against doctors in brain cases, legs, and most everything that comes along, is that correct? A. Yes. We had one case in Stockton a little while ago—twenty-seven doctors, in Stockton, and the poor boy that lost his arm, they couldn't get one doctor to say a good word for him, not one doctor. They were all told if they testified their insurance would be cut off. Mr. Lamb [counsel for defendant]: I assign that as prejudicial misconduct and not responsive. He is not my witness, your Honor. The Witness: You accuse me of—The Court: Wait a minute, wait a minute. Q. Doctor, I am just asking you a few questions * * *" and proceeded with the examination. It is obvious that defendant did not give the court a chance to rule or to admonish the jury. It is also obvious that the witness was a bit anxious to volunteer statements which he thought would help the plaintiff's case. The failure of the defendant to ask for a ruling on his assignment of misconduct would indicate that he did not consider it particularly serious at the time. Also he should have asked that the testimony be stricken from the record, as was done in Packard v. Moore, 9 Cal.2d 571, 71 P.2d 922. We cannot assume that as the statement was volunteered in answer to a question by defendant that plaintiff's counsel was responsible for the answer. As said in Packard v. Moore, supra, 9 Cal. 2d at page 580, 71 P.2d at page 927: "The case in our opinion is governed by the decision in Hughes v. Quackenbush, 1 Cal. App.2d 349, 358, 37 P.2d 99, 103, where the court states the proper rule as follows: 'While courts have condemned repeatedly attempts to bring before a jury the fact that insurance exists, their condemnation extends only to cases where there is an "avowed purpose and successful attempt" to bring the fact before the jury. It does not extend to cases where the information comes in, incidentally, in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated.'" It is not reasonable to assume that the verdict would have been any different if the witness had not made this statement.

[18] The same is true of the alleged misconduct of plaintiff's attorney. This consisted of the following: "Mr. Belli [questioning Dr. Smith]: Q. Do you know of a rule of the San Francisco Medical Society and the Alameda County Medical Society, with reference to one doctor testifying in a malpractice case against another doctor? A. Yes." Defendant's objection to this question was sustained by the court. Mr. Belli then asked: "That is the one with reference to the rule of the Medical Society, your Honor? The Court: Yes." Defendant on recross-examination asked Dr. Smith if he belonged to the Alameda County Medical Society. He replied that he had never joined any organization in his life. On further redirect examination the following occurred: "Mr. Belli: Q. Doctor, if you did belong to either of those societies, under the ethics of those societies, would you be permitted to testify in court against another doctor, under oath? A. No. Mr. Lamb: I object to the form of that question. The Court: I will sustain the objection. That clearly calls for his conclusion. Mr. Belli: I don't want to persist, your Honor, but in view of Mr. Lamb's questions, I would like to ask further if he is familiar with the rule of the County Medical Society. The Court: There is a way to prove that. You cannot prove it by hearsay. Mr. Belli: Q. Do you know the custom? A. Yes. Mr. Lamb: The same objection. The Court: Same ruling." Defendant did not request an instruction to the jury on the subject. "Where remarks of counsel are not assigned as error and where no request is made for an instruction to disregard them, usually the error, if any, cannot be urged on appeal. [Citing cases.]" Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 607, 111 P.2d 346, 352. Moreover, so far as the questions on further redirect examination are concerned, the only objection was as to the form of the questions.

[19] "There is another rule which has become well established that has an important bearing on whether or not we must regard the misconduct as prejudicial and a ground for reversal of the judgment. It is thus restated by the Supreme Court in Mudrick v. Market Street Ry. Co., 11 Cal. 2d 724, 81 P.2d 950, 957, 118 A.L.R. 533:

"'Respecting the misconduct of counsel occurring during the trial and while he was cross-examining witnesses, the defendants cite us to five separate occasions in which they claim that counsel transgressed the rules of propriety. * * * The situation before us is much like that which confronted this court in a former case in which it was said: "The trial court denied a motion for a new trial based upon the ground, among others, of misconduct of plaintiff's attorney. In doing this the court must be deemed to have concluded that no prejudice was suffered by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocations thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is properly due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here." LaFargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540.'" Wills v. J. J. Newberry Co., supra, 43 Cal.App.2d at pages 607-608, 111 P.2d at page 352. See also Cope v. Davison, 30 Cal.2d 193, 180 P.2d 873, 171 A.L.R. 667.

5. Instructions.

Defendant offered, and the court did not give, an instruction to the effect that questions of the jurors in voir dire concerning their possible interest in any insurance company was merely for the purpose of determining their frame of mind and that "no insurance company is a party to this action or interested therein." Defendant contends that the refusal to give this instruction was error. It has been held frequently that an instruction that no insurance company is a party to the action is a proper instruction where the jurors were asked concerning possible interest in such a company. However, in Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173, one of the cases cited by defendant, it was held that the failure to give the instruction is not error. The court said, 52 Cal.App.2d at page 264, 126 P.2d at page 178: "In each of the cited cases the trial court gave the instruction requested after certain claimed improper questions were propounded which subtly intimated the existence of insurance in the case. It was there held that the giving of the instruction was proper. In the instant case there was no showing that the questions were improper or that appellants were entitled to an instruction that no insurance company was a party to the action. [Citing case.] Appellants must show that they were prejudiced by the omission to give any instruction. [Citing cases.]"

[20, 21] The record in our case fails to show the examination of the jurors, so we do not know whether they were asked questions concerning insurance. But assuming that they were, the failure to give this instruction is not error particularly as the proposed instruction contained the phrase "or interested therein." The court would have no way of knowing whether an insurance company was interested in the case. To instruct to this effect, the court must assume a fact which may or may not be true. The proper instruction in this regard would be, in addition to stating that no insurance company is a party to the action, to call the jury's attention to the fact that they are not to speculate upon the question of whether defendant is or is not insured, as that question has no bearing whatever on any issue in the case. See Shriver v. Silva, 65 Cal.App.2d 753, 761, 151 P.2d 528.

[22] The second and third instructions complained of were to the effect that a surgeon is not a warrantor of cures, and that a mere mistake of error in judgment on defendant's part does not entitle plaintiff to recover if defendant exercised the ordinary care, learning and skill used by practicing surgeons in similar localities. Aside from the question of whether the word "cures" applies to the results defendant was attempting to effect in this case, these instructions are proper statements of the law. However, there was no error in failing to give them, as their subjects were well covered in the many other instructions given by the court. The court fairly and fully instructed at some length upon the standard of care required, the difficulties and uncertainties in the practice of surgery, and the fact that "no practitioner can be required to guarantee results."

Judgment affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SHENK, J., dissenting.

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SHOGREN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

No. 14216.

District Court of Appeal, First District, Division 1, California.

Aug. 17, 1949.

1. Divorce 🔑236

Husband and wife 🔑280

Where property settlement agreement providing for payment of support by husband to wife is actually incorporated in divorce decree, it is merged therein, and is enforceable only by proceedings on the decree, including such aids as execution, contempt, and other enforcement processes of the court together with an action on the decree.

2. Divorce ⚷236, 269(1)
Husband and wife ⚷280

If a property settlement agreement is merely referred to in divorce decree, or is approved by court but not actually made a part of decree, and performance of any of its provisions is ordered, provisions of agreement cannot be enforced by contempt proceedings, but if agreement is actually incorporated in decree, and decree orders performance of agreement, then agreement so incorporated is merged in decree and may be enforced only as an order of the court.

3. Divorce ⚷236, 269(1)

Where property settlement agreement which provided that it might be incorporated into any divorce decree was attached by staples to decree, but only reference to agreement was a statement in decree that it was adjudged that the agreement was ratified and made a part of the decree as though fully therein set forth, agreement did not become merged in decree, and provisions of agreement could not be enforced by contempt proceedings.

◆

Prohibition proceeding by Carl V. Shogren, petitioner, against the Superior Court of the State of California in and for the City and County of San Francisco and the Honorable Twain Michelsen, Judge thereof, respondents, to restrain the respondents from hearing an order to show cause why the petitioner should not be held in contempt for failing to pay alimony.

Peremptory writ issued.

Hugh K. McKevitt, Jack M. Howard, Thomas C. Vassar, San Francisco, for petitioner.

Wallace & Parker, Henderson R. Wallace, San Francisco, for respondent.

BRAY, Justice.

Petitioner seeks a writ of prohibition to restrain the superior court from hearing an order to show cause why he should not be held in contempt for failing to pay alimony.

The main question involved is whether the provisions of a property settlement agreement entered into between petitioner and his wife were made an enforceable portion of the interlocutory decree in the divorce action between them.

Facts.

Petitioner and his wife entered into a property settlement agreement which, among other things, provided that petitioner would pay her the sum of $150 per month for her support and maintenance. The agreement provided that if an action of divorce "be instituted by one party hereto against the other, then and in that event this agreement, subject to the approval of the Court having jurisdiction of the subject matter of the divorce action, may be incorporated into any decree of divorce which said Court may hereafter render." Thereafter she brought suit against him for divorce, and on March 17, 1938, obtained an interlocutory decree of divorce on the ground of extreme cruelty.

The decree contained no direct order for the payment of support. The only reference to the property settlement is as follows: "It is further ordered, adjudged and decreed that the certain property settlement agreement entered into between the parties hereto on the 5th day of March, 1938, a copy of which property settlement agreement is on file herein be and the same is hereby ratified and made a part of this decree as though the same were fully herein set forth." There is no filing mark on the agreement, but it appears to be attached by staples to the decree. A final decree of divorce was entered March 23, 1939, in which the reference to the agreement is in substantially the same language as that in the interlocutory decree.

On April 6, 1949, the former wife obtained from the superior court an order directing petitioner to show cause on April 14th why he should not be adjudged in contempt for "wilfully disobeying" the orders in the interlocutory and final decrees for payment to her of support. Her affidavit shows that petitioner is some $13,200 in arrears.

Was the Agreement Sufficiently Incorporated into the Decrees?

[1] Although some of the early decisions in this state indicated that when an agreement had been incorporated in a divorce decree, the wife could enforce the provisions for periodic payments either by contempt proceedings or by independent action on the agreement, it is now well settled that where the agreement for payment of support is actually incorporated in the decree, it is merged therein, has no longer any independent force, and is enforceable only by proceedings on the decree, "including such aids as execution, contempt, and other enforcement process of the court together with an action on the decree." Hough v. Hough, 26 Cal.2d 605, 614, 160 P.2d 15, 19; Howarth v. Howarth, 81 Cal.App.2d 266, 183 P.2d 670, and Price v. Price, 85 Cal.App.2d 732, 194 P.2d 101, are to the same effect. The Hough case is the leading one on the subject. It quotes from Holloway v. Holloway, 130 Ohio St. 214, 198 N.E. 579, 154 A.L.R. 439, as follows, 26 Cal.2d at page 609, 160 P.2d at page 17: "'A decree which incorporates an agreement is a decree of court nevertheless, and as soon as incorporated into the decree *the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. Once the contract is merged into the decree, the value attaching to the separation agreement is only historical.*' (Emphasis added.)" "Taken together the Hough case and the principal case establish the further principle that the obligations imposed by the agreement are enforceable solely by either an action on the decree, or by an action on the agreement, depending on the decree of the court tested by the standard established in the principal case." 21 So.Cal.L.Rev. 205.

Considerable confusion seems to exist among the authorities as to just what constitutes an incorporation of the agreement into the decree sufficiently to merge the agreement with the decree, so as to make it enforceable by proceedings on the decree rather than on the agreement, that is, the *standard of test* mentioned in the above quoted portion of the Southern California Law Review. No clear cut statement has been made as to the test to be applied. However, an examination of the authorities shows that, although not clearly stated in any of them, with the possible exception of Price v. Price, supra, 85 Cal.App.2d 732, 194 P.2d 101, the courts have practically said that to be merged in the decree the agreement must not only be incorporated therein, but that the decree must actually order the payment of money provided by the agreement.

The first case on the subject was Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252, in which the agreement contained a provision that it was to be embodied in any divorce decree that might follow, and then actually was inserted verbatim in the decree. The court held that thereby it was merged in the decree. Then came Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494, in which the decree merely adjudged that the property settlement agreement "be, and the same is hereby, made a part and portion of this interlocutory judgment," 103 Cal.App. at page 362, 284 P. at page 495, and it was held that such reference constituted only a matter "of identification of a certain property settlement, and in nowise state[s] any order for the payment of any sum." 103 Cal.App. at page 363, 284 P. at page 495.

Next was Ex parte Weiler, 106 Cal.App. 485, 289 P. 645, where the interlocutory decree provided: "It is further ordered, adjudged and decreed that this court does hereby approve and confirm and make a part of this decree the provisions of that certain property settlement agreement made and entered into between the parties hereto and executed by them on the 15th day of May, 1928." 106 Cal.App. at page 487, 289 P. at page 646. The court held that by this language "What was formerly merely an agreement of the parties became a part of the judgment of the trial court," 106 Cal.App. at page 488, 289 P. at page 646, basing its judgment on the Tripp case, supra, in which, however, the agreement had actually been inserted in the decree. Then came Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749, in which the decree recited that the agreement dated a certain date was "confirmed, ratified and approved," 128 Cal.App. at page 364, 17 P.2d at page 749, but in no way made a part of the decree. It was there held that the agreement was no part of the decree. It distinguished the Weiler case, supra, by saying, 128 Cal.App. at page 367, 17 P.2d at page 750: "There the agreement itself expressly provided that it should be made part of the judgment of divorce, and in accordance therewith plaintiff in her complaint expressly requested the court to approve and confirm said agreement; and pursuant to such request it was expressly declared in both decrees that said agreement was made part thereof; all of which shows a clear intention on the part of the parties themselves as well as the court to place 'the compelling power of the court behind its every covenant' Tripp v. Superior Court, supra; while in the present case the agreement contained no such provision, the complaint made no such request, and although the agreement was ratified and confirmed by the court, neither decree by express provision or otherwise made the agreement a part thereof."

Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536, followed, in which the trial court "made an order which purported to amend the interlocutory decree by substituting the provisions of the later contract, and entered a final decree of divorce in which it incorporated the second agreement by reference and declared its provisions to be binding. The court did not, however, order the payment of any sums of money, and in view of the pleadings and all the circumstances of the case the amended interlocutory decree, if valid, could not be enforced by the process of the court." 3 Cal.App.2d at page 685, 40 P.2d at page 540. It was held that such incorporation was not sufficient to merge the agreement in the decree. The court summed up the rule in California as follows (although the cases cited by it do not fully support such rule): "Where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252, 253; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645, 646. But if the agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement or even by incorporating it in the decree, order the performance of the contract. Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494, 495; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749; De Haven v. Superior Court, supra [114 Cal.App. 253, 300 P. 95]."

Next was Petry v. Superior Court, 46 Cal.App.2d 756, 116 P.2d 954, 956, where, after the divorce was commenced, a property settlement agreement was entered into. Plaintiff, at a default hearing, requested that it be incorporated in the decree. The decree provided that it was approved and "'made a part of this decree in all its terms, provisions and conditions.

"'*It is further ordered that the plaintiff and defendant fully perform their respective rights and duties vested in and imposed upon them under and by virtue of the property settlement agreement* heretofore made on the 22nd day of June, 1935, which said property settlement agreement has been exhibited during the course of the hearing had in this matter, introduced into evidence, and incorporated into this order.'" 46 Cal.App.2d at page 758, 116 P.2d 954. It was held that that was a sufficient incorporation to merge the agreement into the decree.

In Miller v. Superior Court, 9 Cal.2d 733, at page 735, 72 P.2d 868, 870, the agreement was made a part of the decree by reference only, but the court made an order that defendant pay plaintiff for her maintenance the sum of $150 per month "pursuant to said agreement." It was held that the order of payment was in addition to making the agreement a part of the decree by reference, and could be enforced by contempt proceedings.

Then came Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249, in which, in the interlocutory decree, the property settlement agreement was approved and made a part of the decree, and certain provisions of the agreement, including the clause providing for monthly payments to the wife, were set out in full. It was held that this was sufficient to allow enforcement by the contempt proceedings. The court expressed the rule in an entirely different manner from the way it was expressed in the above quotation from Baxter v. Baxter, [209 P.2d 111]. It said, 16 Cal.2d at page 620, 107 P.2d 249, 250: "If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not actually made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the court and may be enforced as such. Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868."

Following the Lazar case came Plummer v. Superior Court, 20 Cal.2d 158, 124 P.2d 5, in which the property settlement agreement was ratified, approved and confirmed in the decree and was annexed to the interlocutory decree. The court reviewed all of the above cases, and then said, 20 Cal.2d at page 163, 124 P.2d at page 8: "Whatever may have been the rule before the Lazar case, it is now settled that in order to authorize the enforcement of the provisions of a property settlement agreement by a contempt proceeding, the court must order the performance of such provisions." It then held that because of the absence of an order for the payment of the moneys specified in the agreement, contempt proceedings would not lie.

Tieso v. Tieso, 67 Cal.App.2d 872, 155 P.2d 659, was an action brought to reform a property settlement agreement which had been ratified in the interlocutory decree but not incorporated therein. In holding that it was not a part of the decree the court said, 67 Cal.App.2d at page 874, 155 P.2d at page 661: "Where the decree merely approves the agreement without being in such form as to justify the construction that it orders the performance of its terms the only method of enforcing the agreement is by an independent action in contract. [Citing cases.]"

The next case was Hough v. Hough, supra, 26 Cal.2d 605, 160 P.2d 15. There the interlocutory decree provided for the payment of support to the wife and the performance of some of the other terms of the agreement. "It closes with the statement that the 'above provisions are in accordance with the property settlement filed herein, which said property settlement is hereby approved by the Court.'" 26 Cal.2d at page 607, 160 P.2d at page 16. In reversing a judgment of the trial court in an action for unpaid support based upon the agreement, the court held that the agreement was merged in the decree. It approved the rule above quoted from the Lazar case, and then, contrary to the holding in some of the above mentioned cases, stated that, on the question of merger of the agreement into the decree, it was "not vital" that the agreement contain a provision that it should be included in the decree.

Following the Hough case came Howarth v. Howarth, supra, 81 Cal.App.2d 266, 183 P.2d 670, 672. This was an action on the property settlement agreement. The defense claimed that the agreement had been merged in the interlocutory decree of divorce. The decree merely provided that the agreement "attached to the complaint on file herein" was confirmed and approved. The court, upon the authority of the Lazar and Hough cases, held that the agreement had not been merged in the decree because the decree itself imposed no duty or obligation on the husband to pay the support mentioned in the agreement.

Finally came Price v. Price, 85 Cal.App. 2d 732, 194 P.2d 101, which was an action brought upon a property settlement agreement. The exact wording of the divorce decrees in the action which followed the making of the agreement is not set forth. However, the question is stated in the following language of the opinion, 85 Cal. App.2d at page 734, 194 P.2d at page 103: "* * * the complaint, referring to both divorce decrees, states that the agreement 'was, by order of the court, made a part of its decree', and it is with the import of these words that we are concerned in passing upon the propriety of this judgment on the pleadings." After referring to the Hough and Holloway cases, supra, the court said, 85 Cal.App.2d at page 735, 194 P.2d at page 103: "It will be noted from this language that the determining factor is whether the agreement is *incorporated* into the decree and made a part thereof rather than being made a part of the decree by *reference*. Obviously there is a difference for if there is an actual *incorporation* of the agreement into the decree, the decree standing alone then carries within itself the complete measure of the rights and obligations of the parties. In the court's files, the decree or judgment itself supplies all the information necessary to whomsoever may be interested. If recorded it announces to the world the respective interests of the parties in any property involved.

"If on the other hand the agreement is *made a part of the* decree by *reference* only the above is not true. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree or judgment alone." Then, referring to the above quotation from the Lazar case, the court says, 85 Cal.App.2d at page 736, 194 P.2d at page 104: "The plain import of this language seems to be in sensible conflict with the rule announced in the comparatively recent case of Baxter v. Baxter, 3 Cal.App. 2d 676, 40 P.2d 536, 539, where it is said: '* * * an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily *or by reference.*' (Italics added.) The cases of Tripp v. Superior Court, 61 Cal.App. 64 [214 P. 252], and Ex parte Weiler, 106 Cal. App. 485, 289 P. 645, are cited as authority for this statement, but an examination of those cases discloses that the Tripp case does not sustain such a rule, and that it is cited as sole authority for the pronouncement of such a rule in Ex parte Weiler. In the Tripp case the agreement was set out *in full* in both the interlocutory and final decrees and there is no statement in the opinion concerning any situation involving an incorporation by reference." The court holds further, 85 Cal.App.2d at page 738, 194 P.2d at page 105: "It would seem to logically follow then that if a property settlement is made a part of a divorce decree by mere reference it is not incorporated into the decree within the meaning of that term as it is used in the Supreme Court cases of Hough v. Hough, supra, and Lazar v. Superior Court, supra, and in the District Court of Appeal case of Schnerr v. Schnerr, supra. That consequently contempt proceedings are unavailable to assist in its enforcement and that resort may be had only to 'the usual contract remedies'." As it was impossible to tell from the record whether the agreement was made a part of the divorce decrees by *actual incorporation,* "that is by being copied in the decree or by being attached thereto as an integral part thereof or whether it was 'made a part' thereof by merely referring to it," 85 Cal.App.2d at page 739, 194 P.2d at page 105, the case was remanded to the trial court for further proceedings.

[2] In spite of the confusion that exists in the authorities, the later decisions have fairly, although perhaps vaguely, crystallized the rule. A fair summation of the rule as it exists today is the following: (1) If a property settlement agreement is merely referred to in the divorce decree, or approved by the court but not actually made a part of the decree and the performance of any of its provisions ordered, then the provisions of the agreement cannot be enforced by contempt proceedings. (2) If the agree-

ment or any of its provisions are actually incorporated in the decree and the decree orders the performance of such agreement or such provision or provisions, then the agreement or the provision or provisions so incorporated are merged in the decree and may be enforced only as the order of the court.

[3] Applying these tests to the decrees in our case, we find that the agreement did not become merged therein. While the decrees made the agreement parts thereof by reference and the agreement was physically attached to the interlocutory decree, there was no order made in either decree for the performance of the provisions of the agreement. Therefore, enforcement by contempt proceedings does not lie.

Res Judicata.

Plaintiff wife brought certain actions and obtained judgments upon the agreement which judgments petitioner contends constituted judicial determinations that the agreement never was merged in the decree and the question is, therefore, res judicata. In view of our holding that as matter of law the agreement did not become merged in the decree, it is unnecessary to consider the effect of these other judicial proceedings.

Let the peremptory writ issue as prayed.

PETERS, P. J., and WARD, J., concur.

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93 Cal.App.2d 315

SMYTHE et al. v. SCHACHT et al.

Civ. 17032.

District Court of Appeal, Second District,
Division 1, California.
Aug. 15, 1949.

Rehearing Denied Aug. 31, 1949.

Hearing Denied Oct. 13, 1949.

1. Trial 🔑382

Trier of facts can resolve conflicts in evidence whether conflict is between witnesses on one side or on opposite sides.

2. Appeal and error 🔑1011(1)

District Court of Appeal will not disturb a finding of trial court supported by substantial evidence, even though evidence produced by prevailing party is conflicting.

3. Appeal and error 🔑994(3)

A reviewing court may not deem as unworthy of belief evidence which a trial court, having seen the parties and observed their demeanor as witnesses, has accepted.

4. Animals 🔑74(5)

Evidence established that minor plaintiff who went on premises of defendant to greet defendant, and defendant's son, who was a playmate of plaintiff, a few minutes after return of defendant and defendant's family from a vacation trip, and was bitten by defendant's dog when plaintiff remained in defendant's yard and played with dog after defendant's family went into house, was on defendant's premises with defendant's implied invitation and was therefore lawfully on premises. Gen.Laws, Act 384a.

5. Animals 🔑71

In adopting statute making owner of dog liable for damages suffered by a person bitten by dog, legislature did not intend to make liability of owner absolute and render inoperative principles of law such as assumption of risk or wilfully inviting injury. Gen.Laws, Act 384a.

6. Negligence 🔑105

The doctrine of assumption of risk presupposes existence of a dangerous situation or condition known to, or which reasonably should have been known to, the injured party, who nevertheless chooses to enter upon or remain within area of risk.

7. Animals 🔑71

A minor while playing with a neighbor's dog, was required to exercise that degree of care to prevent being bitten and scratched by dog, which would be ordinarily exercised by children of his age. Gen. Laws, Act 384a.

8. Animals 🔑74(8)

Fact that minor who was bitten by defendant's dog while playing with dog had been bitten by other dogs on five previous occasions did not require holding as a matter of law that previous bites should have warned minor that dogs were potentially dangerous, and that minor assumed risk of being bitten by dog of defendant. Gen.Laws, Act 384a.

9. Appeal and error ⚷1011(1)

Before appellate court can say that as a matter of law a party assumed risk from which injury ensued, evidence must be without substantial conflict in reference to matter of knowledge or means of knowledge of existing danger, or that danger was obvious.

10. Animals ⚷74(5)

Evidence did not establish that plaintiff minor who was bitten by defendant's dog while plaintiff was playing with dog invited the bite, and thereby assumed risk, so as to preclude recovery from defendant for injuries resulting from bite. Gen.Laws, Act 384a.

11. Appeal and error ⚷1013

A finding of value or amount of damages is ordinarily so much a matter within exclusive province of jury that it will not be disturbed by reviewing court, especially where verdict has been approved by trial court.

12. Appeal and error ⚷1013

The power of appellate court to reduce or reverse judgments on ground that they are excessive, exists only when excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption, on part of jury.

13. Damages ⚷132(1)

$1,500 for injuries caused by dog bite and scratches, resulting in permanent scars on face of minor, and which injuries caused nightmares, nervousness and a condition of irritability, was not excessive. Gen.Laws, Act 384a.

DORAN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Walter H. Odemar, Judge.

Action by Martin O. Smythe, a minor, by Robert M. Smythe, his guardian ad litem, against Daniel V. Schacht, Jane Doe Schacht, Doe One, for injuries resulting when minor was bitten by a dog belonging to defendants. From an adverse judgment, Daniel V. Schacht and Rae Schacht (sued as Jane Doe Schacht), appeal.

Judgment affirmed.

Sam Shayon, Los Angeles, for appellants.

Clayton B. Thomas, Los Angeles, for respondents

WHITE, Presiding Justice.

This action was instituted on behalf of Martin O. Smythe, ten-year-old son of his guardian ad litem, for damages predicated upon injuries allegedly sustained by said minor child as a result of his being attacked and bitten by a German shepherd dog belonging to defendants.

The first cause of action in plaintiffs' complaint was based upon claimed negligence of defendants and the second cause of action was founded upon the so-called "Dog Bite Statute", Deering's General Laws, Act 384a, Stats.1931, p. 1095.

The second cause of action, among other things, alleged that "said minor child was in and on the private residence property of defendants upon the invitation of defendants."

Following trial without a jury the court made its findings of fact, conclusions of law, and entered judgment against plaintiffs on the first cause of action based on negligence, but awarded the minor plaintiff the sum of $1,500.00 on the second cause of action predicated on the foregoing statute. From such judgment defendants prosecute this appeal.

In view of appellants' contention that the evidence is insufficient to support the findings and judgment it becomes necessary to set forth the evidence. This we are required to do in a light most favorable to respondents. The factual background which gave rise to this action may be thus epitomized: Appellants, husband and wife, own their home in the city of Los Angeles. Their garage is located at the rear of the lot. Immediately adjoining the garage is a fenced-in enclosure or kennel with a fence about five feet high with a door leading from the enclosure into the garage. Within this enclosure appellants kept two German shepherd dogs, one a puppy five months old, and the other called Roguey, the animal involved in this case, and which dog was three years old at the time involved in this litigation.

The appellants have five children ranging in ages from two and one half to seventeen years. One of such children, Walter, was ten years old, the same age as the minor respondent herein, and had been a playmate of the latter for some considerable time. Both of the foregoing dogs were owned and kept by appellants since the animals were born.

The occurrence here in question happened on September 11, 1947. It appears from the record that appellant Mrs. Schacht and four of her children, including Walter, respondent's playmate, had been away on vacation since July 5, 1947. On the morning of September 11th, appellant husband and his oldest son Richard went to the railroad station in the family station wagon to meet the returning members of the family, and about 9:00 a. m. brought them to the family residence. He drove the station wagon up the driveway on the left side of the house and stopped a few feet in front of the garage to discharge the family and unload the baggage. Appellant husband then opened the garage doors and released the two dogs for the purpose of "greeting the whole family."

Some five minutes later the minor respondent proceeded up the driveway on his bicycle, dismounted and joined in greeting the family and particularly his playmate, Walter. Appellant Daniel V. Schacht greeted the boy. Shortly thereafter, all of the Schacht family with the exception of appellant husband went into the house leaving the latter outside to care for the baggage. Respondent minor also remained in the yard and began playing with the dogs.

As to what thereafter transpired while he was playing with the older dog, Roguey, the minor respondent testified:

"Q. And then just tell the court, Martin, what happened? A. Well, I was holding his head, looking at his markings, and he jumped up and bit me.

"Q. And were you patting his head at all? A. Yes.

"Q. And did he growl before he jumped up? A. I didn't hear him growl. I just heard him and he lunged at me.

"Q. He made a lunge at you. How were you standing? A. I was crouched.

"Q. Kind of crouched down? A. Yes.

"Q. And it was then that Roguey lunged at you? A. Yes.

"Q. And when he lunged at you was he on all four legs or did he get up on his hind legs? A. He had his two front paws on my face and his mouth on my—in the middle of my face, and his back paws on the ground. * * *

"The Witness: He had it like this. (Indicating.) He had it come at me.

"Mr. Thomas: For the record may we indicate that the boy is holding both lower portions and sides of his face with his hand.

"The Court: Making a motion which would indicate that the front part of the face was actually in the mouth of the dog."

Appellant Mr. Schacht testified that the minor respondent was "playing with the dogs" and

"Q. And did anything particular attract your attention to Martin or the dogs? A. Yes.

"Q. What did you hear or see? A. Well, I heard the dog growl and that brought my attention to them and I looked, I turned around.

"Q. And what did you see? A. I saw Martin has his back towards me, and I saw his hands outstretched, and the fore part of the dog's face or shoulders, in that general vicinity, and the dog had put his paws up against Martin's face.

"Q. Was Martin standing erect when you turned around, or was he bent over? A. No, he was in a crouch."

There is some conflict in the evidence as to exactly how the boy was injured but that his injuries were occasioned by the dog either biting or scratching him is manifest. There was testimony that on five previous occasions the minor respondent had been bitten by other dogs.

[1-3] That there were some inconsistencies and discrepancies in the testimony of the minor respondent and his mother must be conceded. However, it is within the province of the trier of fact to resolve conflicts in evidence whether the conflict is between witnesses on one side or on opposite sides. Hence, this court will not disturb a finding where there is any substantial evidence supporting it, even though there is a conflict in the evidence produced by the prevailing party. A reviewing court may not deem as unworthy of belief evidence which a trial court, having seen the parties and observed their demeanor and manner as witnesses has accepted.

The so-called Dog Bite Statute, supra, insofar as here pertinent provides as follows: "The owner of any dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness. A person is lawfully upon the private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America, or when he is on such property upon the invitation, expressed or implied, of the owner thereof."

Appellants first earnestly urge that the findings of fact are unsupported by the evidence which they assert shows, as a matter of law, that the minor respondent was not on the premises upon their express or implied invitation.

[4] That the minor respondent in the instant case was upon appellants' property with their implied invitation seems irrefutable. The evidence is without conflict, that on frequent occasions, prior to the departure of certain of appellants' family on vacation, the minor respondent had visited in the home and upon the premises of the former. In this connection appellants in their brief state, "On all of these prior occasions it could be said that he had been invited expressly or impliedly *and on all of said prior occasions he entered the premises to play with the infant children of the defendants by the regular and customary means of access provided, through a door or porch entrance on the south side of the house.*"

That on the occasion of his injury the minor respondent used the driveway on the north side of the house instead of entering through a door or porch on the south side is unimportant. And appellants fail to point out any evidence distinguishing the character of the previous invitations from that extended on the day of the injury. The question is, was minor respondent lawfully upon the property of the dog owners at the point where the injury occurred? We are satisfied that he was.

Appellant Mr. Schacht testified that he had known respondent minor for approximately a year and a half. That the latter was a playmate of one or more of the former's children, that prior to the date of injury he had seen the minor respondent at the Schacht home "quite frequently * * * well, three, four times a week, perhaps." With reference to the visit of the minor respondent on the morning of the injury, appellant Mr. Schacht testified as follows:

"Q. Did Martin Smythe, the boy involved in this case, come to your home that morning? A. Yes, sir.

"Q. About how soon after you drove to the rear of your home and came to a stop in your car? A. Approximately five minutes.

"Q. And where was he when you first saw him? A. Coming into the driveway on his bicycle.

"Q. He rode the bike in, did he? A. Yes, sir.

"Q. And did you exchange greetings or say something to each other? A. Well, I imagine we greeted one another.

"Q. Do you recall what was said, approximately? A. 'Hello, Martin.'

"Q. What did he say to you? A. 'Hello.'

"Q. Was anything further said at that time? A. No, except that he did greet Walter and Walter greeted him.

"Q. Walter was outside at that time? A. Yes, out in the yard. * * *

"Q. A lot of children come to your house a lot of times, don't they? A. Yes. All my children have playmates and they all visit the house.

"Q. And you have had at regular intervals during that time various meetings in connection with the activities of the children? A. Yes."

The case of Fullerton v. Conan, 87 Cal. App.2d 354, 197 P.2d 59, is of little if any comfort to appellants. In the cited case the evidence clearly showed that the injured minor made an excursion beyond the limits of the invitation extended her and her mother. No such situation is here involved. No restriction or limitation either by word or conduct had ever been placed upon the use, visitations and enjoyment of the premises here in question by the minor respondent, nor is there any showing that said minor entered upon the premises or any part thereof without observing the customary formalities of a social visit. Fullerton v. Conan, supra.

In Section 167 of the Restatement of Torts, Comment d, we find the following statement: *"Consent by conduct from relationship or by custom.* The possessor's conduct, whether of act or omission, may constitute consent. Thus, the possessor's failure to object to a particular entry, or his acquiescence in similar entries on previous occasions, may lead the actor reasonably to believe that the possessor is willing that he shall enter the land * * * *Consent to enter on land in the possession of another may be derived from the relationship of the parties, as in the case of intimate friends or social or business visitors* * * *" (Emphasis added.)

Under the facts present in the case at bar we are persuaded that the finding of the trial court that the minor respondent was lawfully upon appellants' property at the point where the injury occurred is amply supported by the evidence.

Appellants next insist that as a matter of law, the evidence in the case amply supports the conclusion that the infant plaintiff failed to exercise ordinary care and caution, that his own acts contributed to his injuries and that his injuries were caused and provoked by his own misconduct. That therefore, the findings of fact to the contrary are erroneous.

[5] In these contentions appellants cannot be sustained. We entertain no doubt that in adopting the statute here in question the legislature did not intend to make the liability of the owner absolute and render inoperative certain principles of law such as assumption of risk or wilfully inviting injury, which over a long period of time have been established in our system of jurisprudence. While the Dog Bite Statute does not found the liability on negligence, good morals and sound reasoning dictate that if a person lawfully upon the portion of another's property where the biting occurred should kick, tease, or otherwise provoke the dog, the law should and would recognize the defense that the injured person by his conduct invited injury and therefore, assumed the risk thereof.

In Vol. 3, Corpus Juris Secundum, Animals, § 150, page 1254, it is said: "Contributory negligence will defeat recovery in an action for injuries caused by a domestic animal where negligence is the gist of the action; but, where it is not, more than ordinary contributory negligence is necessary to relieve the defendant from liability."

And on page 1255 of 3 C.J.S., § 150, we find the following: "It must be established that the injury is attributable not to the keeping of the animal but to the injured party's voluntary act in putting himself in a way to be hurt, knowing the probable consequences thereof so that he may fairly be deemed to have brought the injury on himself; but if this is shown recovery will be defeated."

[6-10] The doctrine of assumption of risk presupposes the existence of a dan-

gerous situation or condition known to, or which reasonably should have been known to the injured party, who nevertheless chooses to enter upon or to remain within the area of risk. Respondent minor herein was required to exercise that degree of care which is ordinarily exercised by children of his age (ten years), mental capacity and discretion. Hernandez v. Murphy, 46 Cal.App.2d 201, 211, 115 P.2d 565. We are not prepared to agree with appellants' contention that because the minor respondent had been bitten by other dogs on five previous occasions it must be held as a matter of law that such experiences should have warned him "that dogs were potentially dangerous aside from warning him not to pat, handle and touch them and crouch down with his face close to the dog's face." In view of appellants' own evidence and contention that the dog here in question had never manifested any ferocious tendencies it is difficult to follow their argument that the minor respondent was expected to anticipate a danger that the dog in question had malice in his heart and mayhem in his teeth. The record is totally barren of any evidence that the minor respondent did anything to provoke the animal or to put himself in a way to be hurt, thereby warranting the reasonable inference that by his conduct he invited the injuries and thereby assumed the risk. The doctrine of assumption of risk is surrounded by the stringent boundary that, before an appellate court can say that as a matter of law a party assumed the risk from which the injury ensued, the evidence must be without substantial conflict in reference to the matter of knowledge or means of knowledge of the existing danger, or that such danger was obvious. No such situation is here present.

Finally, appellants vigorously contend that in the light of the evidence in this case the damages awarded in the sum of $1,500.00 are excessive.

[11] The rule in this regard is thus stated in Hallinan v. Prindle, 17 Cal.App.2d 656, 671, 672, 62 P.2d 1075, 1082: "'A finding of value or the amount of damages is ordinarily so much a matter within the exclusive province of the jury that it will not be disturbed by the reviewing court, and this is especially true where the verdict has been approved by the trial court.' 4 Cor.Jur., Appeal and Error, § 2846, p. 869. This general rule has long been followed in this state. Bartlett v. Hogden, 3 Cal. 55; Douglas v. Berlin Dye Works & Laundry Co., 169 Cal. 28, 145 P. 535.

[12] "The power of the appellate court to reduce or reverse judgments on the ground that they are excessive exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush passion, prejudice or corruption on the part of the jury. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.,N.S., 687, Ann. Cas.1912C, 50; Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 716, 106 P. 83; Diller v. Northern California Power Co., 162 Cal. 531, 123 P. 359, Ann.Cas. 1913D, 908; Zibbell v. Southern Pac. Co., 160 Cal. 237, 116 P. 513; Swain v. Fourteenth Street R. Co., 93 Cal. 179, 28 P. 829; Lynch v. Southern Pac. Co., 24 Cal. App. 108, 140 P. 298. Subject to this limitation the damage resulting from pain, suffering, or injuries of the nature of that here complained of, being incapable of exact measurement, its compensation in terms of money is necessarily only approximate, and must be left to the jury to determine."

In other words, it is not a question of what damages this court would award or whether we consider them high, but whether this court can say that the damages are so excessive as to suggest passion or prejudice.

[13] There was testimony in the record that the minor respondent, a child ten years old, was attacked by a German shepherd dog weighing approximately sixty pounds; the dog bit the boy in the face, in the eyelids, and on the chin, knocking him to the ground in the attack; the dog scratched the top of the right eye of the minor resulting in scars which still remained at the time of the trial, one on the right side of the face about two inches long and consisting of four separate and distinct parallel lines on the face; a scar

on the left side of the face near the eye, consisting of a series of parallel lines about one inch long. Following the attack, the minor respondent's face was washed off at the home of the appellants and the appellant Mr. Schacht took the minor respondent to the latter's home. His mother then took the boy to Sante Fe Hospital where he was given a local anaesthetic. The gashes in his face were closed with four sutures on his left cheek and two sutures on the right. The boy was very much exhausted and was taken to his home by his mother after having received surgical care at the hospital. The attack occurred on a Thursday or Friday and the boy returned to school the following Monday. However, he was given continued medical attention, including rabies shots, and treatment for the purpose of loosening the skin at the outer point of the right eye where the skin was tightening. The medical treatment continued from September 11th to November 14th. The minor respondent's mother was an experienced nurse and was able herself to furnish some of the massage and general care required for her son's treatment. There was testimony that the boy suffered from nightmares following the attack, awakened at night and cried out in his sleep. His tendency to stutter when speaking was aggravated immediately after the accident and this condition continued for about four to six months. The right eye was closed and the boy's face quite swollen after his encounter with the dog. Both sides of his cheeks were discolored from the pressure of the dog's jaws. The swelling continued about three days and there was a hemorrhage in the right eyeball for seven or eight days. The physician who attended the boy expressed a definite opinion that the injuries to the face were the result of dog bite. It was also the opinion of this physician that the attack by the dog might well be expected to account for the nightmares, the aggravation of the tendency to stutter, nervousness, and a condition of irritability. Injury to the soft tissue at the outer end of the right eye resulted in a "dimple in the soft tissues." A physician testified definitely that the scar on the left cheek was permanent as was also the scar on the right cheek consisting of the ridging. While this physician expressed the opinion that the scars "within years * * * may be less noticeable than they are right now * * * I think they are likely to remain to a lesser degree * * *" The doctor stated that surgical treatment for the removal of the scars was not advisable for the reason that surgical treatment would not be likely to remove them.

It is true as contended by appellants that there is testimony that an injury received by the boy when struck by a football some five days after the dog biting caused an aggravation of the condition of his left cheek and made the scar wider, but the minor's attending physician testified, "The only way that it could have affected it in any way at all would have been to delay healing very slightly and to make the scar perhaps a tiny bit wider. It did not increase the length at all." As to the evidence concerning nightmares suffered by the boy and claimed aggravation of his stuttering, the most that can be said is that a conflict existed, and this was resolved against appellants by the trier of fact. The same is true of other testimony relative to the minor respondent's condition of mind and body before and after the dog bite injury and as to the claim that the photographs taken shortly after the injury showing the condition of the boy's face after the accident "palpably showed dirt and other marks."

We think it quite clear from a reading of the record that it may not be said that the judgment of the court indicates at first blush or at all that the trial judge was influenced by passion or prejudice in the amount of damages awarded.

The judgment is affirmed.

DRAPEAU, J., concurs.

DORAN, J., dissents.

93 Cal.App.2d 365

PEOPLE v. CHAPMAN et al.

Cr. 2579.

District Court of Appeal, First District,
Division 1, California.

Aug. 17, 1949.

Hearing Denied Sept. 15, 1949.

Marian Del Chapman and Jack Lester Chapman were charged with burglary of the first degree. Jack Lester Chapman was convicted in the Superior Court for Alameda County and from the judgment and an order denying a new trial, he appealed.

The District Court of Appeal, First District, Ward, J., affirmed the judgment and order, holding inter alia, that the testimony of alleged accomplices was sufficiently corroborated to sustain conviction and that no prejudicial error occurred at trial or in holding defendant for trial. And in denying motions of defendant for change of venue.

1. Criminal law ⚷238

In a preliminary examination, defendant need not be proved guilty beyond a reasonable doubt and "reasonable or probable cause" required to uphold commitment of a defendant exists if there is sufficient proof to make it reasonable to believe that defendant is guilty of offense charged.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Reasonable or Probable Cause".

2. Criminal law ⚷238

Evidence adduced at preliminary hearing was sufficient to justify commitment of defendant for trial on charges of first-degree burglary. Pen.Code, §§ 460, 995.

3. Criminal law ⚷227

That justice's court denied defendant's motion for change of venue made at preliminary hearing shortly after motion was made did not show abuse of discretion, particularly where defendant was not on trial before justice's court.

4. Criminal law ⚷1166(4)

Denial of motion for change of venue on ground that representatives of sheriff's office were prejudiced against defendant was not prejudicial error.

5. Criminal law ⚷126(1)

Newspaper clipping which referred to a convict couple being returned did not entitle defendants to change of venue on ground that they could not be fairly tried in county, in absence of evidence that newspaper report was read by any member of jury or caused any such member to be prejudiced against defendants.

6. Criminal law ⚷124

Denial of motion for change of venue on ground that public defender's office of county was prejudiced against defendant and therefore he was compelled to defend himself was not error, where court after denying motion announced its willingness to appoint outside attorney to represent defendant but defendant expressed preference to represent himself.

7. Criminal law ⚷575

Evidence sustained trial court's conclusion that information pending against one previously convicted was brought to trial within 90 days after delivery to district attorney of written demand for trial as required by statute. Pen.Code, § 1381.

8. Criminal law ⚷665(1)

Refusal to exclude witnesses was discretionary with trial court.

9. Criminal law ⚷665(2)

Permitting at least one peace official to remain in court during presentation of evidence, notwithstanding rule to exclude witnesses, is common practice.

10. Criminal law ⚷665(2)

Excepting deputy sheriff from order excluding witnesses from courtroom was not abuse of discretion, particularly where record indicated defendant merely wished such witness excluded during opening statement and defendant's request that he be excluded while specified witnesses for defendant testified, was granted.

11. Criminal law ⚷511(6)

Finding of loot taken from burglarized homes in defendant's possession and other evidence sufficiently corroborated testimony of alleged accomplices so as to sustain conviction of first-degree burglary. Pen.Code, § 460.

12. Criminal law ⚷511(2)

The testimony of accomplice is alone sufficient to establish commission of crime charged and such testimony need not be corroborated as to all of the elements of such offense, the law requiring only some other evidence which tends to connect defendant with commission of the offense or from which such connection is reasonably inferable.

13. Criminal law ⚷1169(11)

Admitting evidence of six burglaries in addition to those for which defendant was on trial, showing a plan and pattern of breaking into uninhabited homes and ransacking them, was not reversible error. Pen.Code, § 460.

14. Criminal law ⚷1036(1)

Defendant, having made no objection to such testimony at trial, could not object for the first time on appeal to admission of testimony concerning six burglaries in addition to those for which he was on trial. Pen.Code, § 460.

15. Criminal law ⚷1036(2)

Defendant, having made no objection to such testimony at trial, could not object for the first time on appeal to admission of testimony concerning statements made by codefendant during interview with assistant district attorney, at which defendant was not present, offered for purpose of impeaching codefendant's testimony.

16. Criminal law ⚷444

Testimony identifying property depicted in photograph as belonging to parties whose homes were allegedly burglarized by defendant and evidence that apartment in which such property was found was defendant's apartment as well as that of his wife afforded sufficient foundation for admitting photograph in evidence in prosecution for first-degree burglary, though witness who identified photograph referred to the property as found in apartment of defendant's wife. Pen.Code, § 460.

17. Criminal law ⚷1037(1), 1044

Permitting district attorney, in explaining to jury his own disadvantage in prosecuting defendant who represented himself at trial, to characterize defendant as a criminal and comment upon his personality and shrewdness was not prejudicial error, in absence of objection to or motion to strike such argument.

18. Criminal law ⚷780(3)

Instruction to view testimony of accomplice with distrust, not arbitrarily disregarding it, but giving it the weight to which it was found to be entitled after examining it with care and caution and in the light of all the evidence, was not objectionable as violating rule that such testimony is not to be judged by the same standard as testimony of other witnesses.

19. Witnesses ⚷317(2, 3, 4)

Where a witness willfully testifies falsely on a material point with design to deceive, all his testimony must be treated with distrust and rejected unless jury is convinced that he has stated the truth in other particulars.

20. Criminal law ⚷829(13)

Refusal to instruct that prior convictions should not be used to consider it probable defendant was guilty was not error where court instructed that defendant could not be convicted on mere suspicion or probability of guilt and that prior conviction of felony may be shown by examination of a witness and nothing in the record indicated that jury considered prior convictions.

21. Criminal law ⚷742(2), 780(1)

Where question of accomplice arises in trial of a criminal case, court should generally instruct jury upon the law of accomplices and leave the question of whether the witness was an accomplice for decision of the jury as a matter of fact.

22. Criminal law ⚷780(1, 3)

Where a witness for the prosecution is as a matter of law an accomplice, court should so charge and need not define an accomplice.

23. Criminal law ⚷1173(2)

Where court instructed upon the law of accomplices and the necessity for corroboration of their testimony and left to jury the question of whether any witness in the case was an accomplice, failure to instruct that a particular witness for prosecution was an accomplice was not prejudicial error.

24. Criminal law ⚿780(2)

Where evidence did not establish as a matter of law that a particular witness for prosecution was an accomplice and court instructed on the law of accomplices and left to jury the question of whether any witness in case was an accomplice, failure to instruct that such witness was an accomplice was not error, though court after hearing only portion of the evidence had expressed doubt as to whether he should so instruct.

25. Criminal law ⚿1173(2)

Defendant could not complain of failure to instruct jury to disregard codefendant's confession if involuntarily made, where such confession was introduced against codefendant alone.

26. Criminal law ⚿798½

Furnishing jury with forms of verdict is customary, but trial court is under no duty to do so.

27. Criminal law ⚿1038(1)

Defendant could not complain for the first time on appeal that trial court furnished jury with forms of verdict covering only first-degree burglary thereby preventing jury from fixing the degree. Pen.Code, § 460.

28. Criminal law ⚿1172(1)

Evidence of entry into homes under cover of darkness and that defendant had a pistol established that if defendant was guilty of burglary it was burglary of the first degree so that furnishing jury with blank forms of verdict covering only first-degree burglary was not prejudicial to defendant. Pen.Code, § 460.

* * *

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., Oakland, Folger Emerson, Deputy Dist. Atty., Oakland, for respondent.

Jack Lester Chapman, in pro per.

WARD, Justice.

Defendant Jack Lester Chapman, who has represented himself in every stage of this case, appeals from the judgment of conviction on two counts of burglary of the first degree and from the order denying a motion for new trial. One count charged defendant with entering the house of Joseph Aletto located in Alameda County on December 13, 1947. The second charged him with entering the house of Theodore Silveria located in the same county, also on December 13, 1947. Marian Del Chapman, his wife, was jointly charged with the said burglaries, but the jury disagreed as to her guilt. The chronological development of the case will be covered as the various points raised on this appeal are discussed.

[1] Defendant urges that his motion under Penal Code section 995 to have the information set aside on the ground that he had been committed without reasonable or probable cause was erroneously denied. "In a preliminary examination it is not necessary that a defendant be proved guilty beyond a reasonable doubt. 'Reasonable or probable cause,' required to uphold the commitment of a defendant (Pen.Code, § 995), exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. (Pen.Code, § 872; other cases cited.)" People v. Mitchell, 27 Cal.2d 678, 681, 166 P.2d 10, 12.

[2] At the preliminary hearing Joseph Aletto and Madeline Silveria testified that they left their respective homes uninhabited the night of December 13, 1947, and returned to find them ransacked, with clothing, linen and bedding missing. In each case a window near the entranceway was broken. Mrs. Silveria added that "boxes of Dreft and washing powder and our table" were on the lawn. They both testified that they later saw their missing goods at the Sonora court house with De-

tective Ayres of the sheriff's office, where Mrs. Silveria learned they had been obtained from "this hotel" (the Chapmans' hotel in Tuolumne). Alfred W. Ayres testified that on May 28, 1948, he told defendant he was investigating these two burglaries. Defendant told him "it was his policy never to plead guilty to anything" and that "he would like to help me recover as much of the property as possible, and it was all in the Tuolumne hotel at the time he was arrested, and if we hadn't recovered it it was all there or someone must have been there before we were." Defendant and his wife denied the charges, but on cross-examination she stated that their place of business is the Hotel Kimball at Tuolumne, and defendant explained that he told Ayres "I knew where those items of clothing and household articles that were alleged to be stolen were." The foregoing evidence gives rise to the reasonable belief that defendant burglarized the Aletto and Silveria houses. People v. Mitchell, supra; In re Plummer, 79 Cal.App.2d 651, 654, 180 P.2d 771.

[3] Defendant next raises the question whether prejudicial error was committed by the refusal of both the justice's court and the superior court to grant a change of venue. At the preliminary hearing defendant moved for a change of venue saying that trial in Alameda County would result in prejudice to him, as the local district attorney's office was prejudiced against him. The only facts advanced at said hearing by defendant to show such prejudice are that he was already serving a sentence and that the complainants are well known. While it is true that the justice's court denied defendant's motion shortly after it was made, this fact does not show an abuse of the court's discretion, particularly where the defendant was not on trial before the justice's court.

[4, 5] At the outset of the proceedings in the superior court defendant filed a motion for change of venue, supported by an affidavit, charging that in the county of Alameda the offices of the district attorney, the sheriff and the public defender were prejudiced toward the defendants. While many opposing affidavits were filed, none was filed by the sheriff's office. Defendant argues that the charge that said office was prejudiced must be assumed to be true. The only fact stated in defendant's affidavit in support of said charge is that certain members of the sheriff's and the public defender's offices "have conversed among themselves, condemning the defendants", causing defendants to refuse the services of the public defender's office. Such conversation was denied by the four members of the public defender's office. But assuming the truth of the charge that the representatives of the sheriff's office were prejudiced, it cannot be said that the trial court committed prejudicial error in denying the motion for change of venue. "If the charge was admitted to be true, we are not satisfied, notwithstanding the impropriety of those officers indulging in the expression of opinions which might contribute to defeat the due administration of justice, that it would be a good and sufficient ground to authorize the Court to change the place of trial." People v. Shuler, 28 Cal. 490, 495; People v. Brite, 9 Cal.2d 666, 690, 72 P.2d 122. Nor does the fact that defendant produced a clipping from a local newspaper which referred to a convict couple being returned from Folsom and Tehachapi establish that defendants could not be fairly tried in Alameda County and that accordingly defendant's motion should have been granted. There is no evidence that any newspaper reports were read by any member of the jury, much less that they caused any such member to be prejudiced against defendants.

[6] Defendant urges that because his motion for change of venue was denied he was compelled to defend himself as he believed the local public defender's office was prejudiced towards him. The record reveals that in the trial court defendant on several occasions was urged to accept either the services of the public defender's office or of an attorney outside of the public defender's office who would receive no fee. After the motion for change of venue was denied, the court announced that it was willing to appoint an outside attorney to represent the defendants. Defendant replied, "on behalf of my co-defendant,

I believe she would accept that. However, I prefer to represent myself." Accordingly, defendant cannot contend that the trial court failed to observe that degree of fairness necessary to the proper administration of justice.

There is no merit to defendant's contention that as the requirements of Penal Code section 1381 were not satisfied the superior court lacked jurisdiction to try him. Section 1381 provides that where a defendant has been convicted and another information is pending it is mandatory "upon the district attorney of the county in which such charge is pending to bring the same to trial within ninety days after such defendant shall have delivered to said district attorney written notice of the place of his imprisonment and his desire to be brought to trial upon said charge."

[7] Shortly after defendant announced that he was moving for a change of venue on September 30, 1948, the district attorney stated: "I think before the motion to change venue is filed, we ought to set a trial date, your Honor, for this reason: The defendant * * * is doubtless aware that we are under a different statute of time here and that this case must be tried within 90 days from the time of the demand for trial was made, which means it must be tried prior to October 21. I therefore suggest October 18." The court agreed and directed the clerk to arraign the defendants, which was done. On October 4, 1948, the court asked about the time of trial and was informed that the case was set for October 18. On October 18, 1948, after the pleas to the priors were changed and the jury panel sworn, defendant stated: "I would like to make a motion under Section 1381 of the Penal Code that the 90 day period * * * has been exceeded in this case, inasmuch as the demand for trial was mailed within fifteen miles of this Court on July 14th of this year, which * * * would make the 90 day period up on the 13th of October and this is now the 18th and, therefore, it is my contention that the 90 day period as required by law, has been exceeded * * *." The prosecution then produced the following letter dated July 19, 1948, addressed to the District Attorney of Alameda County: "Enclosed find a demand for trial as provided by Section 1381 of the California Penal Code. * * * (signed) Jack Chapman". (The letter bears the district attorney's stamp dated for reception July 21, 1948, 8:59 A.M.) This was introduced in evidence "together with what purports to be a demand for trial signed 'Jack Chapman', which was verified and sworn to on the 14th day of July, 1948, and also as part of the same exhibit an envelope postmarked July 20, 1948, addressed to Mr. J. F. Coakley (the district attorney), in which those two documents were received." It was the duty of the trial court to determine this factual question. Based upon the record this court is unable to say that the foregoing evidence did not justify the trial court's conclusion that October 18 fell within the ninety day period provided by section 1381.

[8-10] Defendant's contention that the court erred in excepting Deputy Sheriff Ayres from the order excluding all witnesses from the courtroom also lacks merit. After the prosecution had made its opening statement counsel appointed for defendant's wife made a motion to exclude all witnesses, which was granted except as to witness Ayres. Thereafter defendant asked that the said witness be excluded. The prosecution stated that he was needed, but the court explained: "He means during the opening statement." The record thus indicates that defendant merely wished this witness excluded during his opening statement. Furthermore, when two of defendant's witnesses arrived from Tuolumne while the prosecution was still presenting its case, defendant's request that Ayres not be present while said witnesses testified was granted. The refusal to exclude witnesses lies with the discretion of the court. People v. Pierson, 69 Cal.App.2d 285, 296, 159 P.2d 39. As was said in People v. Nunley, 142 Cal. 441, 445, 76 P. 45, 47: "It cannot be held that the court abused its discretion in allowing the sheriff * * * who was a witness for the prosecution, to remain in the courtroom during the trial." It is the common and usual practice that at

least one peace official may remain during the presentation of evidence during the entire case.

One of the major points raised on this appeal concerns the sufficiency of the evidence to support the jury's determination that defendant was guilty of the burglaries described in the information. An extended review of the evidence is therefore required. Mr. and Mrs. Aletto and Mrs. Silveria identified photographs of their respective homes and described the contents of certain boxes and a suitcase as being property taken from their homes December 13, 1947, which was subsequently recovered in Sonora.

Henry Lawson, Chief Deputy Sheriff in Tuolumne County, testified that sometime between May 1 and 27, 1948, under the authority of a search warrant he entered the Kimball Hotel where he found Mrs. Chapman in her apartment on the ground floor. He stated that property was taken from Mrs. Chapman's apartment. Lawson next testified as to a conversation with Mrs. Chapman which was offered only against her—that Jack brought in "this stuff", "but she didn't ever say anything to him about it. * * * she was afraid she would get her teeth knocked in if she did." Lawson identified a photograph as showing property which was taken from Mrs. Chapman's apartment. It was only marked for identification at that time, but was later received over defendant's objection. He testified that the property was taken to the sheriff's office in Sonora where he delivered some of it to Mr. and Mrs. Aletto. He also identified a suitcase as having been in said apartment. He punched a hole in the above-mentioned photograph, where said suitcase appeared in the photograph.

As defendant takes the position that his conviction "was substantially based upon the testimony of Helen and Marvin Nelson" attention should be given to their testimony. Mrs. Nelson testified that in July 1947 she, her husband and their four-months-old child went to Tuolumne where they rented an apartment in the Chapmans' hotel—the Kimball Hotel. It was in this manner that they met the defendants, whom they had never seen prior to that time. They moved to Modesto in November 1947. Defendants came to Modesto in December after learning from Mrs. Nelson's sister-in-law, who lived in Tuolumne, that they were in Modesto where Mrs. Nelson's parents lived. The Chapmans invited them to go for a ride, which they accepted after arranging to leave the baby with Mrs. Nelson's mother. The record shows that Chapman was driving his 1947 Chevrolet. Mrs. Nelson testified that before they got to Tracy defendant stopped at a house, "knocked on the door and went around the house, and he went in and then he come back out and he had several things with him, and he told my husband to come on in with him and he went in and then they both come out and Mrs. Chapman unlocked the back of the car, and they put things in there and then we left." Cartons of soap powder were taken. She testified that defendant had previously threatened to kill her baby if she or her husband said anything, and that she knew the Chapmans carried a small gun in the car. They had dinner after they left Tracy but nothing was said as to where they were going. The above evidence of the Tracy burglary was not objected to by appellant defendant.

As to the burglary charged in the second count, Mrs. Nelson testified: "Well, we came to the second house and I believe he (Chapman) backed into the driveway and he got out * * * (her husband) was with him. * * * he (Chapman) came out of the front door and he brought several things with him, and they went back in and they were gone, * * * quit a little while, and then Mrs. Chapman got out and went in. * * * and she came out and she had a little end table with her when she came out." It was brought out that this table and the soap from the house near Tracy were left in the yard.

Mrs. Nelson also testified concerning other burglaries which she had witnessed, including one in Stanislaus County. Marvin Nelson testified substantially in the same manner as did Mrs. Nelson. He was convicted and at the time of the present trial was serving a sentence in the Stanislaus County Jail. He was charged as a defendant in the present case.

Deputy Sheriff Ayres testified as to a conversation with defendant Chapman which occurred on May 28, 1948. He described the conversation, at which defendant, Ayres and Deputy Sheriff Art Ross were present, as follows: "We told Chapman who we were and that we were investigating the burglaries of the Aletto and Silveria homes on the night of the 13th of December, 1947. Chapman asked me—told me that he thought the people of Alameda County should forget those charges against him and he repeated that on two or three occasions, I told him that I had no power to do that. * * * He told me that he had never pled guilty to anything and it was against his policy to plead guilty to anything, and informed me of that, and I informed him that I wasn't there to ask him to plead guilty to anything, that I was there to get the facts concerning the two burglaries. We talked about the type of burglaries they were and the amount of loot. * * * He stated that he would like to help us recover it but that he could not do it. He stated that at the time that he was arrested in Tuolumne that all of the loot that was taken in the two burglaries was in the hotel at Tuolumne, and that if we had not recovered it somebody apparently had gotten ahead of us and had gotten the stolen property. * * * We talked about the different burglaries that he had been implicated in throughout the State, and he stated he didn't know why he pulled burglaries."

The prosecution offered evidence of other similar crimes about which the Nelsons had also testified. Mrs. Louella Hamilton testified that her home, located four or five miles south of Tracy, was burglarized during her absence from December 12 to 17, 1947. In particular she testified that "Quite a bit of Dreft and some Lux" were missing. Defendant raises no objection as to the foregoing testimony. Nor is any objection raised as to the testimony of William Pirrone. He testified that he left his home, located a mile north of Salida, at about 5:45 p. m. March 17, 1948, with his family, to visit his neighbor. From the neighbor's house he saw a car parked in his driveway. He got into and started his own car towards his home. He saw two men off the highway in his vineyard. He identified defendant Chapman as one of the men he saw at that time. He testified that he got out of his car and asked them what they were doing, and Chapman made the remark they "had got a drink of water." He noticed that the other man had "his shirt bulging out, * * * and trinkets dropping out of his shirt." He was attacked by defendant. He referred to the other man as Nelson. After Pirrone had been held with his face in the dirt defendant told him to walk toward the tractor shed and said: "You had better not turn around or I will shoot you."

Defendant testified in his own behalf, saying: "Now with regards to the Nelson situation and all these burglaries and so on, I, as my wife has also admitted, I have committed this one burglary to the extent that the story that was told varies from my story. I imagine the District Attorney will question me about that, and it will come out. However, I do admit the participation in this burglary but I do not admit any others." Except by his plea of not guilty defendant does not anywhere *deny* the burglaries with which he is charged.

[11] The record indicates that even if both the Nelsons are regarded as accomplices their testimony was sufficiently corroborated. Loot was taken from the Aletto and Silveria homes and subsequently found in defendant's possession. Defendant's contention that the evidence does not show his possession of the stolen property lacks merit, in view of the evidence of his statement to Ayres wherein he referred to the Tuolumne hotel and the fact that his wife was there when the officers found the stolen property.

[12] The law on this point is stated in People v. Parker, 80 Cal.App.2d 128, 133, 181 P.2d 16, 19:

"It is now too well settled to require extended discussion that all of the elements of the offense need not be shown by corroborating testimony. The testimony of the accomplice is alone sufficient to establish the commission of the crime charged, and all that the law requires in addition to the testimony of the accomplice is some evidence which tends to connect the defendant with the commission of the offense or from which such connection is reasonably inferable. * * *

"In People v. King, 40 Cal.App.2d 137, 141, 104 P.2d 521, 523, the following is said: 'The entire conduct of the accused may be looked to for corroborative circumstances and if therefrom his connection with the commission of the crime may be fairly inferred the corroboration is legally sufficient. (Citing cases.)'"

This court held in the Parker case that it could not be held as a matter of law that the corroborating testimony did not tend to connect the defendant with the robbery with which he was charged, saying, 80 Cal. App.2d at page 134, 181 P.2d at page 20, "While some of these corroborating circumstances can be reasonably reconciled with innocence, that factor is not determinative. 'If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.' People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780."

Defendant urges that the district attorney and the court were guilty of prejudicial misconduct in permitting evidence of six burglaries in addition to the crimes for which defendant was on trial. As to the Nelson testimony of the Tracy burglary and the Stanislaus County burglary it is difficult to understand defendant's contention that he was prejudiced thereby, in view of his own statements that Mrs. Hamilton's testimony concerning the Tracy burglary and Mr. Pirrone's testimony concerning the Stanislaus County burglary were admissible. Defendant apparently feels that the Nelson testimony naming him as perpetrator of said burglaries is more prejudicial, but Pirrone also identified defendant. Defendant's complaint with respect to the Nelson testimony of other burglaries is that no other testimony was offered connecting defendant therewith, and accordingly the jury would not have been authorized to find him guilty of these burglaries.

[13, 14] That no reversible error occurred in the admission of such evidence can be seen in the fact that such evidence showed a plan and pattern of breaking into uninhabited homes and ransacking them. People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546. Furthermore, defendant never objected to this testimony at the trial, and cannot object for the first time on appeal. People v. Simeone, 26 Cal.2d 795, 804, 161 P.2d 369.

Defendant also argues that prejudicial error occurred in the examination of Mrs. Chapman when she was asked if certain answers had been given by her during an interview with Assistant District Attorney Thompson and in the admission of Thompson's testimony and that of Charles W. Saunders, who was the court reporter who transcribed the conversation. He contends that as such testimony was not admissible against him due to his absence from said conversation mention should have been made of the fact that such testimony was offered only as against his wife.

[15] Such evidence was introduced to impeach Mrs. Chapman's testimony, for the only admission she made in her testimony was with respect to the burglary of the Pirrone home at Salida. Since no objection to the testimony was raised at the trial, defendant cannot now raise the point. People v. Simeone, supra.

Next, defendant urges that the court erred in admitting, over objection, the photograph of the stolen property found in the Chapman apartment at the Hotel Kimball. It is claimed that there was no testimony regarding the circumstances under which the photograph was taken and that, as Lawson who identified said photograph merely referred to the property as found in *Mrs. Chapman's* apartment, it was not admissible against defendant.

[16] There was a sufficient foundation for admission of the photograph, as the property depicted was identified as belonging to the Alettos and Silverias. As to the contention that it was not admissible against defendant as the property was identified as coming from Mrs. Chapman's apartment, as previously noted, there is sufficient proof

that said apartment was also defendant's apartment.

Defendant contends that the district attorney committed prejudicial error when he told the jury: "But with all of that, and taking into consideration the disadvantages which Chapman has willingly assumed for himself, taking all of that into consideration, I urge you not to underrate this man. He is no fool; as he says, 'I am not nuts.' Make no mistake about that. That man is no fool and he has demonstrated by his conduct through this trial that he knows exactly what to do and when to do it. Now I have said, and I will say again, that Chapman is a criminal and a fairly active one, as we know now from the record, but at the same time he has got a pleasant personality. I won't take that away from him. He is pleasant. He has an appealing way of talking. Don't let those factors distract you from the evidence in this case. The man is shrewd and he is shrewd enough to know of those things in his character and in his personality and in his makeup which will appeal to you. He is aware of those things, and he has made use of them. Jack Chapman as he sits in Court today and as he stands here, stands here talking to you, I will venture to say is an entirely different personality from the Jack Chapman who drove down the highway looking for a house to burglarize, an entirely different man from the man who could size up a situation and rapidly determine what house would be a good one to burglarize, and then with the nerve and skill required, go in there and quickly search and strip a house of all of the possessions of the householder and quickly get away. Now that takes a certain amount of nerve and it takes some intelligence and it takes some judgment, all of which he has." The foregoing statement was preceded by the observation that "It is difficult and troubling to represent the State in a prosecution of this kind, where a defendant chooses to represent himself. Obviously, he is not completely aware of the various implications of the procedure to which he subjects himself, he isn't aware of the significance of the rules of evidence, or aware of the various pitfalls which may occur during the course of a trial which he has to avoid, which imposes on the prosecutor in such instances an added obligation not to take advantage, which I have endeavored to do, and I think the defendant will concede that I haven't taken any unfair advantage of him, although he has in part accused me of so doing in his argument."

[17] It cannot be held under the surrounding circumstances in this case, as was said in People v. Lynch, 60 Cal.App.2d 133, 143, 140 P.2d 418, 423, that the remarks of the prosecution were made "for the manifest purpose of prejudicing the jury against the defendant * * *. That the asking of such questions constituted misconduct, and of the fact that such misconduct was prejudicial, there can be little doubt. It would ignore human experience and belie the dictates of common sense to entertain a contrary view. With commendable fairness the attorney general does not attempt to justify the conduct of the prosecutor, but simply suggests that no objection was made thereto by the appellant who appeared as his own counsel. However, we think the foregoing course of conduct was so improper and so offensive to the requirement that the question of guilt or innocence shall be determined by an orderly legal procedure in which the substantive rights belonging to a defendant shall be respected, that the trial judge should have stopped the asking of such questions when the first improper interrogatory was propounded without waiting for an objection."

The remarks made in People v. Greene, 80 Cal.App.2d 745, 750, 182 P.2d 576, 579, are more in point: "defendant makes two points in his brief to the effect that the district attorney committed error in his remarks to the jury wherein he indirectly referred to the defendant as a 'jail bird' and in another remark indicating that the defendant would have pleaded guilty to the charge if his counsel had not suggested otherwise. This latter statement went unchallenged and no motion to strike it was interposed by counsel for defendant. Counsel cannot now be heard to complain. People v. Entriken, 106 Cal.App. 29, 33, 288 P. 788."

[18] The remaining points raised on this appeal pertain to the instructions given to the jury. Defendant urges that the following instructions were erroneously given: "The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. * * * It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case." The paragraph just quoted in just a small part of the court's instructions on accomplices. Defendant contends that the quoted instructions do not correspond with the rule that the testimony of an accomplice is not to be judged by the same standard as the testimony of any other witness, but such evidence is to be acted upon with great caution and is subject to grave suspicion, citing People v. Dail, 22 Cal.2d 642, 140 P.2d 828. In the Dail case the court instructed that the credibility of accomplice witnesses is to be judged by the same standard as that of other witnesses. The court, 22 Cal.2d at page 653, 140 P.2d at page 834, ruled that "This instruction was in direct opposition to the statutory provision that the testimony of an accomplice should be viewed with distrust. (Code Civ.Proc. sec. 2061, subd. 4)." In the present case the trial court did not make the error denounced by the Supreme Court. It first gave the general instruction that credibility is for the jury and then stated that the testimony of an accomplice is to be viewed with distrust, explaining what is meant by such expression.

Next, defendant criticizes the following instruction: "A witness wilfully false in a material part of his or her testimony is to be distrusted in others, that is to say, the jury may reject the whole of the testimony of the witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake, or inadvertence, but wilfully and with design to deceive, *must treat all of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that he or she has in other particulars stated the truth.*" (Emphasis added by defendant.) Defendant urges that the "emphasized portion of this instruction contradicts the correct prior portion to the extent that the instruction, in effect, allows the jury, even though they believe a witness to have testified falsely to nevertheless believe the testimony of that witnesses (sic) if he or she has, in other particulars, told the truth."

[19] Upon the authority of People v. Pribnow, 61 Cal.App. 252, 214 P. 475, this instruction was properly given. In that case, the court said, 61 Cal.App. at page 255, 214 P. at page 476:

"Exception is also taken to certain portions of the charge to the jury. In the first instruction complained of, the court advised that body that, where a witness is false in one part of his testimony he is to be distrusted in others, and that it might reject the whole testimony of a witness who had willfully sworn falsely to a material point, and that, if it found that such testimony was given with the willful design to deceive, it should be viewed with distrust and suspicion, and that the jury might 'reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has, in other particulars, sworn to the truth.' It is claimed that the giving of the latter part of the instruction indicated by the quotation marks constituted error, for the reason that it weakened and destroyed the former portion of the instruction.

"We see no error in the instruction, and we are of the opinion that it fairly states the law. The jury was in effect told that it had the power to entirely disregard the testimony of any witness found to be false in any material respect, but that it was not bound to do so."

[20] Defendant contends that the court erred in refusing to instruct the jury "That prior convictions should by no means be used to consider it probable that the defendant is guilty because of said priors." In re-

fusing to give this instruction the court wrote, "Covered by other instructions given." The court instructed: "A defendant cannot be convicted upon mere suspicion or probability of guilt, nor upon mere proof of opportunity to commit the crime charged. * * * It may also be shown by an examination of a witness that he has previously been convicted of a felony." Defendant relies upon People v. Blanks, 67 Cal.App.2d 132, 153 P.2d 449, but that case merely holds that evidence relating to prior convictions should be considered only as affecting the credibility of the defendant (who had admitted prior convictions on the witness stand). The quoted instruction given in the present case appears to satisfy the rule of the Blanks case. There is nothing in the record to indicate that the jury considered priors and no affirmative instruction was given.

[21, 22] Defendant dwells at length upon the failure of the court to instruct that Marvin Nelson was an accomplice.

"'When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact.' People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902, 39 L.R.A.,N.S., 704. * * *

"In a case where it is not disputed that a witness was an accomplice it may be and in fact has been held that it is the duty of the court to state that fact positively to the jury, People v. Ferlin, 203 Cal. 587, 265 P. 230, but where, as here, the evidence shows that the witness was not an accomplice, it certainly may not successfully be claimed that the court should have instructed that he was. (Citing cases.) Unless the status of the complainant as an accomplice was definitely fixed as a matter of law, the giving of the requested instruction would have been an infringement by the court upon the province of the jury to pass upon questions of fact. (Citing cases.) The rule is concisely stated in 23 C.J.S., Criminal Law, § 1227, pages 787–788: 'Where a witness who testifies for the prosecution is, as a matter of law, an accomplice, the court should so charge. In such case, an instruction defining an accomplice is not necessary.'" People v. Featherstone, 67 Cal. App.2d 793, 796–797, 155 P.2d 685, 687.

[23] Defendant overlooks the fact that the following instructions were given: "A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the testimony and the circumstances as shown by the evidence. * * * Merely assenting to or aiding or assisting in the commission of a crime without guilty knowledge of intent is not criminal, and a person so assenting to, or aiding, or assisting in the commission of a crime without guilty knowledge or intent in respect thereto, is not an accomplice in the commission of such crime. * * * In determining whether or not the testimony of an accomplice has been corroborated as required by law, you must, for the purpose only of your consideration of that question, assume to be removed from the case the testimony of the accomplice and then examine all other evidence with a view to determining if there be any inculpatory evidence, that is, evidence tending to connect the defendant with the commission of the offense. If such other evidence does do that, then the testimony of the accomplice is corroborated; if it does not, then there is no corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him." In view of the fact that these instructions were given it does not appear that any prejudice resulted by the court's failure to instruct that Marvin Nelson is an accomplice. In People v. McDermott, 75 Cal.App. 718, 243 P. 485, quoted in People v. Ferlin, 203 Cal. 587, 601, 265 P. 230, 237, it is said: "'The jury should have been instructed that Sova must be regarded as an accomplice. That question should not have been left to it to determine.

However, it must be presumed that the jurors observed and applied the instructions given them. In other instructions the definition of an accomplice was correctly stated, as also was the rule that the defendant may not be convicted on the uncorroborated testimony of an accomplice, and that the corroborating evidence is not sufficient if it merely shows the commission of the crime and the circumstances thereof; and further, that such corroborating evidence must tend to connect the defendant with the commission of the crime. Hence it is inconceivable that the erroneous instruction given in any way prejudiced any right of the appellant.' "

[24] Defendant also contends that Mrs. Nelson is an accomplice and that because the court stated during the trial, "I am not sure but what I may instruct the jury that she is an accomplice, as a matter of law", it should have done so. Instead the court gave the instructions previously quoted. As the evidence on the question whether she is or is not an accomplice indicates it cannot be said that as a matter of law she is an accomplice, it does not appear that the court committed any error. Furthermore, the court's remark was made after hearing only a portion of the evidence. Defendant admits that ordinarily "the question of whether or not Helen Nelson was an accomplice would be one for the jury to determine."

[25] Defendant also refers to the evidence of Mrs. Chapman's confessions as establishing that she underwent severe grilling and that accordingly the court should have instructed the jury to disregard such evidence if her confession was involuntarily made. As this evidence was introduced against Mrs. Chapman alone, defendant is in no position to raise this point.

[26-28] Lastly, defendant argues that the jury was given no choice as to the degree of burglary since the court prepared blank forms fixing the degree as first degree burglary; that it was the duty of the trial judge to also furnish verdict blanks covering second degree burglary; and that failure to furnish such blanks prevented the jury from fixing the degree. It is the custom but there is no duty to furnish the jury with any form of verdict. People v. Mundt, 31 Cal.App.2d 685, 88 P.2d 767; People v. Corbin, 118 Cal.App. 392, 396, 5 P.2d 460. Furthermore, defendant made no complaint in the trial court and cannot raise the matter for the first time on appeal. People v. Minamino, 56 Cal.App. 386, 392, 205 P. 463. In view of the evidence of entry under cover of darkness into the Aletto and Silveria homes and that defendant had a pistol, if defendant was guilty of burglary it was burglary in the first degree. Penal Code, sec. 460. It cannot be said that defendant suffered any prejudice because of the trial court's instructions.

The judgment and order denying new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

93 Cal.App.2d 489

PEOPLE v. SKEEN.

Cr. 4333.

District Court of Appeal, Second District,
Division 1, California.

Sept. 1, 1949.

Hearing Denied Sept. 29, 1949.

Richard E. Skeen was convicted in the Superior Court of Los Angeles County, William R. McKay, Judge, of criminal conspiracy and grand theft based on misappropriation of funds contributed by prosecuting witness to purported partnership. From the judgment and an order he appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment, holding that defense that there can be no embezzlement of partnership funds was not available, since the jury determined that there was no partnership in fact, that rulings on evidence were not erroneous and that no error could be predicated on remarks of trial judge in absence of objection thereto and assignment of misconduct.

1. Conspiracy ⚿38
Embezzlement ⚿15

Where jury determined that there was in fact no partnership, contention that defendant could not be guilty of criminal conspiracy or grand theft for withdrawing money from partnership account and appropriating it to his own use, because there can be no embezzlement of partnership funds constituted no defense.

2. Criminal law ⚿400(7)

Inquiry as to whether witness had executed a power of attorney to her son-in-law, without calling for text of the power of attorney, was not objectionable on ground that it did not call for the best evidence.

3. Criminal law ⚿1035(3)

Error could not be predicated on remarks of trial judge in course of trial in absence of objection thereto and assignment of misconduct.

◆

Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, James A. Doherty, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

The prosecuting witness, Mrs. Edna H. Allen, is an elderly widow. Her daughter married a gentleman by the name of David A. Scott-Duns. The marriage was of short duration. While it lasted the widow trusted her son-in-law with a general power of attorney, with the idea that he would conduct all of her business affairs.

She even gave him a check for $3,000 for a Christmas present. This check was endorsed by and paid to the defendant Richard E. Skeen. This was in Illinois in 1945. In January of 1946 the mother, her daughter, and son-in-law came to Los Angeles. The defendant Skeen followed shortly thereafter.

A business proposition was suggested among the three parties, the defendant, the son-in-law and the widow. The defendant and the son-in-law represented they could make $40,000 a year with a tennis court and a shop in connection.

After several discussions relative to this project, an agreement was entered into among the three parties. This agreement was entitled "Certificate of Formation of Tennis Enterprises, a limited partnership, and/or Articles of Partnership of Tennis Enterprises, a limited partnership." The agreement recited that Mrs. Allen was to contribute $35,000, and to be a limited partner with 1% interest in the net profits. Scott-Duns was to contribute $1 and the defendant, Skeen, $10,000. Each of the latter parties was to have 49½% interest in the net profits. Mrs. Allen was to get 5% on her investment, and to be repaid the $35,000 by annual payments of not less than 10% from the net profits.

For the purpose of raising the money for her contribution Mrs. Allen sold corporate securities and insurance annuities. The money from these assets passed through Scott-Duns and into two bank accounts in the name of Tennis Enterprises, upon which Scott-Duns and the defendant, Skeen, were empowered to draw checks. Thereupon Scott-Duns and Skeen proceeded to withdraw from these accounts all of the $35,000 without devoting one cent of it to the purposes mentioned in the agreement.

The defendant, Skeen, made his $10,000 payment to the "business" by withdrawing from the Tennis Enterprises account and purchasing United States notes. Then he borrowed from the bank $10,000, pledging the United States notes as collateral security, and thus made his "contribution."

These two men were indicted by the Grand Jury, and charged with one count of criminal conspiracy and four counts of grand theft. The defendant, Skeen, was brought to trial separately before a jury. He did not testify in his own behalf. He was convicted upon all of the counts; his application for probation was denied; and he was sentenced to the penitentiary.

The defendant appeals, and asserts: (1) That the verdict is contrary to the law and the evidence; (2) error in rulings on evidence; and (3) prejudicial comments by the trial judge.

[1] 1. During the trial and in deendant's opening brief, it was contended that the defendant could have been guilty of no crime, because the business arrangement was a partnership, and there can be no embezzlement of partnership funds. People v. Brody, 29 Cal.App.2d 6, 83 P.2d 952. A ready and complete answer to this contention is that the jury passed upon the bona fides of the partnership, and determined that there was none in fact. People v. Cravens, 79 Cal.App.2d 658, 180 P. 2d 453; People v. Stafford, 81 Cal.App. 159, 253 P. 183; People v. Kelley, 81 Cal. App. 398, 253 P. 773.

2. Objection was overruled to the following question:

"Q. By Mr. Arterberry: Now, I will ask you whether or not, about this time, December, 1945, keeping this date of this check in mind or shortly thereafter, in January of 1946, did you ever execute a power of attorney to your son-in-law, Mr. Scott-Duns?"

[2] It is argued that this was error, having in mind the best-evidence rule. The question did not call for the text of the power of attorney, but only whether such a document was executed. Therefore, the objection was not well taken. Other objections have to do with rulings on leading questions designed to elicit facts of the alleged conspiracy. As to these rulings there was no error.

3. Finally counsel urge misconduct arising out of the following colloquy between court and counsel:

"Mr. Smith: Cross examine.

"Mr. Arterberry: If your Honor please, before going into the cross examination, would you instruct the jury that any conversation he had with Mrs. Allen with reference to any civil settlement, or purported civil settlement, has no bearing on the issues in this case.

"The Court: That is correct. It is not controlling on the State.

"Mr. Arterberry: No, sir.

"The Court: The State is interested in the prosecution of criminal cases, and what the desire of the individual is is of no moment, and I think perhaps you should draw up a proper instruction to that effect too.

"Mr. Arterberry: Very well, your Honor.

"The Court: There is no question that is the law, is there?

"Mr. Smith: No, your Honor, that is absolutely right.

"The Court: In other words, if I stole $10,000.00 from you and was indicted by the Grand Jury, and I saw you a week beforehand and gave you back your $10,000.00, I could still be prosecuted.

"Mr. Smith: The question, of course, is whether or not a crime is committed at a certain time, and anything subsequent to that has no bearing on it.

"The Court: Say I took a gun and held you up and stole your money from you without your consent and against your will, and I was indicted. That is what the evidence would show. And then later I met you and I said, 'Mr. Smith, I am sorry about that. Here is your $10,000.00.' That wouldn't affect the prosecution.

"Mr. Smith: Not at all. I think that is absolutely correct.

"The Court: I wanted to be sure that is the law. That is my view of it.

"Mr. Smith: I was a little surprised, your Honor. I wanted the evidence chiefly for the matter of—

"The Court: Surprised or not, it is a matter of record, and you may proceed."

[3] It is hard to see anything in the remarks of the judge which could have prejudiced the defendant with the jury. The only thing which may be drawn from them is a desire on the part of the judge to have an understanding with counsel as to rulings made during the course of the trial. Moreover, no objection to these remarks was made by counsel; and no assign-

ment of misconduct was made. So, in any event, no error may be predicated upon them. People v. Galuppo, 81 Cal.App.2d 843, 185 P.2d 335.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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93 Cal.App.2d 428

MYERS et ux. v. GARAVENTA et al.

Civ. 7586.

Sac. 5971.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

Rehearing Denied Sept. 19, 1949.

Hearing Denied Oct. 20, 1949.

1. Specific performance 🔑121(11)

In action by purchasers for specific performance of contracts for purchase of a tavern, evidence sustained finding that purchasers made an adequate tender to vendor of balance due under contracts so as to cure defaults in monthly payments due under contracts.

2. Specific performance 🔑121(11)

In action by purchasers for specific performance of contracts for purchase of a tavern, evidence sustained finding that vendor had waived forfeitures for defaults by purchasers in making monthly payments due under contracts.

3. Damages 🔑117

Generally, in cases of breach of a contract, such damages are allowed as will compensate the party aggrieved for all detriment proximately caused thereby. Civ. Code, § 3300.

4. Damages 🔑78(6)

Contract for sale of tavern for $15,000 but with provision that, in case of default by purchasers, purchase price should be $18,000, was void in so far as it provided for extra $3,000 in payment in case of default, as providing an arbitrary measure of damages in violation of statute. Civ.Code, §§ 1670, 1671, 3300; Code Civ.Proc. § 462.

5. Pleading 🔑427

In action by purchasers for specific performance of contracts for purchase of a tavern, court did not err in excusing purchasers' nonperformance though such excuses were not pleaded and complaint alleged that purchasers had made all payments on account of the purchase price except a certain balance which had been tendered to vendor, where contracts provided that by tender of amount due purchasers' defaults were cured, and evidence of excuses for nonperformance and waiver by vendor was introduced without objection, and case was tried on theory that such evidence was admissible.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Edward Myers and Gladys L. Myers, his wife, against Margaret Garaventa and others for specific performance of contracts for the sale of a tavern by the named defendant to the plaintiffs. From a judgment for the plaintiffs, the named defendant appeals.

Judgment affirmed.

Huberty & Huberty, San Andreas, for appellant.

Mull & Pierce, Arthur DeBeau Carr, Sacramento, for respondent.

ADAMS, Presiding Justice.

On October 31, 1944, Margaret Garaventa was the owner and operator of a tavern at Mokelumne Hill in Calaveras County known as "Peek Inn." On that date she entered into three contracts of sale with Edward Myers and Gladys L. Myers which are in effect but one, wherein she agreed to sell, and Mr. and Mrs. Myers agreed to buy: (a) the real property upon which the tavern was located, together with improvements thereon, for $7,000; (b) all the vendor's stock of liquor, beer, wines and other stock in trade, approximating in value $3,000; and (c) the tavern business including the good will as a going concern, the fixtures, and all contracts, engagements, benefits and advantages in respect thereto, including the liquor license, for $5,000, a total of $15,000. It was also provided that time was of the essence of the contract, and the usual forfeiture clauses were set forth, but section 16 provided: "Ten days shall be considered a reasonable time after notice to retake and if the buyer tenders to seller the full amount, due owing and unpaid after notice of retaking by the seller, seller shall execute proper instruments vesting title in buyer."

The buyers made down payments amounting to $3600, and went into possession of the tavern. Under the contract they were to pay $500 per month, and payments in addition to the $3600, amounting to $2100, were made, and though not made on the due dates no objections to the delays were made by the seller. On the contrary, she willingly gave extensions, stating that the buyers were to make payments when they could. However, on June 14, 1945, Mrs. Garaventa, without having at any time expressed dissatisfaction with the course of affairs, served upon plaintiffs a notice of rescission of the contract. Two days later plaintiffs tendered to her the full amount due, and when same was refused deposited the money in escrow and thereafter maintained the deposit.

Plaintiffs then brought this action for specific performance, which was decreed by the trial court. That court found that payments amounting to $5700 had been made by plaintiffs, and that defendant accepted them without objections; that immediately after the execution of the contract she expressly stated to the Myers that they need not worry about making prompt payments and that she would not exact any forfeiture if they unavoidably became unable to perform on time; and that thereafter, until June 16, 1945, she repeatedly stated to plaintiffs that she would not take advantage of the provisions of the contract or attempt forfeiture thereunder, and that at no time prior to June 16, 1945, did she give notice of, or state that she would insist upon, strict performance of the agreement. It further found that on or about June 16, 1945, plaintiffs found a purchaser for the property for $20,918.92, and entered into a contract with him for sale of same, and that such contract was made with the express consent of defendant who stated that she would take no advantage of plaintiffs on account of such sale, and that in reliance upon her statements plaintiffs gave possession to the purchaser, Otis B. Coen, and accepted from him a payment of $3418.92, and transferred to him title to the personal property. Also it was found that plaintiffs paid upon the installments due for the months of March and April, 1945, the sum of $300 each, and that the failure to pay the balances of $200 was expressly excused by Mrs. Garaventa. It was recited in said findings that plaintiffs had failed but had not neglected nor refused to pay any installment or any interest or insurance, but that failure to pay was excused by defendant by her acts and conduct which lulled plaintiffs into a sense of security. As for some small alterations in the premises which Mrs. Garaventa complains of, they were made with her knowledge and consent.

The trial judge filed a written opinion in the case which was included in the record on appeal. Therein he stated, regarding the evidence:

"The plaintiffs desired to purchase it. They had limited means of which defendant was undoubtedly aware. The contract of sale was expressed in rigid terms but at the very time of the execution the defendant stated to them that she would not be severe in enforcing its terms. The plaintiff took possession of the property and apparently cared for and conducted it properly. They committed no waste, were not indifferent or negligent in the conduct of the business and so far as appears paid to the defendant all that they could from the conduct of the business. The parties rapidly became friends and the most cordial relations existed between them up to the very day of the notice of forfeiture.

"There was no act which the defendant claims to have been an act of breach and forfeiture of which she was not aware and of which she made no complaint. Payments made to her which were less than the amount due she received with a friendly acceptance. She discussed with plaintiffs the state of their business and of the promise of an increased patronage. Doing the best they could apparently they were lulled into a sense of approval by the acts of the defendant. They had paid to her on account of the contract a large sum of money, which suddenly for actions of which she had at the time approved, she sought to take from them."

He also called attention to section 16 of the agreement of sale, stating that the buyers had conformed thereto by tendering to the seller the full amount due; and that plaintiffs had "two supports for a favorable judgment. By their tender they have cured their defaults, and through the waivers of the defendant their forfeitures have been excused."

[1, 2] Those conclusions seem well supported by the evidence which shows that up to the time that plaintiffs secured a buyer for the premises, at a price in excess of that charged by Mrs. Garaventa, plaintiffs and said defendant had been on terms of intimate friendliness, and that defendant had repeatedly told plaintiffs to pay when they could; that she had been aware of some bad luck which plaintiffs had suffered, particularly the suspension of their liquor license for 30 days for some alleged irregularity, which suspension deprived them of income for such period.

As the trial court heard the testimony and saw the witnesses we cannot say that its conclusions were not well founded. Plaintiffs' tender was adequate, and their sale to the Coens had been approved by defendant. It cannot be said that their defaults were grossly negligent, or wilful, or a fraudulent breach of duty. There is also section 16 of the contract which provides that if a tender of the full amount due, owing and unpaid is made within ten days after notice of retaking by the seller, the seller shall execute proper instruments vesting title in the buyer; and in this case such tender was made within the time specified.

Appellant makes some argument that the price of the property was to be $18,000 instead of $15,000, if there was not full compliance with the provisions of the agreement, and that the tender was, therefore, insufficient. The contract provided: "Thus as set out in the agreement above referred to that the overall purchase price of building, stock, and fixtures and good will shall be Fifteen Thousand ($15,000.00) Dollars provided all the terms, conditions, and covenants herein and therein contained are properly and timely performed, but if they are not, then it is and is herein declared to be the agreement that purchaser buying this real property and only this real property must pay and will pay a total of Ten Thousand ($10,000.00) Dollars exclusive of interest." Also: "Although it is known to all parties and understood as such that the overall purchase price of the tavern business and fixtures and chattels as set out in this agreement, the stock of liquor now on hand by seller, and the building itself * * * is Fifteen Thousand ($15,000.00) Dollars only if, as and when this contract and the contract for the purchase of said real property have been carried out in their entirety and if default is made in said contract of purchase of the real property notwithstanding the provisions of this contract buyer covenants herein and agrees that the purchase price is Eighteen Thousand ($18,000.00) Dollars for the said stock, fixtures, and real property so that any deficiency will be calculated on a total purchase price of all three in the amount of Eighteen Thousand ($18,000.00) Dollars."

[3, 4] On her motion for a new trial appellant urged that the overall price of the property was to be $18,000, and $15,000 was to be the reduced price only if the buyers performed all of the conditions of the contract; but the trial court, in an opinion then rendered, stated that there seemed to be no proper relationship between the difference of $3,000 and any damage which would result to defendant in

case of breach; that the general rule in cases of breach of a contract is that such damages are allowed as will compensate the party aggrieved for all detriment proximately caused thereby, Civ.Code, sec. 3300; and that the contract apparently provided for a different and arbitrary one inconsistent with sections 1670 and 1671 of the Civil Code. Those sections provided that every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, is would be impracticable or extremely difficult to fix the actual damage. The court said that no such difficulty existed here.

[5] We agree with that conclusion. The additional sum of $3,000 appears to bear no relationship to the damage which the seller would suffer from breach of the agreement, but to have been fixed rather as a penalty unrelated to actual damages which might be suffered, which damages could have been compensated for by the payment of interest on the amounts in default. See Eva v. McMahon, 77 Cal. 467, 472, 19 P. 872; Drew v. Pedlar, 87 Cal. 443, 450, 25 P. 749, 22 Am.St.Rep. 257; Stephens v. Daugherty, 33 Cal.App. 733, 737, 166 P. 375; Elliott v. Title Insurance & Trust Co., 64 Cal.App. 508, 513-514, 222 P. 175; 8 Cal.Jur. 844, 847, 849; Restatement of Law of Contracts, Vol. 1, sec. 339, p. 552, and comment, subsection (1). Appellant also urges that the court erred in excusing plaintiffs' non-performance since such excuses were not pleaded, but, on the contrary, the complaint alleged that plaintiffs had made all of the payments on account of the purchase price of the property and had well and truly performed all of the terms and conditions except that they had not paid $9739, but had made timely tender of said sum to defendant. Appellant points out some of the conditions of the contract which called for consent of the seller in writing, before any changes or modifications were permissible, and that plaintiffs had made changes without written consent. She relies upon cases holding that a complaint must either allege performance or a valid excuse for non-performance, that recovery on proof of excuse for non-performance cannot be had on an allegation of full performance; and that a like rule applies to waiver of the terms of an agreement when waiver it relied upon by a party.

However, it may be said in this case that section 16 of the contract provided that by tender of the amount due, the buyers' defaults were cured, and that evidence of excuses for non-performance and waiver by defendant was introduced without objection by defendant; and the case was tried apparently on the theory that same was admissible. Also respondents rely upon cases holding that affirmative matters by way of replication are deemed to have been pleaded, and that defendant's answer in this case opened the door for evidence of waiver and permitted the showing of same in order to overcome such affirmative matters. See 21 Cal.Jur., sec. 113, pp. 165-166; Bank of Anderson v. Home Insurance Co., 14 Cal.App. 208, 11 P. 507; Code Civ.Proc., sec. 462.

The trial court, in its opinion, stated that in an action to enforce the performance of a contract a plaintiff may, as was done here, allege full performance where, after notice of forfeiture, he had made a tender of full performance which was denied, citing Hind v. Oriental Products Co., Inc., 195 Cal. 655, 670, 235 P. 438.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

93 Cal.App.2d 422

AMORUSO v. CARLEY et al.

Civ. 7554.

Sac. 5951.

District Court of Appeal, Third District, California.

Aug. 22, 1949.

Hearing Denied Oct. 20, 1949.

Action by Angelina Amoruso against Archie L. Carley and another, for specific performance of instalment contract for sale of realty and to be relieved of default by reason of failure to comply with contract. Defendants filed a cross-complaint to quiet title to the realty.

The Superior Court for Sacramento County found for cross-complainants, and from judgment in their favor, plaintiff appealed.

The District Court of Appeal, Third District, Adams, P. J., affirmed the judgment, holding that the evidence justified forfeiture of purchaser's rights under contract on ground that default in payment of instalments thereunder and taxes and water assessments was willful or due to gross negligence and that offer to pay overdue instalments after declaration of forfeiture and deposit in bank for vendors were insufficient in amount.

See also 200 P.2d 199.

1. Appeal and error ⚿931(1)

On appeal, all intendments are in favor of judgment of trial court which heard and saw witnesses.

2. Vendor and purchaser ⚿104

Evidence justified forfeiture of purchaser's rights under instalment contract for sale of realty on ground that default in payment of instalments thereunder and taxes and water assessments was willful or due to gross negligence and that offer to pay overdue instalments after declaration of forfeiture and deposit thereof in bank for vendors were insufficient in amount. Civ.Code, §§ 1500, 3275.

3. Negligence ⚿13

"Gross negligence" is the exercise of so slight a degree of care as to justify belief that there was an indifference to the things and welfare of others and raise a presumption of the conscious indifference to consequences and a passive and indifferent attitude toward results.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Gross Negligence".

4. Contracts ⚿318

Party seeking relief under statute against enforcement of a forfeiture must prove facts that will justify relief. Civ. Code, § 3275.

◆

Appeal from Superior Court, Sacramento County; B. F. Van Dyke, Judge.

Frank L. Murphy, Sacramento, for appellant.

Elliott, Atkinson & Sitton, Sacramento, for respondent.

ADAMS, Presiding Justice.

On October 21, 1944, Angelina Amoruso entered into a contract to buy from Archie L. Carley and Gertrude A. Carley, about three and one-half acres of land in the Carmichael Colony in Sacramento County, for $650. One hundred dollars was paid on execution of the agreement, and the balance was to be paid in monthly installments of $12.50 or more on the 1st day of each month beginning December 1, 1944, including interest, the buyer to pay all taxes and water assessments. The contract provided that if the buyer failed to comply with its terms the sellers were released from all obligations to convey, and the moneys theretofore paid were to be retained by them as liquidated damages. It also provided that time was of the essence of the agreement.

Mrs. Amoruso went into possession and made payments amounting to $179.82 as follows: February 11, 1945, $37.50; April 30, 1945, $37.50; August 30, 1945, $62.50, plus $17.32 for water taxes which the sellers had paid; November 25, 1945, $25. In March, 1946, she gave defendants' agent a check for $50 signed by her daughter, which check was dishonored, payment having been stopped. No other payments were made, taxes for the years 1944 and 1945 were permitted to become delinquent, and irrigation district taxes amounting to $68 were not paid until December 20, 1946, after the sellers had given Mrs. Amoruso notice of termination of her rights under the contract. On numerous occasions the sellers' agent called Mrs. Amoruso's attention to her delinquencies, and on October 18, 1946, a letter was mailed to her at her Sacramento address by attorneys representing the Carleys, which letter notified her she was in default and that unless all delinquent payments were made within 10 days the contract would be declared forfeited and the moneys paid by her retained for the use of the premises. On October 30, 1946, said attorneys sent to her by registered mail a letter similar to the former one, but notifying her that unless all delinquent payments were made on or before November 5th the contract would be terminated. This letter was returned to the writer as "unclaimed," whereupon these attorneys secured the services of a process server, who, after several calls at Mrs. Amoruso's said residence, succeeded in serving her with the aforesaid letter on November 4th. No action was taken by Mrs. Amoruso, and on November 18th the same attorneys mailed to her a notice advising her that since nothing had been done by her after service of notice on November 4th her rights under the contract were terminated. Receipt of this letter is admitted. On December 18th Mrs. Amoruso and her son went to the home of the Carleys (whom she had not before met), where she told Mr. Carley she had money in her purse to pay the balance due; but she made no tender of it. That same day she filed this action asking specific performance of the contract, and that she be relieved of default by reason of any alleged failure to comply with the provisions thereof. Defendants filed their answer and a cross-complaint praying that their title to the property be quieted. Plaintiff answered the cross-complaint and after the trial of the issues the court made findings in favor of cross-complainants, and entered judgment accordingly.

In her complaint plaintiff alleged that she had duly performed under the contract and on or about November 18, 1946, had tendered to defendants payment in full, but such payment had been refused. She also alleged that she had, on that day, deposited in a bank, for defendants, $415 which she computed to be amount due defendants, and was ready, able and willing to pay any additional amounts found to be due them. This allegation as to the date is incorrect since the call on Mr. Carley, and the deposit in the bank, were made December 18th. She also alleged that she had placed improvements on the property of the value of $6000; that any default or forfeiture on her part was "without gross negligence, wilful or fraudulent conduct" on her part, and that the defendants had waived same.

The evidence adduced revealed that the only improvements placed upon the property consisted of a fence costing, as plaintiff said, about $100. It also showed that she did not, on December 18, 1946, actually tender money to Mr. Carley but stated to him that she had the money in her purse; that both such alleged tender and deposit were made only after defendants had terminated the contract; and that though she was advised by defendants on November 4th that the contract would be terminated if she did not act promptly, she did nothing for some six weeks thereafter, and presented no excuse for her delay or for her failure to comply with the terms of her agreement or to heed the repeated warnings of defendants' agent as to her defaults in payment.

In its findings the trial court found that in the main the allegations of plaintiff's complaint were untrue, that her deposit of moneys in bank was made after termination of the contract and was insufficient in amount; that without just cause she had defaulted in her payments, and that such default was not in anywise waived by the sellers, nor was the "time is of the essence" provision waived. In the judgment it was, however, provided that as a condition thereof the defendant should pay to plaintiff $124.52, the amount of taxes and water charges which she paid after termination of the contract.

On this appeal from the judgment appellant admits her delinquency in payments but argues that her so-called tender on the day she filed her action had the effect of curing her default regarding the eleven installments then unpaid, and that the deposit in the bank kept such tender good; that the notice of time within which she was called upon to act by the notice she received November 4th was insufficient; that there was no showing of grossly negligent, wilful misconduct and fraudulent breach of duty such as is contemplated by section 3275 of the Civil Code before a forfeiture is enforced; and that the judgment results in undue enrichment of defendants.

Since the briefs were filed in this case the Supreme Court has rendered its decision in Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, and this court has decided the case of Kammerer v. Woodson, Cal.App. 208 P.2d 372, cases involving principles of law applicable to the case now before us. The case of Myers v. Garaventa, Cal.App., 209 P.2d 135, this day filed, involves like questions, to wit, whether where contracts for sale of real property provide for installment payments and provide that time is of the essence thereof, there has been an effective waiver of the time provisions of the contract, or the seller has, by his conduct, estopped himself from reliance thereon, and whether, under the evidence in the case, it has been shown that the purchaser's defaults are excusable, or whether they show a "grossly negligent, or wilful, or a fraudulent breach of duty."

In Barkis v. Scott the evidence showed that the purchase price involved was $6150, $700 of which was paid on execution of the contract, and the balance with interest at 6% was payable in monthly installments of $42.50. The buyers made 57 of such payments—a total of $2422.50—including payment due May 15, 1946. They also made improvements on the property of the value of $3,114.47. Checks for June and August payments were returned by the bank, but the July check was honored. On August 26, 1946, the seller notified the buyers that he had elected to declare a forfeiture for defaults in the June and August payments. The evidence showed that the buyers were not aware that the June and August checks had been dishonored until they received the seller's notice of forfeiture. It also showed that they immediately tendered certified checks for the amounts due, and then opened an account, under the provisions of section 1500 of the Civil Code, depositing therein all amounts due under the contract. The dishonor of the checks of June and August as explained by the buyers was due to their failure to make usual deposits because of the husband's illness, and both defendants testified they believed they had sufficient funds on hand to cover such checks. Under those circumstances the court held that the defaults could not be said to be wilful or to be due to gross negligence or fraudulent breach of duty; and, futhermore, that in view of the payments made to the seller and the improvements made by the buyer, the former would, by a forfeiture, realize more than the benefit of his original bargain. It was accordingly held that the forfeiture should be denied.

In the Kammerer case delay in payment of three installments of $100 each on the contract price of land sold for $15,000, upon which a total of $2700 had been paid, and default in the payment of a small amount of taxes and insurance were held by the trial court not to constitute such a grossly negligent, wilful or fraudulent breach of the contract as justified a forfeiture; that under the special provisions of the agreement the buyers were really in default of but one payment regarding which forfeiture could be declared; and as to the taxes they were not aware of the amount chargeable to them since taxes upon the property contracted for and certain personal property were not segregated, and no demand for payment of same had been made upon them, as was required by the contract. Tender of all amounts due was made by the buyers, and this court affirmed the judgment restoring them to the benefits of the contract on condition that they pay to the sellers the sum of $1198.54, which covered installments, interest, insurance and taxes to the date of judgment. In that case the appeal was on the judgment roll alone, and what excuses for their delay plaintiffs presented at the trial were not before us, and we assumed that the evidence was sufficient to support the findings of the trial court and justify the relief from default granted by it.

[1] In Myers v. Garaventa, not only were the facts different from those shown here, but a valid tender of the full amount due was made immediately after notice was given, in conformity with a provision of the contract that if buyers tendered to seller the full amount due, owing and unpaid, within 10 days after notice of retaking by the seller, the seller should execute proper instruments vesting title in buyer. Also the judgment of the trial court which heard and saw the witnesses was in favor of the plaintiffs, and all intendments are in favor of that judgment.

[2] The instant case, however, differs in very material respects from the foregoing ones. Here plaintiff, from the very beginning, delayed the payment of installments of but $12.50 per month. At the time forfeiture was declared she had made no payments for eleven months. The only improvement she made upon the property was the construction of a fence costing no more than $100; she was shown to have had other real estate dealings so was not unfamiliar with them, and she had been constantly urged by the sellers' agent to make her payments; she permitted the taxes to become delinquent and failed to pay water assessments; she apparently evaded service of notice upon her, and even after notices were finally served did nothing to relieve her default until the day this action was filed; the offer which she made on that day to pay the overdue installments was of an insufficient amount, as was the deposit in bank; she was in possession of the property, but throughout the life of the contract her conduct plainly evidenced gross negligence and wilful conduct which the trial judge who heard and saw the witnesses was fully justified in holding was sufficient to justify the forfeiture.

[3] As to what constitutes wilful conduct and gross negligence see Parsons v. Smilie, 97 Cal. 647, 654, 32 P. 702; Crowell v. City of Riverside, 26 Cal.App.2d 566, 581, 80 P.2d 120; Pfitzer v. Candeias, 53 Cal.App. 737, 740, 200 P. 839, and Taylor v. U. S. Fidelity and Guaranty Co., 86 Cal. App. 382, 390, 260 P. 898. Gross negligence was said, in Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 66, 77 A.L.R. 1327, to be "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and "that want of care which would raise a presumption of the conscious indifference to consequences." Also see Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, and Browne v. Fernandez, 140 Cal. App. 689, 693, 36 P.2d 122, 124, where the court said that "* * * gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results * * *."

[4] While we are aware that the strict rule applied in such cases as Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, has been modified in later decisions of our courts, it was said in Barkis v. Scott, supra, that section 3275 of the Civil Code presupposes that the party seeking relief is in default (which plaintiff Amoruso was), and that in order to secure relief under its terms it is necessary for him to prove facts that will justify relief (which this plaintiff signally failed to do).

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

93 Cal.App.2d 522

SHIPS & POWER EQUIPMENT CORPORATION v. SAN DIEGO COUNTY.

Civ. 3952.

District Court of Appeal, Fourth District, California.

Sept. 2, 1949.

Hearing Denied Oct. 31, 1949.

The Ships & Power Equipment Corporation, a New Jersey corporation, sued the County of San Diego, to recover personal property taxes levied by the County for year 1947–1948 upon vessels belonging to plaintiff and moored in San Diego Harbor.

Plaintiff contended that vessels had not attained a permanent situs in California and that upon sale of vessels to plaintiff by United States while moored in San Diego Harbor their situs for tax purposes was fixed in state in which plaintiff was incorporated.

The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment against plaintiff, and plaintiff appealed.

The District Court of Appeal, Barnard, P. J., affirmed judgment, holding that since vessels were moored in San Diego Harbor for more than a year prior to tax levy, and were never used in trade or commerce, vessels acquired a tax situs in San Diego County, regardless of fact that plaintiff was incorporated in sister state.

1. Taxation 🔑260

Generally, tangible personal property is taxable at its actual situs.

2. Taxation 🔑262

For taxation purposes, a vessel that is completely inoperative is no different than any other tangible personal property which is movable on land or water.

3. Taxation 🔑262

Even under special rules governing vessels used in trade and commerce, vessel may acquire a tax situs at a place other than that of the domicile of the owner. Revenue and Taxation Code, § 1138; Const. art. 13, §§ 1, 4.

4. Taxation 🔑167

Where plaintiff bought vessels from United States Navy which were never used in trade or commerce and were inoperative more than a year prior to time when county in which they were moored assessed personal property taxes on them, the vessels acquired a tax situs in county in which they were moored, and county could levy tax upon them, although plaintiff was a corporation incorporated in sister state.

Charles B. DeLong, San Diego, for appellant.

James Don Keller, District Attorney, Carroll H. Smith, Chief Trial Deputy, Robert G. Berrey, Deputy District Attorney, San Diego, for respondent.

BARNARD, Presiding Justice.

This action involves the validity of a personal property tax levied for the year 1947–48 upon certain ships moored in San Diego harbor. The plaintiff paid the tax under protest and brought this action to recover the amount paid.

The cause was heard upon an agreed statement of facts. The plaintiff is a New Jersey corporation, and none of its officers reside in California. On December 4, 1946, it purchased from the United States Navy thirty-three seagoing vessels, being L. C. I. landing craft constructed for Navy use in transporting infantry troops in assault landings. On January 16, 1947, it purchased from the Navy a seagoing P. C. vessel constructed for use in patroling the seas. On February 15, 1947, it purchased from the Navy two L. S. M. landing craft, constructed for use in transporting troops and equipment in assault landings. All of these vessels had been thus used by the Navy during World War II. Each of said vessels was over 50 tons net burden, but none of them had ever been registered at any port in this state or engaged in the transporting of freight or passengers, or engaged in trade or commerce. None of them had at any time been registered or documented or enrolled, or licensed, or awarded a number by the United States or by any other country or jurisdiction.

The dates when these vessels were decommissioned do not appear, but they had all been decommissioned at San Diego harbor on or prior to March 25, 1946. They remained moored in that harbor at least until July 6, 1948, the date of the stipulation. During said time they were capable of being recommissioned and of operating on the high seas.

On March 3, 1947, the county assessor assessed a tax of $2486.02 upon said vessels, which the plaintiff paid under protest and under a threat that otherwise the vessels would be seized and sold. None of said vessels had been assessed or taxed in New Jersey, or in any other state or jurisdiction. The vessels are still owned by the plaintiff and have not been sold or otherwise disposed of.

It was further stipulated that the president of plaintiff corporation, if called as a witness, would testify: "At the times of the purchase of said vessels and each of them, it was the intention of plaintiff to operate or cause to be operated as seagoing vessels upon the Yangtse River in China, but because of the inflation in that country have not done so." Also that on October 14, 1947, an authorized agent of the plaintiff wrote to a man in San Diego offering to sell to him "all of the L. C. I.'s in San Diego" at a price of $7500 each, or at a price of $6200 each if all were taken at one time.

From these facts the court made the further finding that on March 3, 1947, the stay and location of said vessels and each of them in San Diego harbor "was permanent, though indefinite, as distinguished from a temporary stay or location; that on said date said 36 vessels, and each of them, had become commingled with and a part of the general mass and bulk of personal property in the State of California and the county of San Diego; and that on said date said 36 vessels, and each of them, had acquired an actual permanent situs in said county of San Diego though indefinite, as distinguished from a temporary situs." The court found as conclusions of law that these vessels were subject to taxation by the defendant, that this tax was lawfully assessed and levied, and that the plaintiff is not entitled to recover the amount paid, or any part thereof. Judgment was entered accordingly, and this appeal followed.

The appellant contends that being seagoing vessels owned by a foreign corporation the tax situs of these ships was in the home state of the corporation. In support of this it is pointed out that section 1138 of the Revenue and Taxation Code provides that "Vessels documented outside of this State and plying in whole or in part in its waters, the owners of which reside in this State, shall be assessed in this State." It is argued that the converse of this must also be true, and that the effect of this statute is that where the owners do not reside in this state the vessels may not be taxed here. Neither the rule expressed in the statute nor its converse should have any application here since these vessels were not documented outside of this state and were not plying, in whole or in part, in the waters of this state. It is further contended that the court's conclusion that the vessels had attained a permanent situs in this state is not justified by law or the facts; that the vessels had no home port or situs and were not subject to taxation during the time they were owned by the United States Government; and that their situs for tax and all other purposes was immediately fixed in New Jersey the moment they were sold to the plaintiff. Also, that a permanent situs, as distinguished from a temporary situs, could in no event be established in any period short of a full tax year.

Section 1 of article XIII of the State constitution requires that "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value." Section 4 of that article provides such an exception for any vessel of 50 tons burden which is "registered at any port in this State and engaged in the transportation of freight or passengers." It clearly appears that this exemption has no application here. These vessels were not thus registered, were never engaged in any such transportation, and were not constructed for such a purpose.

[1] The facts of this case would seem to bring it within the general rule that tangible personal property is taxable at its actual situs, rather than within the special rules that have been developed with respect to the taxation of vessels which are engaged in foreign or interstate commerce, as a necessary result of which they cannot be said to have an actual permanent situs. The true test of whether a vessel is thus engaged in the transportation of freight or passengers is whether such vessel is regularly used for that purpose. County of Los Angeles v. Craig, 38 Cal.App.2d 58, 100 P.2d 818. While a mere temporary withdrawal from such use would not affect the standing of a vessel so regularly used, it would hardly seem reasonable to apply the special rule to a vessel which was not built for such use and had never been so used, regularly or otherwise, even though the owner may have at one time intended to put the vessel to such use in a foreign country at some indefinite time in the future.

These vessels had never been used in trade or commerce and were entirely inoperative from some time prior to March 25, 1946, the exact date not having been brought out by the appellant, at least up to July 6, 1948, when the agreed statement of facts was signed. During this entire period they were moored in San Diego harbor and not used for any purpose. The stipulated testimony with respect to appellant's intention at the time of purchase is qualified, the expressed intention being to either operate them or "cause to be operated" in China. There is no evidence of the kind of use thus contemplated, whether for war or for commerce. It is a reasonable inference from this indefinite evidence, and from the further evidence of an offer of sale, that these vessels were purchased as merchandise and with the intention of selling them to the best advantage.

[2, 3] For taxation purposes, a vessel that is completely inoperative is no different than any other tangible personal property which is movable on land or water. Tennant v. State Board of Taxes and Assessments, 95 N.J.L. 465, 113 A. 254; Thompson v. Day, 143 La. 1086, 79 So. 870, 8 A.L.R. 660. Even under the special rules governing vessels used in trade and commerce a vessel may acquire a tax situs at a place other than that of the domicile of the owner. Olson v. City and County of San Francisco, 148 Cal. 80, 82 P. 850, 2 L.R.A., N.S., 197, 113 Am.St.Rep. 191, 7 Ann.Cas. 443; Bush v. State, 140 Fla. 277, 191 So. 515; North American Dredging Co. v. Taylor, 56 Wash. 565, 106 P. 162, 29 L.R.A., N.S., 105; Sayles v. Los Angeles County, 59 Cal.App.2d 295, 138 P.2d 768.

[4] The trial court's finding that these vessels had acquired a tax situs in San Diego County is sufficiently supported by the agreed facts. The fact that the federal government owned these vessels prior to the time they were sold to the appellant is not material on this question. While the federal government, during its ownership, was exempt from any local taxation, the special rules governing the use of vessels in trade and commerce involve, for taxation purposes, the question of permanent or temporary situs of the vessel itself. This question of situs depends upon the place or manner in which the vessel is used and not upon the owner's situation with respect to general tax liability. This entire matter of situs, for taxation purposes, merely constitutes an exception to the other special rule which for convenience regards the home of the owner of a ship used in commerce, as the proper place for taxation. It clearly appears that these vessels had never been engaged in commerce and that they remained inoperative during the entire tax year in question. From the nature of the proof offered it seems probable that all or most of them had been in this situation for more than a year prior to March 3, 1947, when this tax was assessed.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

93 Cal.App.2d 484

WILLIAMSON v. PACIFIC GREYHOUND LINES.

Civ. 13890.

District Court of Appeal, First District, Division 2, California.

Aug. 31, 1949.

Hearing Denied Oct. 27, 1949.

Margaret Williamson sued the Pacific Greyhound Lines, a corporation, for personal injuries sustained from falling baggage as bus on which plaintiff was a passenger went around a sharp turn.

The Superior Court of San Francisco County, Edward P. Murphy, J., entered judgment for defendant, and plaintiff appealed.

The District Court of Appeal, First District, Division 2, Goodell, J., reversed the judgment on the ground that the issue of plaintiff's contributory negligence was erroneously submitted to the jury since she had no prior notice requiring her to be on lookout to protect herself against danger from falling baggage.

1. Carriers ⚷337

A passenger of a bus is not charged with duty of inspecting baggage without prior notice requiring her to be on lookout to protect herself against such danger.

2. Appeal and error ⚷1064(1)
Carriers ⚷347(1)

In action by bus passenger against bus company for injuries sustained by baggage falling from rack as bus went around a sharp turn, trial court's refusal to withdraw issue of passenger's contributory negligence was reversible error, where passenger had no prior notice requiring her to be on lookout to protect herself against danger of falling baggage.

3. Appeal and error ⚷1064(1)
Carriers ⚷348(1)

In action by bus passenger for injuries sustained from baggage falling from rack as bus went around a sharp turn, instruction that it was passenger's duty to observe condition of baggage stored within bus and that if she failed to do so she was guilty of negligence, was reversible error.

4. Appeal and error ⚷882(12)

In action by bus passenger for injuries sustained from baggage falling from rack as bus went around a sharp turn, passenger was not estopped on appeal from assigning error on action of trial court in refusing to withdraw issue of contributory negligence on theory she invited error by introducing instructions on issue of contributory negligence, where question was pleaded by bus company, and passenger did everything in the opposite direction by seeking withdrawal of entire question.

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Clarence N. Riggins, Napa, for appellant.

Dana, Bledsoe, & Smith, San Francisco, A. Dal Thomson, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from a judgment on a verdict in defendant's favor in an action for damages for personal injuries. On a prior appeal this court reversed a judgment of nonsuit. 78 Cal.App.2d 482, 177 P.2d 977. The present appeal is based solely on errors in instructions at the second trial.

Appellant was a passenger on a bus of respondent going from Napa to San Francisco. On boarding the bus she took an aisle seat four or five seats behind the driver and on his side of the bus. Appellant alleged that she was injured by a heavy suitcase, not her own, which fell from a baggage rack above the seats, an accident allegedly caused by respondent's negligence in the operation of the bus and in failing to inspect and to take precautions for the safe storage of the baggage. She testified that when the bus went around a sharp curve it swayed and jolted with such force as to throw her against the woman seated on her left and that simultaneously with the jolt the suitcase fell from the rack and struck her on the head, right shoulder and arm.

Contributory negligence and assumed risk were pleaded as follows: "* * * defendant alleges, upon its information and belief, that if plaintiff was a passenger upon defendant's bus * * * she had full knowledge of the location of the baggage and baggage rack in said bus and carelessly and negligently failed to take any precautions for her own safety and assumed all of the risk incident to the situation."

Appellant testified that she had only a hand-bag with her, had no occasion to look at the baggage racks, and did not do so. On cross-examination this was elaborated; she saw no baggage above her, saw none protruding from the racks, noticed nothing irregular with respect to the baggage racks, and did not observe any baggage being placed in or taken out of the racks. She "had no baggage and wasn't interested". There was no evidence that any of the baggage was in a dangerous position.

The court refused the following instruction tendered by appellant: "There is no evidence in this case which would support a finding of contributory negligence on the part of the plaintiff."

The court gave the following instruction among others tendered by respondent: "I instruct you that the plaintiff, Margaret Williamson, during the time she was a passenger on defendant's bus was obligated to exercise ordinary care to see and observe the condition within said bus and to observe and to exercise ordinary care in the observation of the condition of baggage stored within the said bus. Any failure on plaintiff's part, if any, to use ordinary care in this regard would constitute negligence. If you find from a preponderance of the evidence that plaintiff was careless in such observations and you further find from a preponderance of the evidence that such carelessness, if any, was a proximate cause of any injuries sustained by her, if any, then your verdict must be for the defendant."

The facts in Prunty v. Allred, 73 Cal. App.2d 67, 165 P.2d 935, 939 are practically identical with those in this case. There the falling of the suitcase from the rack coincided with the bus coming back into its own lane "rather suddenly * * * because there was oncoming traffic", after passing a truck at about 45 miles per hour. Here it was simultaneous with the swaying and jolting of the bus on a sharp curve. Here nothing had fallen from the rack before the suitcase fell, while there a short while before the suitcase fell a fur coat had fallen from the rack upon the passenger-plaintiff and had been put back in the rack, from which incident it was argued she knew more about the possibility of things falling from the rack than did the driver. The trial court there withdrew the issue of contributory negligence from the jury. In affirming the judgment the court said: "We are unable to discover any evidence supporting defendants' claim that plaintiff was guilty of contributory negligence. * * * She did not place the baggage in the rack, she was not charged with the duty of inspecting the baggage, nor did she assume it. She had no notice requiring her to be on the lookout to protect herself against such danger. She was a passenger for whose safe carriage the defendants were charged with the duty of exercising the utmost care and diligence. Civ.Code, § 2100. Defendants have not pointed out wherein she could be so charged. It was therefore proper for the court to withdraw that issue from the jury's consideration. Blackwell v. American Film Co., 189 Cal. 689, 699, 209 P. 999."

The appellants in that case in their petition to the Supreme Court for a hearing, made a distinct point of the withdrawal from the jury of the defense of contributory negligence. They argued that if the record contained any "evidence from which an inference of contributory negligence could be drawn, it was prejudicial error to withdraw the question" and cited Thomas v. Visalia Electric R. Co., 169 Cal. 658, 661, 147 P. 972, 973 holding that "A litigant is entitled to proper instructions bearing upon any legitimate legal inference which may be drawn from evidence given. * * *" Their petition, however, was denied.

Appellant of course relies on Prunty v. Allred. Respondent has made no attempt to distinguish the two cases and we are satisfied they are not distinguishable.

[1] The holding there that the passenger "was not charged with the duty of inspecting the baggage" having "had no notice requiring her to be on the lookout to protect herself against such danger" is in

accord, apparently, with the general law on the subject. 13 C.J.S., Carriers, § 774, pp.1544–1545.

Selman v. City of Detroit, 283 Mich. 413, 278 N.W. 112, cited by respondent is distinguishable, as there the passenger was on notice, having seen the baggage over which she stumbled in the aisle of the street car. In the present case there was no evidence of any fact that should have put appellant on notice of any danger arising from stored baggage, or any circumstance whatever indicating any lack of care on her part. As was said in our prior opinion 78 Cal.App.2d 487, 177 P.2d 980, "No danger was apparent to her, and none under the facts presented could have been."

[2, 3] It follows that the instruction withdrawing from the jury the issue of contributory negligence should have been given. It is equally clear that the instruction which told the jury that it was plaintiff's duty to observe "the condition of baggage stored within the said bus" and that if she failed to do so she was guilty of negligence, was erroneous.

That the refusal of the one and the giving of the other instruction was prejudicial is accentuated by the fact that in appellant's cross-examination she was repeatedly asked if she did not look at the baggage rack and answered that she did not, and had no occasion to do so.

[4] Respondent contends that if error resulted from the instructions on contributory negligence it was invited and induced by the several instructions on the same subject tendered by appellant. It must be borne in mind that contributory negligence was introduced into the case by respondent's plea. The only way to remove it from the case was for the court to tell the jury (as appellant requested) that there was no evidence to support it. Once the court decided not to do so, instructions on that subject inevitably followed, including the one already quoted which runs counter to Prunty v. Allred. It can hardly be said however, that appellant invited them when she did everything within her power in the opposite direction by seeking the withdrawal of the entire question.

Appellant's instructions on contributory negligence were purely defensive tendered provisionally of course (as happens every day) to be used only in case the court refused her withdrawal instruction.

The several cases cited by respondent on invited error do not go so far as to support its present claims. One of them, Cedzo v. Bergen, 53 Cal.App.2d 667, 674, 128 P.2d 683, 688, in holding that the appellant invited the instructions of which he complained, points out (as we have done) "that the issue as to plaintiff's contributory negligence was raised by the pleading" and the opinion follows that with the significant observation that the plaintiff there did not "request an instruction that the evidence was insufficient to support a verdict against the plaintiff on the issues so raised * * *."

Dowd v. Atlas Taxicab, etc., Co., 69 Cal. App. 9, 14, 230 P. 958, 960, is in point. There it is said: "Even where a party is unable to induce the court to instruct the jury according to his view of the law, 'the fact that he asks instructions presenting the most favorable view of the law that the court will entertain does not estop him on appeal to assign error upon the action of the court.' 38 Cyc. 1789." The Supreme Court followed this in Huebotter v. Follett, 27 Cal.2d 765, 769, 770, 167 P.2d 193. See, also, the concurring opinion in Ray v. Kennedy, 24 Cal.App.2d 583, 586, 76 P.2d 147.

The judgment is reversed.

DOOLING, J., concurs.

93 Cal.App.2d 500

ROWELL v. CROW et al.

Civ. 7601.

District Court of Appeal, Third District, California.

Sept. 2, 1949.

Hearing Denied Oct. 31, 1949.

Joseph W. Rowell brought an action against Henry T. Crow and Kate Crow to recover sums due for professional services rendered as an architect in drawing plans for construction of proposed hotel building.

The Superior Court, Stanislaus County, H. L. Chamberlain, J., held that plaintiff had not performed his contract and that defendants had not received any benefit, and gave judgment to defendants.

The District Court of Appeal, Adams, P. J., affirmed the judgment on the ground that it was supported by the evidence.

1. Contracts 🔑28(3)

In action by architect to recover for professional services rendered in drawing plans for hotel, evidence sustained finding that parties had entered into oral contract for preparation of plans and specifications to be used in erection of five-story building, cost of which was not to exceed $250,000.

2. Contracts 🔑322(3)

In action by architect to recover for professional services rendered in drawing plans for hotel, evidence sustained finding that defendants did not waive performance by architect in respect to $250,000 cost covenant or condition in preparation of plans.

3. Appeal and error 🔑1010(1)

Appellate court will not interfere with findings of trial court where there is substantial evidence to support the findings.

4. Contracts 🔑280(4)

Where architect entered into oral contract to draw plans for construction of hotel, cost of construction not to exceed $250,000, but hotel constructed according to plans would cost more than twice that sum, and plans were never used, architect was not entitled to compensation.

5. Work and labor 🔑28(1, 2)

In action by architect to recover in quantum meruit for professional services rendered in drawing plans for hotel, evidence sustained finding that defendants received no benefit whatever from the services of the architect and that neither of the defendants promised to pay architect any amount except on condition that architect prepare plans for a building to be constructed at a cost not exceeding a sum of $250,000.

6. Work and labor 🔑1

Recovery on quantum meruit is based upon benefit accepted or derived for which the law implies a contract to pay, but where no benefit is accepted nor derived there is nothing from which such contract can be implied.

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Calkins, Hall, Linforth & Conard, Maurice E. Gibson, San Francisco, for appellant.

Hawkins & Hawkins, Modesto, for respondents.

ADAMS, Presiding Justice.

Appellant, an architect, brought this action to recover from respondents the sum of $20,207 alleged to be due him for professional services rendered. From a judgment for respondents he perfected this appeal.

So far as pertinent to this appeal, the appellant alleged that on or about May 28, 1945, he entered into an oral contract with respondents whereby it was agreed he would prepare architectural, structural, mechanical and electrical engineering plans and specifications for respondents to be used in the erection of a five-story fireproof hotel building in the City of Modesto and to superintend the erection thereof; that bids were invited thereon, the lowest of which was $598,819; that respondents failed and refused to proceed with the erection of the building and by reason thereof he was entitled to the sum above mentioned.

The trial court found in favor of respondents on the allegations set up in their defense that the oral agreement alleged by appellant was subject to the condition that the plans and specifications would be so drawn by appellant that the building would cost not more than $250,000, which was all respondents could and would pay for its construction; that by reason of the fact that the lowest bid of $598,819 was far in excess of $250,000 the respondents received no benefit whatever from appellant's services.

The trial court found:

"That on or about the 28th day of May, 1945, plaintiff entered into an oral contract with defendants, and each of them, wherein and whereby it was agreed that plaintiff would prepare architectural, structural, mechanical and electrical engineering plans and specifications for the defendants, and each of them, for the erection of a hotel building known as the 'Hotel Modesto' in Modesto, Stanislaus County, California. There was no agreement between the parties to said oral contract that the plaintiff was to superintend the erection thereof from said plans for the sum of six per cent, or any other per cent of the contract price of said building, sixty per cent, or any other per cent of such fee to be due and payable when said plans and specifications were completed and bids received thereon. That at the time said contract was entered into, defendants stated to plaintiff that they would not build a hotel building that would cost over $250,000.00, and that they had available for the construction cost thereof only $122,000.00 and that they would not obligate themselves to borrow in excess of $125,000.00 and, therefore, would not build a hotel building unless the hotel building could be built for a sum not to exceed $250,000.00, and if plaintiff could prepare plans and specifications for a building to cost not more than $250,000, he could proceed to draw such plans. That plaintiff assented to such condition and prepared plans and specifications for a hotel building and took bids therefor, and the lowest bid for the construction of such building, not including the cost of elevators, was $598,819.00, and the lowest bid for the elevators was $30,000.00. That defendants failed and refused to proceed with the erection of said hotel building for the reason that the said hotel building could not be built or constructed for $250,000.00, and for the reason that the plaintiff had not performed his contract to prepare plans and specifications for a hotel building to cost not to exceed $250,000.00. That at the time the bids for the construction of said hotel building were made and opened, defendants were not financially able to pay the cost thereof by limiting their borrowing to $125,000.00.

* * * * * *

"That the said plans and specifications were not used by defendants or either of them for any purpose except to obtain the said bids, and that neither the said proposed building nor any part thereof has been constructed, nor is the same, or any part thereof, proposed to be or intended by the defendants to be constructed."

[1] The first contention of appellant is that there is no substantial evidence to support the finding that the parties entered into an oral contract covering appellant's services. It is difficult to follow his reasoning since he alleged that the parties entered into an oral agreement; and the court found, upon substantial evidence, that such oral contract had been entered into by the parties. Under such circumstances we find no merit in the contention.

The second point urged by appellant is that there is no substantial evidence to support the finding that under the oral contract appellant undertook and agreed to prepare plans and specifications to be used in the erection of a five-story fireproof building, the cost of which would not exceed the sum of $250,000, or that his employment was subject to such minimum cost limitation. We have examined the record and find that respondent Henry T. Crow, his son, Harry Crow, and the son's wife, Jewell Crow, all testified they were present when the oral agreement was entered into, and their testimony supports the court's finding.

[2] The third contention of appellant is that there is no substantial evidence to support the finding that respondents did not waive performance by appellant with respect to such $250,000 cost covenant or condition. We have read the record and

find no evidence of any waiver of any of the terms of the agreement by respondents.

Passing the fourth contention and taking up appellant's fifth, he argues there is no substantial evidence that respondents received no benefit from appellant's services. After examining the record we are unable to find any evidence showing that respondents received any benefit from any of appellant's services. They agreed to compensate him on condition that he prepare plans and specifications for the construction of the building at a cost not to exceed $250,000, and appellant agreed to prepare such plans and specifications. His failure to meet his obligation and the fact that the plans and specifications he prepared were not used in any construction is ample evidence that respondents received no benefit from his efforts.

[3, 4] In passing upon the foregoing contentions we are guided by the familiar rule that an appellate court will not interfere where, as here, there is substantial evidence to support the findings. 2 Cal.Jur. 918, sec. 542. Furthermore, in Martin v. McMahan, 95 Cal.App. 75, 78, 271 P. 1114, this court held that where an agreement provides for a building not to cost more than a certain sum and the cost does exceed that sum, the architect is not entitled to compensation. Also see 6 C.J.S., Architects, § 14, p. 310.

[5] The fourth point raised by appellant is that since he alleged a second cause of action for the same services based on quantum meruit and the court found that his services in preparing the plans and specifications and in placing and receiving the bids were reasonably worth the sum sued for, he is entitled to recover on that count. But, the court further found that "defendants received no benefit whatever from the services of the plaintiff"; that "the said plans and specifications so prepared by the plaintiff and the services rendered by him have been without any value whatsoever to the defendants, or either of them"; and that "neither of the defendants ever promised or agreed to pay the plaintiff any amount whatever for his services except upon the sole condition that * * * plaintiff should prepare plans and specifications for a building which could under the conditions actually existing be constructed at a cost not exceeding the sum of $250,000.00."

[6] Recovery on quantum meruit is based upon benefit accepted or derived for which the law implies a contract to pay. Where no benefit is accepted or derived there is nothing from which such contract can be implied. See Miller v. San Francisco, etc., Soc., 125 Cal.App. 85, 91, 13 P.2d 824; Wescoatt v. Meeker, 63 Cal.App.2d 618, 625, 147 P.2d 41; Van Ryn v. Rock County, 211 Wis. 678, 247 N.W. 848, 850; Geddis v. Board of Commissioners, 20 Ind. App., 274, 50 N.E. 581, 582; Ylijarvi v. Brockphaler, 213 Minn. 385, 7 N.W.2d 314, 319; Bouterie v. Carre, La.App., 6 So.2d 218, 220; Granger v. Fontenot, La.App., 3 So.2d 215, 216.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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93 Cal.App.2d 493

PEOPLE v. MONTANEZ.

Cr. 4340.

District Court of Appeal, Second District, Division 1, California.

Sept. 1, 1949.

Tony Joseph Montanez was convicted in Superior Court of Los Angeles County, Thurmond Clarke, Judge, of committing a lewd and lascivious act upon body of a five-year old child, with intent of arousing, appealing to and gratifying the lust, passions and sexual desires of the child and himself and he appealed.

The defendant contended that evidence was insufficient to sustain conviction and that there was no corroboration of testimony of child.

The District Court of Appeal, White, P. J., affirmed the judgment, holding that evidence sustained conviction and that conviction could be based on uncorroborated testimony of child.

1. Infants ⚷20

A defendant could be convicted of committing a lewd and lascivious act upon body of a five year old child with intent of arousing, appealing to and gratifying the lust, passions and sexual desires of child and of defendant, on uncorroborated testimony of child. Pen.Code, § 288.

2. Criminal law ⚷1159(2)

District Court of Appeal may not set aside a conviction unless evidence on which it is based is so insubstantial or so inherently unbelievable or improbable as to constitute no evidence.

3. Infants ⚷20

Evidence sustained conviction for committing a lewd and lascivious act upon body of a five year old child with intent of arousing, appealing to and gratifying the lust, passions and sexual desires of child and of defendant. Pen.Code, § 288.

◆

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

WHITE, Presiding Justice.

Defendant was charged by information with the crime of violation of section 288 of the Penal Code, in that on October 2, 1948, he committed a lewd and lascivious act upon the body of a certain five-year-old child with the intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of the said child and the defendant. Trial by jury was waived by the defendant, his counsel and the district attorney, and it was stipulated that the People's cause be submitted on a transcript of the preliminary hearing, with the right on either side to put on additional testimony. Defendant was adjudged guilty and permitted to apply for probation. Probation was denied and judgment and sentence pronounced. The present appeal is from the judgment.

The sole ground urged for reversal is that the evidence is insufficient to support the judgment. The following recital of the testimony will demonstrate that this contention is without merit.

The complaining witness testified at the preliminary examination that she went to Sunday school and knew what happens to little girls that do not tell the truth; that the oath meant that she was to tell the whole truth. On Saturday afternoon she went to a park with her brothers. She saw defendant at the park; he was sitting down, and he followed wherever she went. She was playing ball with her brothers; she was chasing the ball when she went close to the defendant, who "got me and laid me on the grass," and took out his sex organ and touched her on her panties and put his hand on her back beneath her panties. The defendant then told the other children to have a race. While the other children were racing defendant took the complaining witness into the men's restroom, holding her by the wrist; that while in there he again took out his sex organ and made the witness touch it. She then went outside, crying, and went home. On cross-examination she testified that defendant promised her a nickel but did not give it to her; that he had a gun which he said was a "cap" gun.

The mother of the child testified that the child came home scared, shaking and perspiring, and said that something "bad" had happened at the park.

In his own behalf defendant testified that after visiting a friend he went downtown to have a beer, decided to go to an employment office, and took a short cut across the park. When he got to the park he went to the restroom. He saw some children while walking across the park; the complaining witness was one of them; that the children asked him where he was going and asked if he wanted to see them play a race, which he did. They then asked him for money to go to a show and he told them he did not have any. That he did not get to the employment office because it closed at noon on Saturday. Defendant was apprehended an hour or so after leaving the park. He denied the criminal acts testified to by the child. On cross-examination he was asked if he remembered denying to the officers that he had been in the park. He replied that he did not understand what they meant. He admitted denying that he had seen the child, and admitted sitting on the park lawn near the men's restroom for about five minutes. He denied stating to the arresting officers that the little girl followed him into the restroom. He was asked if while he was in the men's room some other men were there, to which he answer in the affirmative. He was asked if that was before or after the little girl was there, and he replied it was before. However, subsequently he testified that the child did not go into the toilet at any time he was there; that he did not take the child's hand and make her touch his penis, because he was in the men's room alone except for the presence of other men who did not remain there very long.

In rebuttal the prosecution called Richard, a brother of the complaining witness, who testified that at the park the defendant told Richard and his brother to race and told his sister not to race because she was too small; that the defendant told the witness' sister to sit down by him; the witness did not see the defendant do anything to his sister; that when Richard and his brother came back from the race the sister came out of the men's restroom crying and said that defendant made her touch his penis. They, the witness and her brothers, then ran home and told their mother. Richard was ten years old and his brother was eight.

It was stipulated that if Police Officer Potter of Pasadena were called he would testify that shortly after his arrest the defendant "first denied being in the park, denied the victim's accusations, but did say to the officer that the little girl followed him into the toilet."

[1-3] It is at once manifest that this appeal is without merit. It is argued that the testimony of the child should have been received with caution, and that while defendant may have exposed himself in violation of section 311 of the Penal Code, there is no corroboration of the alleged violation of section 288 of the Penal Code. It is conceded by appellant that this court may not consider the weight of the evidence. Appellant places some importance upon the fact that the defendant testified to a "complete denial" and the contention that the testimony of the complaining five-year-old child was not corroborated. The testimony hereinbefore recited is a complete answer to these contentions. Aside from the fact that the testimony of the child was not required to be corroborated, People v. Lucas, 16 Cal.2d 178, 181, 105 P.2d 102, 130 A.L.R. 1485; People v. Carlson, 73 Cal.App.2d 933, 935, 936, 167 P.2d 812, the transcript contains testimony which not only corroborates portions of the child's testimony, but justifies the rejection by the court as false of the defendant's version of what occurred. If the testimony of the ten-year-old brother was believed, as apparently it was, then obviously it was a justifiable inference that the defendant suggested a race among the older children in order that he might be alone with the prosecuting witness. Admissions and discrepancies in defendant's story were in themselves sufficient to warrant a trier of fact in rejecting his defense and affording credence to the witnesses for the prosecution. This court may not set aside a judgment unless the evidence on which it is based is so insubstantial or so inherently unbelievable or improbable as to constitute no evidence at all. In the present cause not only was the evidence of the prosecution substantial, but the evidence as a whole warranted no other finding than the one which was made.

As heretofore stated, the cause was tried on the transcript of the preliminary hearing, and such further evidence as either side saw fit to introduce. The child and her mother testified at the preliminary hearing. Upon the trial the prosecution offered no further evidence in chief; the defendant testified in his own behalf, and the prosecution offered testimony in rebuttal. The case of People v. Wallin, —— Cal.App.2d ——, 208 P.2d 400, recently decided by this court, is not, as suggested in appellant's closing brief, determinative of this cause. No attack was made on the competency of the complaining victim; her testimony was amply corroborated. The child was present in court, and in fact was asked to stand up, at which time she walked to a place beside the counsel table, when the following transpired:

"Mr. Bird (Deputy Public Defender): Q. Is this Erlinda Anita Gonzales?

"Mr. Galliano (Deputy District Attorney): "That is right."

Thereupon the Deputy Public Defender asked the defendant, "Was she one of the children you saw there?" to which he replied, "Yes." She was therefore available as a witness had the defendant or his counsel chosen to call her to the witness-stand for any purpose.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

Eugenie H. PIKE, Plaintiff, Cross-Defendant and Appellant, v. Ruth Wooley PIKE, as Executrix of the Estate of Warren A. Pike, Deceased, Defendant, Cross-Complainant and Respondent.

Civ. 16937.

District Court of Appeal, Second District, Division 2, California.

Aug. 25, 1949.

Hearing Granted Sept. 29, 1949.*

On petition for rehearing.

Rehearing denied.

Prior opinion 208 P.2d 380.

WILSON, Justice.

I dissent from the order denying the petition for rehearing. Further consideration has led me to the conviction that the decision of this court should be vacated and further examination given to the questions presented by the appeal.

No appeal having been taken from the decree in the divorce action between plaintiff and decedent, Warren Pike, and no proceedings having been had for its modification, it became final and the trial court was without power in the instant action to enter a judgment contrary to the terms of the divorce decree. Wilson v. Superior Court, 31 Cal.2d 458, 464, 189 P.2d 266; Deyl v. Deyl, 88 Cal.App.2d 536, 539, 199 P.2d 424. The interlocutory decree of divorce is a conclusive adjudication of all issues determined thereby and cannot be modified save in the manner generally applicable to judgments. Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697.

The court erred in holding that the joint tenancy was terminated by the property settlement agreement. The facts in the instant case do not render it distinguishable from Spahn v. Spahn, 70 Cal.App.2d 791, 800, 162 P.2d 53, and Hammond v. McArthur, 30 Cal.2d 512, 183 P.2d 1.

Limitation of time does not permit discussion of other questions that should be further considered.

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93 Cal.App.2d 497

Ex parte CHIAPETTO.

Cr. 2616.

District Court of Appeal, First District, Division 1, California.

Sept. 2, 1949.

Ellsworth Chiapetto petitioned for writ of habeas corpus.

The District Court of Appeals, Ward, J., discharged the petitioner on the ground that he had served maximum sentence under Penal Code for conviction of misdemeanor.

Infants 🔑**20**

Provision of Welfare and Institutions Code fixing maximum term of imprisonment for contributing to juvenile delinquency to two years in county jail was repealed to extent of conflict with subsequently enacted Penal Code provision limiting confinement in county jail on conviction for misdemeanor to one year. Welfare and Institution Code, § 702; Pen. Code, § 19a.

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* Dismissed March 2, 1950.

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George T. Davis, San Francisco, Kenyon C. Keller, San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty., San Francisco, Elton C. Lawless, Deputy Dist. Atty., San Francisco, for respondent.

WARD, Justice.

The petitioner for writ of habeas corpus was imprisoned by virtue of a judgment and commitment dated August 25, 1948, for a misdemeanor, i. e., violating section 702 of the Welfare and Institutions Code. The section is part of article 6 of the same code which sets forth the jurisdiction of the juvenile court, defines "Contributing to delinquency of minor" and provides penalties for certain violations. The present judgment and commitment order that "Ellsworth Chiapetto be punished by imprisonment in the County Jail * * * for the term of One (1) year and nine (9) months."

The petition, without denial by the attorney general or the district attorney, who appear jointly for The People of the State of California, alleges "That said Ellsworth Chiapetto has actually been confined in the County Jail for a period of ten months and nineteen days since the date of the commitment; that in accordance with the provisions of Penal Code, Section 4019, the San Francisco County Board of Parole Commissioners have by affirmative action granted the said Ellsworth Chiapetto good time credits on his sentence at the rate of five days for each month he has served or a total credit of in excess of fifty days; that said good time credits have not been forfeited by any action of the said Ellsworth Chiapetto or by the San Francisco Board of Parole Commissioners." From the foregoing allegation it must be concluded that petitioner has served in excess of the equivalent of one year.

The maximum term of imprisonment on conviction of contributing to juvenile delinquency is two years in the county jail. Welf. & Inst.Code § 702. This penalty clause is based on section 21 of the juvenile Court Law, Stats.1915, ch. 631, as amended 1921, ch. 504, but was modified by Penal Code section 19a, which provides that "In no case shall any person sentenced to confinement in a *county or city jail* on conviction of misdemeanor * * * or for any reason, be committed for a period in excess of one year. * * *" (Italics added.) The defendant in this case was not committed to a state penal farm or a state institution. See People v. Phair, 137 Cal.App. 612, 31 P.2d 421; People v. Lewis, 13 Cal.2d 280, 89 P.2d 388. Section 19a was enacted in 1933 and amended in 1941, Stats.1933, ch. 848, Stats.1941, ch. 552, subsequent to the enactment of the penalty clause covering the offense of contributing to the delinquency of a minor.

The codification of the Juvenile Court Law as part of the Welfare and Institutions Code, Stats.1937, ch. 369, is a mere restatement of the previous statute, insofar as the provisions relate to the same subject matter and are substantially the same. Welf. & Inst.Code § 2. The penalty clause in section 21 of the Juvenile Court Law and that in section 702 of the Welfare and Institutions Code are identical as applied to the question presented by this petition. The amendment in 1945, Stats.1945, ch. 1234, to include a new violation did not alter the penal clause in any manner affecting the present problem. In the enactment of a new provision by amendment of a part of the statute, "The portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." Gov.Code § 9605.

It must be determined that the penal provision of Welfare and Institutions Code section 702, generally referred to as Juvenile Court Law section 21, is repealed to the extent that the confinement in a county or city jail is limited to only one year.

Pending the hearing the petitioner was released on bail. The petitioner is discharged and the bail exonerated.

PETERS, P. J., and BRAY, J., concur.

93 Cal.App.2d 508

KAUFMAN v. BROWN et al.

Civ. 3942.

District Court of Appeal, Fourth District, California.

Sept. 2, 1949.

Robert H. Kaufman sued John W. Brown and others for wrongful arrest and imprisonment.

From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., for defendants, plaintiff appealed.

The District Court of Appeal, Griffin, J., reversed the judgment, holding, inter alia, that the second amended complaint stated a cause of action.

1. False imprisonment ⊂⇒2

"False arrest" or "false imprisonment" is a trespass committed by one person against another's person by unlawful arrest or detention without authority. Pen.Code, § 236.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "False Arrest" and "False Imprisonment".

2. False imprisonment ⊂⇒7(1), 8

A person detained pursuant to lawful arrest cannot bring action for false arrest, but action for false imprisonment may be maintained against one unlawfully detaining plaintiff for unreasonable time and unnecessarily failing to take him before magistrate within reasonable time after his arrest. Pen.Code, §§ 145, 849.

3. False imprisonment ⊂⇒20(1)

An amended complaint, specifically alleging that defendants unlawfully arrested and imprisoned plaintiff without court warrant authorizing them to do so and averring resulting damages to his good name, reputation and credit, stated cause of action for false arrest.

4. False imprisonment ⊂⇒20(1)

In action for false arrest and confinement without warrant, plaintiff need not plead absence of probable cause. Pen.Code, §§ 836, 837.

5. False imprisonment ⊂⇒20(1, 2)

Plaintiff alleging, in pleading cause of action for false arrest, that arrest was forcibly and falsely made without warrant, need not negative all named factual situations wherein arrest would have been lawful, and matter of justification, if any, must be pleaded by defendants. Pen.Code, §§ 836, 837.

6. False imprisonment ⊂⇒20(1)

To charge unlawful arrest without legal process, only arrest without process, imprisonment, and damages need be alleged, as imprisonment is presumed to be unlawful and burden rests on defendants to allege and prove its lawfulness or justification.

7. False imprisonment ⊂⇒20(1)

In action for false imprisonment after arrest made without process, plaintiff need not allege that arrest was unlawful, but if process was employed, facts rendering it invalid must be set forth in complaint.

8. False imprisonment ⊂⇒20(1)

A complaint, alleging that defendants wrongfully unlawfully and forcibly imprisoned plaintiff and restrained him of his liberty for about 24 hours in city jail, defendants refused plaintiff's demand to be taken before magistrate so that he might be released on bail, made no complaint against him and released him after such time without having preferred any charge against him, stated cause of action for false imprisonment.

9. Arrest ⚷70
False Imprisonment ⚷8

One making arrest without warrant owes duty to bring arrested person before proper magistrate without unnecessary delay, and failure to do so renders officer or private person making arrest a trespasser from beginning and liable for false arrest and imprisonment.

10. False Imprisonment ⚷39

In action for false arrest and imprisonment, whether unreasonable time elapsed after plaintiff's arrest without taking him before magistrate was fact question for jury.

11. Pleading ⚷214(1)

On demurrer to complaint, allegations thereof must be accepted as true.

12. False Imprisonment ⚷15(3)

A principal is liable for false imprisonment by his agent or employee acting in scope of his authority.

13. False Imprisonment ⚷15(2)

A person authorizing, encouraging, directing or assisting an officer to do an unlawful act, procuring unlawful arrest without process, or participating in unlawful arrest or imprisonment, is liable to person arrested or imprisoned for damages.

14. Appeal and error ⚷1008(1)
False Imprisonment ⚷39

In action for false arrest and imprisonment, whether defendants acted jointly and in concert with one another in making arrest and detaining plaintiff for over 24 hours without taking him before magistrate and whether such delay was reasonable or unreasonable are fact questions for trial court or jury.

15. Limitation of actions ⚷127(5)

In action for false arrest and imprisonment, second amended complaint, merely amplifying and stating additional matters to make more complete cause of action stated in original complaint filed on last day of one-year limitation period, was not demurrable as stating cause of action barred by statute of limitations. Code Civ. Proc. § 340, subd. 3.

T. T. Crittenden, San Diego, for appellant.

Thomas Whelan, J. F. DuPaul, City Attorney, Louis M. Karp, Deputy City Attorney, San Diego, Ann Wansley, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff instituted this action on January 16, 1948, for wrongful arrest and imprisonment claimed to have occurred on January 17, 1947. Both general and special demurrers to plaintiff's orginal complaint, the amended and the second amended complaints were sustained with leave to amend. Plaintiff declined to plead further. Judgment for defendants was thereupon rendered. Plaintiff appealed on the judgment roll.

The second amended complaint alleges that defendant Local 500, Waiters and Bartenders Union is an unincorporated association and engaged in promoting and bettering the welfare and working conditions of its members; that defendant John W. Brown is secretary and treasurer thereof; that defendant Dick Ulrich is its business agent and that defendant Peter George is president and that said persons were officers and agents of said Union and that defendants Glenn Besnah and Cyrus Sterns were police officers; that on January 17, 1947, the police officers, acting in their capacity as such, and the officers and agents of Local 500, Waiters and Bartenders Union, acting in its behalf and with its knowledge, consent and advice maliciously, wrongfully and unlawfully, and without an order, warrant or process of any court authorizing them so to do, forcibly arrested and imprisoned plaintiff and restrained him of his liberty for about 24 hours in the city jail; that plaintiff demanded to be taken before a magistrate so that he might be released on bail, but said defendants refused such demand; that they maliciously took plaintiff without making or filing any complaint or advising him of any charge or of the cause of his arrest; that after 24 hours he was released from custody by orders "of said police officers"; that in so doing defendants acted jointly and in concert and without reasonable or probable cause and with malicious intent to arrest, oppress and injure him; that as a result he suffered great mental and physical distress and has been damaged in his good name and reputation and credit in the sum of $15,000. Additional punitive damages in the sum of $30,000 are sought.

The grounds of demurrer are several. The first is that the second amended complaint does not state facts sufficient to constitute a cause of action against these defendants or any one of them.

[1-3] It is apparent that the pleader was endeavoring to state a cause of action for false arrest and false imprisonment which is a trespass committed by one against the person of another by unlawful arrest or detention without authority. Neves v. Costa, 5 Cal.App. 111, 89 P. 860; Sec. 236, Penal Code; Davis v. Pacific Telephone & Telegraph Company, 127 Cal. 312, 57 P. 764, 59 P. 698. A person detained pursuant to a lawful arrest cannot bring an action for the false arrest itself. Stubbs v. Abercrombie, 42 Cal.App. 170, 183 P. 458. However, an action for false imprisonment arising from unlawful detention may be maintained if the defendant unlawfully detains the prisoner for an unreasonable period of time and unnecessarily delays taking him before a magistrate within a reasonable time after his arrest. Williams v. Zelzah Warehouse Co., 126 Cal.App. 28, 14 P.2d 177; Sec. 849, Penal Code; Sec. 145, Penal Code; Vernon v. Plumas Lumber Co., 71 Cal.App. 112, 234 P. 869. 35 C.J.S., False Imprisonment, § 51, P. 582; Roseman v. Korb, 311 Mass. 75, 40 N.E.2d 255. The question, therefore, is whether the complaint sufficiently alleges that plaintiff was unlawfully arrested or unlawfully detained by the defendants. Plaintiff specifically alleges that defendants did not have a warrant authorizing his arrest. This allegation, coupled with the allegation of imprisonment and the averment of damages, constitutes a cause of action for false arrest. Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381; Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372; Peters v. Bigelow, 137 Cal.App. 135, 30 P.2d 450; McAlmond v. Trippel, 93 Cal.App. 584, 269 P. 937; Culver v. Burnside, 43 S.D. 398, 179 N.W. 490; Sebring v. Harris, 20 Cal.App. 56, 128 P. 7; Burton v. Drennan, 332 Mo. 512, 58 S.W.2d 740; 22 Am.Jur. p. 419, secs. 101 and 102; 35 C.J.S., False Imprisonment, § 55, p. 591.

[4, 5] Sections 836 and 837 of the Penal Code provide how a lawful arrest may be made without a warrant. Where arrest and confinement is without a warrant plaintiff need not plead that it was "without probable cause". Sebring v. Harris, 20 Cal.App. 56, 128 P. 7; Brown v. Meier & Frank Co., 160 Or. 608, 86 P.2d 79, 82. Plaintiff, in so pleading such a cause of action, where it is alleged that the arrest was forcibly and falsely made without a warrant, plaintiff need not negative all named factual situations in which plaintiff's arrest would have been lawful, and if matter of justification exists, it must be pleaded by the defendants. Knight v. Baker, 117 Or. 492, 244 P. 543; Greaves v. Kansas City Junior Orpheum Co., 229 Mo. App. 663, 80 S.W.2d 228, 236; Raymond v. Corrigan, 37 S.D. 609, 159 N.W. 131; Adair v. Williams, 24 Ariz. 422, 210 P. 853, 854, 26 A.L.R. 278; 35 C.J.S., False Imprisonment, § 51, p. 579; 22 Am.Jur. 415, 416, sec. 90; Markovitz v. Blake, 26 Ga.App. 153, 105 S.E. 622; Seaboard Oil Co. v. Cunningham, 5 Cir., 51 F.2d 321; Burton v. Drennan, 332 Mo. 512, 58 S.W. 2d 740, 741; Greaves v. Kansas City Junior Orpheum Co., 229 Mo.App. 663, 80 S.W.2d 228.

It should be here noted that the complaint in Dillon v. Haskell, 78 Cal.App.2d 814, 178 P.2d 462, was held insufficient because it did not allege that plaintiff was arrested without a warrant and did not negative all or any of the named factual situations in which plaintiff's arrest would have been lawful. In the complaint before us the plaintiff did allege that the arrest was made forcibly and unlawfully without a warrant.

[6] In Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372, it was specifically stated that when an arrest is made without legal process all that need be alleged to charge an unlawful arrest is the arrest without process, the imprisonment and the damages. The arrest without a warrant and the imprisonment that followed, having been alleged, there is a presumption that the imprisonment was unlawful and the burden rests upon the defendants to allege and prove its lawfulness or justification. People v. McGrew, 77 Cal. 570, 20 P. 92; People v. Agnew, 16 Cal.2d 655, 661, 107 P.2d 601; Mackie v. Ambassador Hotel, etc., Corp., 123 Cal.App. 215, 221, 11 P.2d 3; Brown v. Meier & Frank Co., supra.

[7, 8] In Peters v. Bigelow, 137 Cal. App. 135, 30 P.2d 450, the rule is stated to be (quoting from the syllabus):

"When an arrest is made without process it is not necessary to allege, in an action for damages for false imprisonment, that such arrest was unlawful, but if process is employed the facts constituting the invalidity thereof must be set forth.

"In this action for damages for false imprisonment, where the complaint alleged plaintiffs' imprisonment in the county jail and their detention and restraint there without right or authority, and against their will, there was alleged such a trespass upon their rights as called upon defendants to show a justification therefor, and the complaint stated sufficient facts to constitute a cause of action." See, also, Foerst v. Hobro, 125 Cal.App. 476, 13 P.2d 1055.

Under the authorities cited and discussed the complaint in the instant action states a cause of action in this respect and the burden rests upon defendants to show justification.

The complaint contains another allegation that the defendant police officers and the other named defendants wrongfully, unlawfully and forcibly imprisoned plaintiff and restrained him of his liberty for about 24 hours; that plaintiff demanded to be taken to a magistrate so he might be released on bail, and that defendants refused; that defendants failed to make a complaint against him and that he was, after being held for 24 hours in the city jail released without charge being preferred against him; and that all of the defendants "in so doing", acted jointly and in concert.

[9] In Peckham v. Warner Bros. Pictures, Inc., 36 Cal.App.2d 214, 97 P.2d 472, which was an action for false arrest and false imprisonment, it was held that it was the duty of one making an arrest without a warrant to bring the person so arrested before a proper magistrate without unnecessary delay, and if this was not done the officer or private person who made the arrest became a trespasser from the beginning, and was liable for false arrest and imprisonment. In that case plaintiff was incarcerated for almost 24 hours before being released and was never taken before a magistrate. It was held that the question as to whether or not an unreasonable time had elapsed after the arrest before taking plaintiff to a magistrate was a factual question for the jury. See, also, Korkman v. Hanlon Drydock, etc., Co., 53 Cal.App. 147, 199 P. 880; 12 Cal.Jur. 433, sec. 4. The Peckham case also cites 22 American Jurisprudence [1939] p. 366, False Imprisonment, sec. 20, stating the rule to be [36 Cal.App. 2d 214, 97 P.2d 474]: "'It is the duty of an officer or other person making an arrest to take the prisoner before a magistrate with reasonable diligence and without unnecessary delay; and the rule is well settled that whether the arrest is made with or without a warrant, an action for false imprisonment may be predicated upon an unreasonable delay in taking the person arrested before a magistrate * * *, regardless of the lawfullness of the arrest in the first instance * * * an officer arresting a person without a warrant, as on view under statute, is liable for a false imprisonment where he detains the prisoner an unreasonable time without securing a warrant or other legal authority for his detention.'" See, also, 22 Am.Jur. p. 412, sec. 85.

In Keefe v. Hart, 213 Mass. 476, 100 N.E. 558, 559, Ann.Cas.1914A, 716, cited in the Peckham case, the Supreme Court of Massachusetts considered a similar question and held (quoting from the syllabus): "It cannot be determined as a matter of law that a delay of an hour and a half, by officers arresting without warrant, in taking the prisoner before a magistrate, was reasonable, since such delay might have been beyond the time of adjournment of the magistrate's court, and involved a further delay; the question becoming one of law only when the facts are agreed." See, also, Jackson v. Miller, 84 N.J.L. 189, 86 A. 50.

[10] Applying the above-stated rules of law to the facts in the instant case, as pleaded, plaintiff being incarcerated for over 24 hours before being released, and in fact never having been taken before a magistrate, a cause of action for false imprisonment was stated. The issue as to whether an unreasonable time had elapsed after the arrest of said plaintiff without taking him before a magistrate is a factual question.

[11, 12] The respondents cite Mackie v. Ambassador Hotel, etc., Co., 123 Cal.App. 215, 11 P.2d 3, in support of their argument that there could be no liability as to defendant Local 500, Waiters and Bartenders Union. The facts established in that case differ from the allegations in the complaint before us. On demurrer we are compelled to accept the allegations of the complaint as true. Whether plaintiff will be able to establish the truth of his allegations in this respect is not now before us, and as to the allegation in reference to the liability of Local 500, Waiters and Bartenders Union for the acts of its officers and agents, it is well established in California that a principal is liable for false imprisonment by an agent or employee acting in the scope of his authority. Weir v. Continental Oil Co., 5 Cal.App.2d 714, 716, 43 P.2d 375.

[13] In Frickstad v. Medcraft, 100 Cal.App. 188, 279 P. 840, it is specifically stated that a party who authorizes, encourages, directs or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest or imprisonment, is liable. See, also, Peckham v. Warner Bros. Pictures, Inc., supra; Williams v. Zelzah Warehouse Co., 126 Cal.App. 28, 14 P.2d 177; Wood v. Lehne, 30 Cal.App.2d 222, 226, 85 P.2d 910; Montalbano v. Rainbow Gardens, Ltd., 9 Cal.App.2d 661, 50 P.2d 972; Moffatt v. Buffums', Inc., 21 Cal.App.2d 371, 375, 69 P.2d 424; Weir v. Continental Oil Co., supra; Frickstad v. Medcraft, 100 Cal.App. 188, 194, 279 P. 840; Miller v. Fano, 134 Cal. 103, 66 P. 183; Knight v. Baker, 117 Or. 492, 244 P. 543; Burton v. Drennan, supra; Collins v. Owens, 77 Cal.App.2d 713, 719, 176 P.2d 372; 12 Cal.Jur. p. 442, sec. 12.

And in McAlmond v. Trippel, 93 Cal.App. 584, 269 P. 937, it was held (quoting from the syllabus): "In an action for false imprisonment and malicious arrest, the allegations of plaintiff's complaint that several defendants, without process or commitment or legal authority of any kind whatsoever, arrested and imprisoned the plaintiff were sufficient, without alleging a conspiracy to arrest the plaintiff, or the definite part each defendant performed." See, also, Burton v. Drennan, 332 Mo. 512, 58 S.W.2d 740.

[14] It has likewise been held that it is a factual question for the determination of the trial court or a jury whether or not, in making an arrest and in detaining a plaintiff for over 24 hours without taking him before a magistrate, defendants acted jointly and in concert with one another, and if so, whether such 24-hour delay was reasonable or unreasonable. People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L.R.A. 193.

[15] The last ground of demurrer calling for our consideration is the claim that since the first complaint was filed on the last day of the year and did not set forth a cause of action against the union, the amended complaint setting forth such a cause of action, if any, was barred by subdivision 3, sec. 340 of the Code of Civil Procedure, citing McKnight v. Gilzean, 29 Cal.App.2d 218, 220, 84 P.2d 213. This claim is not meritorious. The original complaint named the Union as a party defendant and alleged its legal existence, and also named the president, the business agent and secretary-treasurer as defendants and alleged that such defendants, acting within the scope of their authority as

officers thereof, imprisoned plaintiff and deprived him of his liberty, unlawfully, and with force, without probable cause, without right or authority, and on a pretended charge, without making or filing a complaint against him or advising him of the charge or cause of the arrest. The facts pleaded in the second amended complaint did not change nor modify the cause of action first stated. It merely amplified and set forth additional matters to make the original cause of action more complete. Under the authorities the statute of limitations did not run against the cause of action set forth in the second amended complaint. Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

93 Cal.App.2d Supp. 871

PEOPLE v. CRITTENDEN.

C. A. 152789.

Appellate Department, Superior Court,
San Diego County, California.

Aug. 5, 1949.

1. Criminal law 🔑573

In prosecution for practicing law without city license, record showing that complaint was filed and defendant waived time to plead January 28, that case was put upon setting calendar for March 2, and defendant released, and that case was called and trial set without objection by defendant for April 6 did not establish that defendant was denied a speedy trial. Const. art. 1, § 13.

2. Constitutional law 🔑33

The constitutional guaranty of speedy and public trial is self-executing. Const. art. 1, § 13.

3. Criminal law 🔑573

The guaranty of speedy and public trial in state constitution reflects the letter and spirit of similar provision in federal constitution. Const. art. 1, § 13; U.S.C.A. Const.Amend. 6.

4. Criminal law 🔑573

Defendant who made no objections to time of setting case for trial was not denied his constitutional right to speedy trial. Const. art. 1, § 13.

5. Criminal law 🔑573

Accumulation of business in court and condition of calendar make a difference in construing constitutional guaranty of speedy trial. Const. art. 1, § 13.

6. Criminal law 🔑573

Under constitutional guaranty of speedy trial, prosecution acting with due diligence will be granted a reasonable time to prepare case for trial. Const. art. 1, § 13.

7. Criminal law 🔑573

Defendant's obstruction by vacillation or fraudulent conduct furnish good cause for extending time of trial, notwithstanding constitutional guaranty of speedy trial. Const. art. 1, § 13.

8. Criminal law 🔑1114(1)

Whether defendant was accorded a speedy trial must be determined from record on appeal. Const. art. 1, § 13.

9. Municipal corporations 🔑122(2)

In prosecution for practicing law without city license in violation of ordinance, contention that ordinance was not published in manner required by charter could not be sustained where defendant introduced no evidence on the point at trial and record did not show that ordinance was not so published.

10. Criminal law 🔑429(3)
Municipal corporations 🔑110, 122(2)

San Diego charter provision requiring publication of general ordinances in book form is directory only, and one accused of violating ordinance must prove non-publication, and where existence of ordinance is otherwise sufficiently proved, its admission in evidence is proper.

11. Criminal law ⚷304(12)

Municipal courts take notice of ordinances which are law of the forum.

12. Criminal law ⚷444

In prosecution for practicing law without city license in violation of ordinance, where original ordinance was produced in court and identified by city officer whose duty included its custody, ordinance was admissible without direct testimony that it had not been repealed and was operative on date of violation charged.

13. Licenses ⚷6(3)

An ordinance under which attorney was convicted of practicing law without city license was within power of council under San Diego Charter.

◆

Appeal from Municipal Court of San Diego; Eugene Daney, Judge.

T. T. Crittenden was convicted of practicing law without a city license in violation of ordinance, and he appeals.

Affirmed.

T. T. Crittenden, San Diego, in pro. per.

J. F. DuPaul, City Attorney, San Diego, C. H. Augustine, Deputy City Attorney, San Diego, for plaintiff and respondent.

BURCH, Judge.

The defendant is a practicing attorney in good standing at this bar. During the year 1948, in compliance with Ordinance No. 3432 (New Series) of the City of San Diego, adopted January 14, 1947, the defendant paid the fee for procuring a license to engage in the general practice of law in the City of San Diego. During the year 1949, the defendant, while still engaged in the practice of law in the City of San Diego, refused to comply with the license requirement of the Ordinance.

A criminal complaint was filed against defendant on January 28, 1949, charging he "did unlawfully engage in a trade, calling, occupation or profession as an independent contractor without first obtaining a license therefor from the city of San Diego."

The record on appeal further shows that on said date of January 28, 1949, defendant waived the time to plead; that defendant plead not guilty; that defendant waived a jury trial, and the case was put upon the setting calendar for March 2, 1949; that defendant was thereupon released on his own recognizance. On the latter date, the case was called on the setting calendar and the trial set for April 6, 1949. Defendant, on April 6, 1949, waived a jury trial in open court and moved to dismiss the complaint upon the ground that he had not had a speedy trial guaranteed to him by the Constitution of the State. His motion was denied, the trial proceeded, and the Court found the defendant guilty of the charge. The time for sentence was set for April 11, 1949. Defendant then appeared and moved for a dismissal on the ground that he had been denied a speedy trial. The motion again was denied, and defendant was sentenced to pay a fine.

[1] The record is devoid of any showing, other than has been indicated so far in this opinion, that the defendant was denied a speedy trial. Moreover, in the proposed statement on appeal prepared and presented by the defendant, there is no suggestion whatever that when the case was called on March 2, 1949, defendant made any objection whatever to the trial date set, April 6, 1949.

It is the contention of the defendant, as regards this phase of the case, that his motions for dismissal made at the time of trial and again at the time set for pronouncement of judgment should have been granted, and that the failure to grant them was a denial of his constitutional right under section 13, article I, of the Constitution of California.

[2, 3] "Section 13 of article 1 of the Constitution of California provides in part as follows: 'In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial.' This provision of the Constitution is self-executing. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500; In re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 513, 85 Am. St.Rep. 178. It reflects the letter and

spirit of the following provision of the Federal Constitution to the same effect: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. * * *' U.S.Const.Amend. 6. This is a fundamental right granted to the accused, and has been the policy of the law since the time of the promulgation of Magna Charta and the Habeas Corpus Act. In re Begerow, supra." Harris v. Municipal Court, 209 Cal. 55, at pages 60, 61, 285 P. 699, 701. 209 Cal. on page 64, 285 P. on page 702 of the above quoted case it is said that "* * * incarceration is not essential to the operation of the constitutional guaranty."

[4] In the case of People v. Molinari, 23 Cal.App.2d Supp. 761, 67 P.2d 767, the Court held that the defendant's constitutional right to a speedy trial was properly raised through a continuance to a date beyond the statutory period of thirty days where the defendant at the time it was so continued properly raised the question by his objection to the continuance. The significance of the Molinari case, supra, for present purposes is that the record affirmatively shows that the continuance, at the time it was made, was properly objected to by the defendant. This contrasts with the record here. There is nothing to indicate that the defendant made any objections to the time of setting. It seems to be well settled in the law that under those circumstances the constitutional right has not been denied the defendant. People v. Douglass, 100 Cal. 1, 34 P. 490; People v. Peter, 20 Cal.App. 151, 128 P. 415; People v. Magee, 60 Cal.App. 459, 213 P. 513; In re Scott, 81 Cal.App. 577, 254 P. 596; People v. Rongo, 169 Cal. 71, 145 P. 1917; People v. Kristy, 4 Cal.2d 504, 50 P.2d 798.

In People v. Kristy, supra, the Court says, 4 Cal.2d at page 510, 50 P.2d at page 801: "There is nothing whatever in the record to justify the statement that defendants were out of sight of the jury or beyond hearing of the proceedings, even if, as now claimed, they were not actually within the courtroom. It affirmatively appears that in these proceedings appellants were adequately represented by counsel. They should not be permitted now to raise the objection, based upon their absence from the courtroom, without presenting a record sufficient to prove that fact."

In People v. Rongo, supra, the Court says 169 Cal. at page 73, 145 P. at page 1018: "He (the defendant) was arraigned October 14th, and the time to plead was continued to October 16, 1912, on which day he pleaded not guilty, and the case was set for trial December 17, 1912. So far as the record shows, there was no objection made by defendant, on October 16, to setting the case for trial on December 17th, although that date was beyond the sixty-day limit. Consent will therefore be presumed."

In People v. Douglass, supra, the Court says 100 Cal. at page 3, 34 P. at page 491: "The bill of exceptions is entirely silent as to the orders postponing the trial and refusing to dismiss the prosecution, and there is nothing in the transcript in regard to those orders, except the record entries made by the clerk of the court below. * * * And the rule is that, in the absence of any showing as to what took place when the order was made, the appellate court will presume in support of the action of the court below that the defendant assented to the order. People v. Swafford, 65 Cal. 223, 3 P. 809. It will also be observed that it does not appear from the second entry that good cause for denying the motion was not shown.

"Conceding, then, as held in People v. Morino, supra [85 Cal. 515, 24 P. 892], that the burden was upon the prosecution to show good cause for holding the defendant without trial for a longer time than that named in the statute, and that in the absence of such showing the court had no discretion in the matter, but was imperatively required to grant the defendant's motion, still the rule is settled by decisions of this court, found in nearly every volume of our reports, that on appeal all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear.

"Under this rule it was incumbent upon the defendant, if he claimed error, to set out in his bill of exceptions the facts showing it. As he wholly failed to do this, his first contention cannot be sustained."

The Douglass case, supra, is found interesting for the concurring opinion of DeHaven, J. We quote from the last sentence of his opinion: "* * * the remedy for a defendant whose motion for a dismissal has been improperly denied is an application for a writ of habeas corpus before judgment of conviction."

[5-7] In presenting this contention the defendant relies upon the self-executing constitutional provision (section 13, article I) for there is no statute directed to a Municipal Court trial which defines what would be a "speedy" trial. People v. Molinari, 23 Cal.App.2d Supp. 761, 67 P.2d 767, supra; Harris v. Municipal Court, 209 Cal. 55, 285 P. 699, supra. It has been held that the accumulation of business in the court and the condition of the calendar make a difference, Murphy v. The Superior Court, etc., 53 Cal.App. 6, 200 P. 483; People v. Holmes, 13 Cal.App. 212, 109 P. 489; People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Vasalo, 120 Cal. 168, 52 P. 305; that the prosecution, acting with due diligence, will be granted a reasonable time within which to prepare the case for trial, People v. Molinari, 23 Cal.App.2d Supp. 761, 67 P.2d 767, supra, and that obstruction by the defendant by conduct of vacillation, People v. Duffy, 110 Cal.App. 631, 294 P. 496, or fraudulent conduct on his part, In re Gere, 64 Cal.App. 418, 221 P. 689, furnish good cause for extending the time of trial.

[8] We have shown that the question of whether defendant was accorded a speedy trial must be determined from the record on appeal; that there is nothing in that record which discloses that an earlier trial was possible by reason of the state of the calendar, or for some other good and sufficient cause, and in this state of the case we are bound to hold in accordance with the presumption that the proceedings in this respect were regular and proper.

[9, 10] Defendant makes the further contention that section 20 of the City Charter was not complied with by the city. That section provides that the city shall publish its ordinances of a general nature in book form "at least once in two years," and also that when so published any such ordinance may be admitted in the courts without further proof of its "due passage and publication." Again the record is devoid of any showing that this ordinance was not so published by the city. Defendant introduced no evidence whatever at the trial. It was held in Hollander v. Denton, 69 Cal.App.2d 348, 159 P.2d 86, that in a proper case the defendant would have to prove non-publication; that this section is directory only, and where the existence of an ordinance is otherwise sufficiently proved, its admission in evidence is proper.

We find nothing in Stockton Plumbing and Supply Company v. Wheeler, 68 Cal. App. 592, 229 P. 1020, cited by the defendant, which militates in any way against the holding in Hollander v. Denton, supra. Nor are we able to understand the application of anything said in that case to the question before us here. The case simply holds that the use of the word "may" in a city charter is not a permissive word with regard to contracts which are void because they contravene stated public policy. The public policy in question there was that which forbade a councilman in his official capacity from being a party to a contract with himself in his private business capacity.

Not only has the charter section before us been interpreted in the Hollander case contrary to the contention of the defendant, but it seems obvious that an ordinance enacted with all the formalities required by law does not cease to be an ordinance by the mere fact that the city council may fail at some future date to perform an official duty. If this be true, even though the provisions of section 20 of the Charter of the City of San Diego were held to be mandatory, a decision which we are not called upon to make here, publication every two years would not be necessary to the validity of the particular ordinance before us.

It is further suggested upon the part of defendant that the record on appeal affirmatively shows that there was no testimony before the trial court that Ordinance No. 3432 (New Series) was in operation as a valid existing ordinance on the date of January 28, 1949, when defendant was charged with its violation. It was not directly testified at the trial that the ordinance had not been repealed and was operative on that date.

[11] In the instant case, the original ordinance was produced in court and identified as such by the city officer whose duty included the custody of such as a city ordinance. We are aware of no sound reason or rule why the Municipal Court in its trial or Appellate Departments should not notice the controlling law of its jurisdiction. Municipal Courts take notice of ordinances which are the law of the forum. Ex parte Hansen, 158 Cal. 494, 111 P. 528; Ex parte Davis, 115 Cal. 445, 47 P. 258; 31 C.J.S., Evidence, § 27, p. 542; Wigmore on Evidence, Sec. 2572. Note: Greif v. Dullea, 66 Cal.App.2d 986, 153 P.2d 581.

[12, 13] An ordinance is to a municipality what a state law is to the state. The trial court properly admitted the ordinance in evidence, in our view. The subject matter of the ordinance in question is within the power and authority of the council under the charter.

Therefore, we conclude that the record on appeal discloses no error and that defendant was properly convicted.

The judgment is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

34 Cal.2d 234

PEOPLE v. NIXON et al.

Cr. 5012.

Supreme Court of California, in Bank.

Sept. 7, 1949.

Writ of Certiorari Denied Dec. 5, 1949.

Albert E. Nixon and Jesse A. Murphey pleaded guilty to murder, and were sentenced to death. Both defendants moved to vacate the judgments and to allow the withdrawal of pleas of guilty upon the ground that they were involuntary.

The Superior Court of Fresno County, Arthur C. Shepard, J., denied the motion and defendants appealed.

The Supreme Court, Edmonds, J., held that the record sustained the order denying the motion and affirmed.

Schauer, J., dissenting.

1. Criminal law ⟹1131(4)

Ordinarily appellate court will not entertain a motion to dismiss which is based upon grounds requiring examination of the records for its disposition.

2. Criminal law ⟹274

Where defendants pleaded guilty to murder which after hearing was determined to be murder in the first degree, denial of motion to withdraw guilty pleas on ground that they were involuntary was not error.

◆

Ernest Spagnoli, San Francisco, for appellants.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

EDMONDS, Justice.

Albert E. Nixon and Jesse A. Murphey pleaded guilty to murder, which was determined, after a full hearing, to be of the first degree, and were sentenced to death by judgments which have become final. People v. Rye (Nixon), 33 Cal.2d 688, 203 P.2d 748. A few days before the date fixed for execution, both Nixon and Murphey, in the court where the sentences were pronounced, moved (1) to vacate the judgments and (2) to allow the withdrawal of the pleas of guilty, upon the ground that they were involuntary. After a full hearing at which affidavits were admitted into evidence and witnesses examined, the court denied the motion. An appeal was then taken from that order.

[1] The attorney general has moved to dismiss the appeal upon the ground that "the motion made in the court below * * was without any merit and was interposed solely for purposes of delay; and that the appeal taken to this court from the denial of said motion is frivolous and taken solely for purposes of delay." He recognizes the rule that ordinarily an appellate court will not entertain a motion to dismiss which is based upon grounds requiring an examination of the record for its disposition. But, as stated in Hibernia Savings & Loan Society v. Doran, 161 Cal. 118, 120, 118 P. 526, "where * * * a mere inspection of the record discloses that no relief can be given to the appellant, this court will consider the question, to save unnecessary delay * * *." See also Williams v. Duffy, 32 Cal.2d 578, 197 P.2d 341. However, by the time the motion to dismiss came on for hearing, the parties had filed their briefs upon the merits and it was stipulated that the appeal might be submitted for decision without further argument. By that stipulation, the question presented by the attorney general's motion has become moot and need not be determined.

The sole contention of the appellants is that, upon the record, the trial court abused its discretion in denying the motion to withdraw the pleas of guilty. To support that position, a series of affidavits and letters by the defendants were offered in evidence. In substance, they repeat the same story: Nixon and Murphey claim to have "understood" that if they pleaded guilty their punishment would not exceed life imprisonment, but that if the case went to trial the district attorney would insist upon the death penalty.

The affidavits themselves, however, are equivocal in stating the defendants' position. Murphey stated: "He [the district attorney] did not tell us we would not get the death penalty but if we would plead guilty he would not ask for it. * * *"

And Nixon stated to the same effect: "The reason we wanted to plead guilty is because the district attorney said if we pleaded guilty * * * he would not ask for the death penalty." The record of the hearing to determine the degree of the crime shows no recommendation as to punishment. In connection with the present motion, the district attorney testified that, "I made no such representation to them * * *, however, at the hearing, I made no argument for the death penalty".

Murphey's affidavit further states: "They had not come out and promised us we would not get the supreme penalty but we were told they would not ask for it and two of the officers that always escorted us from jail to court kept telling us we would not get the death penalty and was offering to bet ten to one in our favor we would not get the death penalty." With reference to this latter statement, the officer who was in charge of taking the prisoners from the jail to the court testified at the hearing upon the present motions: "They were many times asking me if I had ever seen a death by gas, and what the reactions were. And they never expressed anything in their hopes at any time of getting anything but death * * * I just told them once, I said, 'Oh, I don't think you fellows will get the extreme penalty.' * * * [I was] trying to cheer them up * * * That was just before the day of sentencing * * * on the way up to the court. * * *" This was almost a week after the pleas of guilty were entered.

In argument the defendants' counsel stressed the lack of any reasonable explanation for the pleas of guilty. Two quite plausible answers were given during the hearing upon the motion: (1) "On the way down, when they asked * * * to plead guilty * * * they said, 'Well, we are going to get the death penalty, but I guess that is the only thing to do. The right thing to do.'"; (2) "* * * when the facts are well within the grasp of the prosecution, in case of a brutal killing, it is by many members of the profession considered easier to save a man's life before the Judge than it is before the Jury * *", and this was the advice given by counsel appointed for the accused.

The record in the original case, which by stipulation was considered as being in evidence in the present proceeding, discloses that the defendants were repeatedly warned of the serious nature of the charges; that, although counsel was waived, the court refused to accept the pleas until competent counsel had been appointed and had consulted with the defendants. After the pleas of guilty were made a hearing was had upon the degree of the crime. In this hearing, which lasted for four full days and went far beyond the necessary inquiry, evidence relevant to all of the elements of guilt was received.

[2] Although there is some conflict, the record of the proceeding in which the motion was denied contains substantial support for that determination. Further, there is considerable doubt whether the affidavits, standing alone, would justify relief in the nature of a writ of error coram nobis. People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657; In re Hough, 24 Cal.2d 522, 150 P.2d 448; People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375. As pointed out in this court's prior opinion upholding the judgment, "Throughout the entire proceeding, there was scrupulous regard for the defendants' rights." People v. Rye (Nixon), 33 Cal.2d 688, 203 P.2d 748, 749. The same careful consideration was given when the motions now under review were heard by Judge Arthur C. Shepard, who sentenced the defendants. In denying the motions he summarized the proceeding which culminated in the death sentences as follows: "I did not choose young counsel [to represent the defendants] that had just been admitted to the bar. I chose counsel who had had some years of criminal law practice, who knew the ins and outs of the practice. They were not all old men, but they had had considerable experience, and they all represented men in serious cases. I did not appoint just one counsel, I appointed one for each [defendant] * * * if, in the evidence anywhere, had it appeared to the Court that they were not guilty, or that the degree was different

than announced, the Court would either have announced a different degree or would have set aside their plea whether they wanted it set aside or not. I would not accept a plea and I do not think any other honorable Court would accept a plea if the evidence did not itself show they were guilty * * *

"I have no doubt in my mind but that the defendants and each of them when they pleaded guilty, hoped down deep in their hearts that they would receive less than the extreme penalty. It would be unnatural if they did not have such a hope * * * Furthermore, I cannot say that it is not a burden on my mind. It is a tremendous burden, to have to be the instrument that causes the death of a human being. On the other hand, I cannot honestly say that my mind tells me that any other punishment under the law should be meted out * * *

"I cannot think of a thing that I could have done in the ordinary, reasonable processes of the administration of the law that would have more properly protected the rights of these defendants. Now, the mere fact that we are protecting their rights does not mean that they should not receive punishment, nor answer for their crimes. It merely means that we should be sure that they did commit the crime, and we should be sure they are not to be improperly punished for the crime. * * *"

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

Under the current law of this state the motion of the attorney general to dismiss the appeals should be granted. People v. Shorts (1948), 32 Cal.2d 502, 506, 512-513, 516, 197 P.2d 330. Defendants, in their application for stay of execution, failed to show any merit in the appeals, any probable cause for reversal, or any ground for a stay of execution. On the showing made on their application no stay of execution should have been granted and the appeals should have been dismissed forthwith. (People v. Shorts, supra.) The subsequently filed record has not in any material degree either added to or detracted from the showing initially made on the application for stay of execution; if probable cause for reversal was shown on that application (as was necessarily held by the majority) such probable cause still exists and the judgments should be reversed. If the court erred in granting the stays of execution, whether through an excess of caution inspired by the nature of the penalty involved or otherwise, it should now acknowledge the fact and consistently with the precedent vacate the stays of execution and dismiss the appeals.

34 Cal.2d 209

DILLARD et al. v. McKNIGHT et al.

L. A. 20790.

Supreme Court of California, in Bank.

Aug. 25, 1949.

Irene Dillard and husband sued General Jackson McKnight, J. F. Wilcox, and others for the death of plaintiffs' son from injuries sustained in an automobile collision. They recovered judgment against named defendants on a finding that defendant McKnight was acting within the scope of his employment by defendant Wilcox in driving one of the automobiles involved. Thereafter, James A. Bower and another, copartners of defendant Wilcox, were added as defendants, and from a judgment in their favor by the Superior Court of Los Angeles County, Leslie E. Still, J., on a finding that defendant McKnight was not acting within the scope of his employment by defendant partners, plaintiffs appealed.

The principal question was whether the first judgment was res judicata on such issue as against the added defendants.

The Supreme Court, Spence, J., affirmed the judgment, holding, inter alia, that the prior adjudication did not bind defendant Wilcox' copartners.

Prior opinion 195 P.2d 819.

1. Judgment 🔑678(1)

The "res judicata" principle precludes parties to action or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Judicata".

2. Judgment 🔑540

The res judicata principle rests on sound public policy that there must be an end of litigation, so that persons who have had one fair trial on an issue may not again have it adjudicated.

3. Judgment 🔑678(1)

A judgment or order is operative, not only on parties thereto, but to same extent on their privies. Code Civ.Proc. § 1908, subd. 2.

4. Judgment 🔑634

Application of "res judicata" principle depends on whether issue decided in prior adjudication was identical with that presented in subsequent litigation, whether there was final judgment on merits, and whether party against whom principle is invoked was a party or in privity with party to prior adjudication.

5. Judgment 🔑700

Generally, partners are not in such privity as to render judgment against one of them in action against him personally for tort arising from partnership business res judicata when same issues are raised in subsequent action against another partner. Civ.Code, § 2403(3) (d, e).

6. Constitutional law 🔑309(1)

Under "due process of law" mandate, no person can be affected by hearing or adjudication of court without his voluntary appearance or service of process affording him opportunity to appear and contest claim against him.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Due Process of Law".

7. Partnership 🔑219(4)

A judgment entered against partners after service of process on less than all of them will not be given effect of personal judgment against partners not actually served.

8. Partnership 🔑205

Service of process on one partner is not service on all partners.

9. Judgment 🔑17(1)

To sustain a judgment against a defendant, he must be served with process or brought into court through some of forms of law.

10. Judgment 🔑678(2)

While term "privity" has been defined as envisaging an interest in subject matter of litigation, acquired after rendition of judgment through or under one of parties, as by inheritance, succession or purchase, term has also been correlated with broader concept consistent with careful examination in circumstances of each case.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Privity".

11. Judgment 🔑678(2)

"Privity" has been defined as mutual or successive relationship to same property rights or such identification in interest of one person with another as to represent same legal rights.

12. Judgment 🔑678(1)

The term "privy," when applied to judgment or decree, refers to one whose interest has been legally represented at trial.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Privy".

13. Constitutional law 🔑309(1)

Partners sued in their individual capacities on tort liability arising from partnership transaction are entitled, under "due process of law" requirements, to notice and opportunity to be heard before being deprived of valuable property rights by judgment.

14. Judgment 🔑675(1)

A person who is not a party to action, but controls it, individually or in co-operation with others, is bound by adjudications of litigated matters, if he has proprietary or financial interest in judgment or in determination of fact question or law question with reference to same subject matter or transaction, and other party, having notice of such person's participation, is equally bound.

15. Judgment ⚷746

Where parties suing one of three partners failed to urge claim that judgment against him was res judicata as against his copartners until plaintiffs moved unavailingly for new trial after finding in such copartners' favor on second trial following their addition as defendants, and did not put in issue question of their participation in conduct of prior litigation, judgment was not binding against them on grounds of their exercise of control over defense in such litigation and estoppel to deny effect of judgment. Civ.Code, §§ 2403, 2407, 2409.

16. Judgment ⚷700

Mere knowledge of partner not sued that his copartner is being sued on alleged partnership transaction is insufficient to render judgment in such action res judicata on all issues litigated as against partner not sued if, in subsequent action against him, his relationship to original defendant is proved.

17. Evidence ⚷43(2)

A trial court is bound to take judicial notice of its own records in action brought and tried therein.

18. Evidence ⚷52
Pleading ⚷6

Matters which are subject of judicial notice are not dependent on pleading or proof for their effectiveness in determination of issues before court.

19. Judgment ⚷948(1)

In death action against one of three partners and his employee, plaintiffs could not rely on principle of judicial notice in support of their plea that judgment against such defendants on judge's finding that employee was acting within scope of his employment by codefendant at time of fatal accident was res judicata on such issue as against employer's copartners on second trial after their addition as parties defendant, for such judgment did not operate as matter of law to conclude copartners' rights.

20. Judgment ⚷746

A party joining issue on question previously litigated or voluntarily opening investigation of matters which he might claim to be concluded by prior judgment waives right to assert benefit of former adjudication, and case will be determined without regard therefor.

21. Appeal and error ⚷996, 1012(1)

The weight, sufficiency and construction of evidence and inferences to be drawn therefrom are matters for trier of facts.

22. Appeal and error ⚷994(3), 1011(1)

Questions as to witness' credibility and determination of conflicts and inconsistencies in his testimony were for trial judge in case tried without jury.

23. Evidence ⚷594

A witness' statement of facts contradicting his testimony, omissions in his account of particular transactions or of his own conduct, discrediting his whole story, and his manner of testifying, may be considered in determining weight of his testimony, though no adverse verbal testimony is adduced.

24. Automobiles ⚷244(26)

In action for death of passenger in automobile colliding with automobile operated by one of defendants, evidence supported trial judge's finding that such defendant was not acting within scope of his employment by codefendants at time of fatal accident.

25. Evidence ⚷589

The verity of witness' testimony must be tested by trial judge in light of all facts and circumstances, and he may disbelieve such parts of witness' account as appear to be evasive, equivocal, confused, or otherwise uncertain.

26. Appeal and error ⚷1010(1)

A trial judge's fact finding on substantial evidence is conclusive on appeal.

27. Judgment ⚷585(5), 700

Where judge, presiding at both trial of death action against employer and employee and second trial after addition of employer's copartners as defendants, expressly declared that evidence was not the same in each trial, Supreme Court, on plaintiffs' appeal from judgment for added defendants on finding at second trial that employee was not acting within scope of his employment at time of fatal accident, cannot eliminate inconsistency between such finding and contrary finding on first trial, but must affirm judgment, notwithstanding prior judgment against defendant employer, as such judgment did not bind his copartners.

◆

Dana Williams and Kenneth Sperry, of Long Beach, for appellants.

Arthur C. Fisher, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs' son died on July 24, 1941, as the result of injuries sustained by him four days earlier in a collision between a Pontiac coupe in which he was a passenger and a Studebaker automobile then being operated by one McKnight in an allegedly negligent manner. To recover damages for their son's death, plaintiffs in September, 1941, instituted the instant action against said McKnight; his employer, J. F. Wilcox; the owner of the Studebaker automobile, W. J. Neville; Thorley Oil Company; and several fictitiously named defendants. On August 11, 1942, the cause went to trial as to certain defendants on the first amended complaint and at the conclusion thereof, a motion for a nonsuit was granted as to defendant Thorley Oil Company. Judgment was then ordered "for the plaintiffs against the defendants General Jackson McKnight and J. F. Wilcox in the sum of $7500.00 and * * * in favor of the defendant W. J. Neville." The court found, among other things, that "at all times herein mentioned, defendant General Jackson McKnight was the agent, servant, and employee of the defendants herein, and that he was acting within the scope of his employment as such agent, servant and employee." Accordingly, on September 2, 1942, judgment was entered in plaintiffs' favor as indicated; it became final, and execution thereon was returned unsatisfied.

As the result of certain evidence adduced upon the 1942 trial, plaintiffs claim to have learned for the first time the identity of James A. Bower and Robert A. Thorley as proper parties to this action. Accordingly thereafter, service of process was made upon them in pursuance of their fictitious designations as Doe IV and Doe V, respectively, and on August 16, 1946, plaintiffs' first amended complaint herein was amended to show their true names. On September 12, 1946, the cause went to trial for the second time before the same judge. At the conclusion of this second trial, it was found by the court that the automobile collision was the "direct and proximate result of the negligence of the defendant General Jackson McKnight"; that on the day of the accident said "defendant General Jackson McKnight was employed by the defendants J. F. Wilcox, Robert A. Thorley, and James A. Bower as a driller" on a certain oil well, but "at the time" in question he "was not acting within the scope of his employment." Accordingly, judgment in favor of defendants Bower and Thorley was entered on December 27, 1946; and plaintiffs appeal therefrom.

In taking their appeal, plaintiffs properly note that "all of the findings of the trial court were favorable to the plaintiffs, with the exception of the finding that the defendant McKnight was not acting within the scope of his employment at the time of the accident." Their challenge of the propriety of this single adverse finding—the "only" one which "supports the judgment" on the second trial—rests on these two considerations: (1) that the "former judgment herein, wherein it was found that the defendant McKnight was acting within the scope of his employment as an employee of the defendant J. F. Wilcox, is res adjudicata and conclusive of that issue as against the defendants Robert A. Thorley and James A. Bower * * * co-partners and joint employers of the defendant McKnight"; and (2) that the "findings of the trial court with respect to whether the defendant McKnight was acting within the scope of his employment at the time of the accident are contrary to the undisputed evidence in the case." Plaintiffs' position cannot be sustained in the light of the record and the legal principles applicable thereto.

It is undisputed that in the "first part of July," 1941, defendant Wilcox was drilling an oil well close to the corner of Main Street and Sepulveda Boulevard, near the town of Lomita, in the county of Los Angeles; that defendant Bower helped finance the venture on a "50-50" basis, and that they ran out of money; that thereupon they began negotiations with defendant Thorley, who operated a producing oil well located on certain property which he owned in the city of Los Angeles; that as a result of these negotiations defendant Thorley invested some money in the "Wilcox well" and on July 14, 1941, as a limited partner executed Articles of Limited Partnership (which were never filed or recorded [Civ.Code, sec. 2478, subd. (1) (b)]) in connection with such investment; that six days later—July 20, 1941—defendant McKnight, who was then, and theretofore had been, employed as a "driller" by defendant Wilcox, became involved in the accident heretofore mentioned.

[1-4] Plaintiffs first argue the significance of the established partnership undertaking in relation to the principle of res judicata as a factor in the second trial. That principle precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. 1 Freeman on Judgments, 5th Ed., § 407, p. 887; 2 Black on Judgments, 2d Ed., § 504, p. 764; 50 C.J.S., Judgments, § 592, page 11; 15 Cal.Jur., Judgments, § 166, p. 97. It rests upon the sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated. Ibid. So it is stated as "an elementary principle, recognized by [our] code [Code Civ.Proc., sec. 1908, subd. 2], that a judgment or order is operative not only upon parties but to the same extent upon their privies." 15 Cal.Jur., Judgments, § 220, p. 191. But the application of the principle of res judicata in a given case depends upon an affirmative answer to these three questions: Was the issue decided in the prior adjudication identical with the one presented in the subsequent litigation? Was there a final judgment on the merits? Was the party against whom the principle is invoked a party or in privity with a party to the prior adjudication? Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892.

[5-9] There is no dispute here, of course, as a matter of record, that the issue of defendant McKnight's scope of employment in relation to the happening of the accident in question was completely adjudicated incident to the entry of judgment against defendant Wilcox at the conclusion of the first trial in this action, and that such judgment has long since become final, but the third essential element relative to the identity of the parties does not appear. It is generally recognized that partners are not in such privity with one another that a judgment against one partner in an action brought against him personally on a tort arising out of the partnership business is res judicata when the same issues are raised in subsequent litigation against another partner. 1 Freeman on Judgments, 5th Ed., § 518, p. 1112; 2 Black on Judgments, 2d Ed., § 566, p. 852; 50 C.J.S., Judgments, § 806, pages 351–352; Tonge v. Item Publishing Co., 244 Pa. 417, 91 A. 229, 231–232; Liebert v. Reiss, 174 App.Div. 308, 160 N.Y.S. 535, 536; Emmons v. Hirschberger, Sup., 69 N.Y.S.2d 401, 402; Pate v. Geo. P. Wyly & Co., 118 Ga. 262, 45 S.E. 217, 218; Robinson v. Seay, 175 Mo.App. 713, 158 S.W. 409, 412–413; Ablon v. King, Tex. Civ.App., 279 S.W. 563, 566; American Photo Player Co. v. Simon, 151 La. 708, 92 So. 307, 308; cf. Cal.Civ.Code, sec. 2403, subd. (3) (d), (e).) If the rule were otherwise a partner would be required to discover at his peril any action against his copartner that might conceivably relate to the partnership business and seek to intervene therein. On the second trial

the only issue that would be open would be the nature of his relationship to the party sustaining the adverse judgment. Such procedure would deprive him of valuable rights contrary to "the mandate of due process of law"—that no person can be affected by a hearing or adjudication of a court of justice without his voluntary appearance or affording to him by means of the service of process an opportunity to appear and contest the claim that may be made against him. See Bernhard v. Bank of America, supra, 19 Cal.2d 807, 811, 122 P.2d 892, and authorities there cited. Consistent with these observations is "the accepted rule that in no case will a judgment entered after service on less than all the partners be given the effect of a personal judgment against partners not actually served." Ellsworth v. Bradford, 186 Cal. 316, 319, 199 P. 335, 336, and authorities there cited. Thus it was said in the early case of Ingraham v. Gildemeester, 2 Cal. 88, at pages 89–90, in response to the assertion that "service upon one partner, is service upon all". "Such is not the rule in this State. To sustain a judgment against a defendant, he must be served with process, or brought into Court through some of the forms of law." See, also, Golden State & Miners' Iron-Works v. Davidson, 73 Cal. 389, 392–393, 15 P. 20.

[10-13] It is true, as plaintiffs argue, that while the term "privity" has been defined as envisaging "an interest in the subject matter" of the litigation acquired "after rendition of the judgment * * * through or under one of the parties, as by inheritance, succession, or purchase", Bernhard v. Bank of America, supra, 19 Cal.2d 807, 811, 122 P.2d 892, 894; see, also, Servente v. Murray, 10 Cal.App.2d 355, 360–361, 52 P.2d 270, it has also been correlated with a broader concept consistent with "careful examination in the circumstances of each case as it arises." 30 Am. Jur., Judgments, sec. 225, p. 957. So it is said in 50 C.J.S., Judgments, § 788, at pages 324–325, that under "many decisions, privity means a mutual or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights; and the term 'privy' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial." As illustrative of this concept, plaintiffs refer to the recent case of Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73, wherein this court determined that a "privity" of relationship existed between a husband and wife so as to make an adverse judgment in a prior action brought by the husband to recover for personal injuries sustained by him in an automobile accident res judicata as to the same issues when raised in a later action brought by the wife on account of personal injuries which she sustained in the same accident. But that conclusion was based upon the community property law of this state—that "the right, or cause of action, involved in [the husband's] prior litigation was community in nature and the proceeds of any judgment that might have been recovered from defendant would have belonged to both husband and wife, as community property. * * * the husband was representing the community * * * and consequently the wife was also represented as to her interest in the community and is bound by the [prior adverse] judgment." 33 Cal.2d at page 321, 202 P.2d at page 77. Manifestly as so analyzed, such decision, to like effect, see Cutting v. Bryan, 206 Cal. 254, 258, 274 P. 326, is in nowise analogous to the present situation involving partners sued in their individual capacities and entitled, under the requirements of "due process of law", to "notice and an opportunity to be heard" before being deprived of valuable "property rights by a judgment." Bernhard v. Bank of America, supra, 19 Cal.2d 807, 811, 122 P.2d 892, 894. Plaintiffs have cited us no case holding to the contrary in the matter of individual partners sued on a tort liability arising out of a partnership transaction, and our independent research has revealed none.

[14-16] Of course, there are situations where persons neither parties nor privies to parties to an action may be bound by a judgment. The rule is stated in section 84 of the Restatement of Judgments as

follows: "A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." See, also, 1 Freeman on Judgments, 5th Ed., § 432, p. 939 et seq.; 50 C.J.S., Judgments, §§ 782–783, pages 317–320. In urging the binding effect of the first trial's findings and judgment against defendants Bower and Thorley on the second trial, plaintiffs appear to rely in part upon a claim of their exercise of control over the defense in the prior litigation. Thus, plaintiffs argue that from the record it may be inferred that defendants Bower and Thorley, through their correspondence with defendant Wilcox' counsel at the time of the first trial, knew of plaintiffs' cause of action as involving the responsibility of the partnership and so were in an equal position of authority to exercise control over the conduct of such proceedings consistent with their joint and several liability on a partnership matter, Civ.Code, secs. 2407, 2409; that they chose to stay "in the background" and let defendant Wilcox, as agent of the partnership, Civ.Code, sec. 2403, "bear the brunt of the defense," so that "they are now estopped to deny the force and effect of the [first] judgment." Plaintiffs claim the situation is analogous to that of an "undisclosed principal," who is bound by a judgment in a prior action rendered against his agent on the identical issue when raised in subsequent litigation, citing Shamlian v. Wells, 197 Cal. 716, 242 P. 483; also, 30 Am.Jur., Judgments, § 248, p. 977.

But the frailty of plaintiffs' position in this respect arises from their failure to urge the claim of res judicata until they moved unavailingly for a new trial herein, and at no time in the proceedings of the second trial did plaintiffs put in issue the question of the participation of defendants Bower and Thorley in the conduct of the prior litigation. Neither Bower nor Thorley nor the partnership was named as a party to the action as it was prosecuted through the first trial and culminated in a judgment against defendant Wilcox, and defendants Bower and Thorley in the second trial might have been able to prove that they did not participate in the conduct of the prior defense or agree to have their copartner Wilcox conduct it for them had plaintiffs attempted to prove that they did. The entire matter of such alleged participation and exercise of control would be a question of fact to be resolved from the evidence adduced thereon, and defendants Bower and Thorley would be entitled to have their day in court in challenge of such charge by plaintiffs. See Jones' Commentaries on Evidence, 2d Ed., Vol. 4, § 1810, p. 3351 et seq. Otherwise, to follow plaintiffs' theory, mere knowledge of one partner that his copartner is being sued on an alleged partnership transaction would be sufficient to render the first judgment res judicata on all issues litigated, if in the subsequent prosecution of the action against the later-served partner proof is made of the relationship he sustained to the party-defendant in the prior trial. Such an extension of the doctrine of res judicata cannot be reconciled with the requirements of due process as above discussed. Nor does plaintiffs' citation of the case of Shamlian v. Wells, supra, 197 Cal. 716, 242 P. 483, sustain their position. There the undisclosed principal undertook to justify his occupancy of plaintiffs' land on the basis of a contract made with his agent. The contract had been terminated in an action to which only the agent was a party. It was held that the undisclosed principal could not attempt to reap the benefit of his agent's contract and at the same time deny that his agent represented him in litigation concerning it. Defendants Bower and Thorley are not seeking to take advantage of a contract made by defendant Wilcox as a secret agent and at the same time disclaim liability for his acts performed in connection therewith. Rather their concern would only be with their right to secure their day in court on the issue of whether defendant Mc-

Knight was acting in the scope of his employment when he injured plaintiffs' son. Such right could not be denied them in the absence of plaintiffs' showing of an estoppel against them in the course of the second trial.

[17-20] Nor does it avail plaintiffs to rely on the principle of judicial notice in support of their present plea of res judicata. While a trial court is bound to take judicial notice of its own records in the same action, 20 Am.Jur., Evidence, § 86, p. 104; 10 Cal.Jur., Evidence, § 52, p. 728; Craiglow v. Williams, 45 Cal.App. 514, 516, 188 P. 76; Schomer v. R. L. Craig Company, 137 Cal.App. 620, 627, 31 P.2d 396; Mason v. Drug, Inc., 31 Cal.App.2d 697, 701, 88 P.2d 929; In re Reader, 32 Cal.App.2d 309, 313, 89 P.2d 654, and matters which are subject of judicial notice are not dependent upon either pleading or proof for their effectiveness in the determination of issues before the court, 20 Am.Jur., Evidence, § 25, p. 54; 10 Cal.Jur., Evidence, § 25, p. 698; Altoona Quicksilver Mining Company v. Integral Quicksilver Mining Company, 114 Cal. 100, 103, 45 P. 1047, the judgment entered against defendant Wilcox upon the conclusion of the first trial did not operate as a matter of law to conclude the rights of his copartners, defendants Bower and Thorley. As so viewed, the situation here is akin to that existing when the former judgment, available in bar of the retrial of an issue, was entered not in the same, but in a different action, and proper evidence in proof of its effectiveness as a prior adjudication must be made in the trial of the subsequent action or the benefit will be held to have been waived. 50 C.J.S., Judgments, § 836, page 404; see, also, Johnston v. Ota, 43 Cal.App.2d 94, 97, 110 P.2d 507. The record here shows that the trial judge was, in fact, fully aware of the earlier findings and determination of the scope of employment issue incident to the entry of the judgment against defendant Wilcox at the conclusion of the first trial, but that he viewed the matter in the second trial as one for independent decision upon the evidence there adduced pursuant to plaintiffs' undertaking to try the entire cause anew. Accordingly, he remarked: "No, I do not think it [the evidence] was exactly the same. I think we have had some different testimony and some testimony that wasn't in the other case * * * there was quite a bit of testimony in that other case that is not in this. * * * I cannot see it your [plaintiffs'] way. I do not think he [McKnight] was within the scope of his authority." Where a party joins issue on a question previously litigated or voluntarily opens an investigation of matters which he might claim to be concluded by a prior judgment, he will be held to have waived his right to assert the benefit of the former adjudication and the case will be determined without regard therefor. 50 C.J.S., Judgments, § 597, page 15; Cooley v. Snake River Dist. Imp. Co., 78 Or. 384, 152 P. 1190, 1192; see, also, 2 Freeman on Judgments, 5th Ed., § 808, p. 1715; Domestic & Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 562-563, 51 P.2d 73; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826; Wolfsen v. Hathaway, 32 Cal.2d 632, 638, 198 P.2d 1. So here, in any event, plaintiffs' attempt to assert the binding effect of the first judgment against defendants Bower and Thorley in the second trial, and thus conclude their right to an independent adjudication of the issues presented by the pleadings, comes too late.

There now remains for consideration plaintiffs' contention that the findings of the trial court with respect to whether defendant McKnight was acting within the scope of his employment at the time of the accident are contrary to the undisputed evidence in the record, and that they are therefore wholly unsupported.

It appears that one Bob Hickerson, pursuant to the suggestion of defendant Thorley made shortly after entry into the joint enterprise in question, was placed in charge of the drilling operations at the Wilcox well. Sometime during the four years intervening between the first and second trials said Hickerson died and his testimony in the first trial was not submitted for inclusion in the present record. The only evidence on the scope of employment issue is the testimony of defendant McKnight, called as a witness for plaintiffs. He stated that he was employed as a "driller" on the Wilcox well and that he took his "orders" from Bob Hickerson, his immediate superior; that he worked an eight-hour shift and on July 20, 1941, the day of the accident, he went on duty at 4:00 p. m.; that they were then "short a derrick man" and that he so told Hickerson, who then said: "* * * well, go ahead, that he [Hickerson] didn't know where to get one, if I knew where to get one to hire him * * * any time I could find one, any time one come around to hire him, that it was all right with him."

It further appears from defendant McKnight's testimony that when Hickerson "started to leave" the well at about "7:30 or 8:00 p.m.," he found that "he could not get his car started"; that then McKnight, at Hickerson's direction and using the car of one Jack Neville, another employee at the well, "pulled him [Hickerson]" to two service stations; that "there was no mechanic" at either station; and that sometime "between 9:00 and 10:00 p.m." McKnight left Hickerson and the latter's car at the Thorley Oil Company well in Los Angeles, some "eight or nine miles" from the Wilcox well. Before they parted Hickerson gave McKnight certain instructions to carry to the driller who was to come on duty at midnight. McKnight left Hickerson with the intention of returning to the Wilcox well. As he drove along the road, he discovered that he had "missed the Main Street crossing * * * didn't see the sign"—"the lights were not very good on the car"— and he said he then decided to drive first to a hotel where he believed he could find a derrick man to employ, before going "back to the well." He claimed that he made no stops, except at boulevard signals, "between the time [he] unhooked [his] car from Mr. Hickerson's truck until the * * * accident," which occurred about 10:00 p.m. He was "knocked unconscious as a result of the accident," and he said that he "came to * * * in the Los Angeles County Jail." When asked as to whether he had "had any drinks, any alcoholic drinks" on the day of the accident, he answered that he had "five or six coke highballs" around "12:00 or 1:00 p.m." —"before [he] got on the job" but none later. Amplifying this point and in response to the query as to whether he had "ever been convicted of a felony," he stated: "Yes * * * in connection with this accident." Then in response to several further questions, he testified that he was "imprisoned in the county jail * * * a straight jail sentence [of] a year" but he "never spent any time in the State Prison"; that "they got [him] on three heads, negligent homicide, hit and run, and drunk driving." Thereupon the trial judge stated that "it wasn't a felony," that "the record [would] be corrected" as obviously "he [the witness] does not know whether it was a felony * * * it's a legal question"; and when counsel for defendant Thorley then said that "it [was] agreeable with [him] that the question and answer be stricken," the trial judge so ruled.

During the two or two and one-half hours he was assertedly driving in the evening of July 20, 1941, McKnight was not sure "how far" he traveled but apparently counsel agree it was about "ten" miles, as the route was traced on the map introduced in evidence by plaintiffs as follows: 7.6 miles in towing Hickerson's car from the Wilcox well to the place where he left the latter in Los Angeles, at the Thorley Oil Company well; and then 2.4 miles to the scene of the accident. After hearing the evidence, the trial judge said: "I do not think he [McKnight] was within the scope of his authority and he had definite instructions to go back to the lease [the Wilcox well] and when the time came for the new driller to come on the morning tour to tell him how many points to keep the pressure on. From the time he went on duty and the time the accident happened, which was around 10:00 o'clock, I am satisfied there must have been several hours in there he cannot very well explain. I think he was out drinking during that time, because he obviously was drunk, and was so found by the Court, at the time of the accident. * * * that is the conclusion that I am drawing from the evidence, that he was drunk and that he was not doing anything within the scope of his authority. In fact he was told to go back to the lease [the

Wilcox well], and it was obvious that he has to pick up the roughneck [the derrick man] at some other time or any time when he would go by there, either that one or another one—from his own testimony. I cannot see where he was in the business of the partnership at that time. * * * I find that he was on his own and he was undoubtedly drinking and he wasn't doing any of the business that he was supposed to be doing. In fact, he was told by Mr. Hickerson to come back to the lease [the Wilcox well] and he intended to come back [there] himself. He said that both times he was on the witness stand, and I think he must have had a few drinks after he left Mr. Hickerson and prior to the time he says he got lost. I think that was probably the reason he got lost, and the Court finds against the plaintiffs" on that "one issue of [whether McKnight was] acting within the scope of his employment."

It is manifest that the trial judge concluded from the evidence that McKnight at the time of the accident had deviated from the scope of his employment and was then pursuing, not his employer's but his own, interests in stopping for drinks along his line of travel instead of taking the route which would return him to the Wilcox well as Hickerson had instructed him. Plaintiffs argue that such conclusion fails to take into account McKnight's testimony that Hickerson earlier that day had requested him to "hire" a "derrick man" at "any time [he] could find one"; that such instruction contemplated that he was to make the necessary arrangements at his convenience; that it was only after he became "lost" by reason of the poor headlights on the car that he decided to take advantage of the opportunity presented by driving to the hotel in search of the needed derrick man and endeavoring to have the latter come to work at the Wilcox well "the next evening if * * * not * * * that night"; and that he then intended himself to "go back to the [Wilcox] well." But apparently, in the light of McKnight's own account of the relevant circumstances surrounding the accident, the trial judge deemed it significant that as McKnight left Hickerson that night, the latter gave him certain orders for the crew due at midnight at the Wilcox well but "didn't say anything * * * about a derrick man"; that Hickerson intended McKnight to "hire" another man "any time one come around" the well, but not to undertake any special trip for that purpose; that it was not until he "lost" his way that McKnight decided to disobey Hickerson's instructions to return to the Wilcox well and turned aside to his own interests; that there was a certain time gap after he left Hickerson until the happening of the accident during which McKnight had the opportunity to stop for "drinks" and apparently had done so in view of McKnight's ready admission on the witness stand that he had served a jail sentence "in connection with [the] accident," as "they got [him] on three heads, negligent homicide, hit and run, and drunk driving." While McKnight maintained that he had not had any drinks after "12:00 or 1:00 p. m." that day and had made no stops other than for "boulevard signals" after he left Hickerson that night, until he had the accident about 10:00 p. m., such statements only produced a conflict with the significance of his admitted conviction on the "drunk driving" charge. Plaintiffs made no objection to this line of testimony given by McKnight as he was asked whether he had "ever been convicted of a felony," and it was only following his detailed account of the basis of his "jail sentence" imposed by reason of the accident, that the trial judge declared that "it wasn't a felony" and ruled that "the question and answer be stricken," consistent with the statement of counsel for defendant Thorley that such procedure was "agreeable with [him]." In such circumstances manifesting the intent to strike from the record only "the question and answer" as to whether McKnight had "ever been convicted of a felony," plaintiffs unavailingly argue now that they "had a right to assume that all of the evidence concerning the nature of the crime that the witness McKnight had been convicted of was stricken from the record."

[21-23] The weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn there-

from were matters for the trier of the facts. Singh v. Furuta, 59 Cal.App.2d 695, 698, 139 P.2d 664; Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 96, 172 P.2d 725; Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579. Likewise questions as to the credibility of a witness and the determination of conflicts and inconsistencies in his testimony were for the trial judge. Hansen v. Bear Film Company, Inc., 28 Cal.2d 154, 184, 168 P.2d 946; Purcell v. Goldberg, 34 Cal.App.2d 344, 347, 93 P.2d 578; Peterson v. Peterson, 74 Cal.App.2d 312, 319, 168 P.2d 474. A witness "may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced." Burns v. Radoicich, 77 Cal.App.2d 697, 700, 176 P.2d 77, 79.

[24-26] In accord with these settled principles, plaintiffs' challenge of the sufficiency of the evidence in support of the trial judge's finding on the scope of employment issue cannot prevail. The verity of McKnight's testimony was to be tested by the trial judge in the light of all the facts and circumstances, and he was free to disbelieve such parts of the witness' account as appeared to him "evasive, equivocal, confused, or otherwise uncertain." Burns v. Radoicich, supra, 77 Cal.App.2d 697, 701, 176 P.2d 77, 80; see, also, Shapiro v. Equitable Life Assur. Soc., supra, 76 Cal.App.2d 75, 97, 172 P.2d 725; Barham v. Khoury, supra, 78 Cal.App.2d 204, 211, 177 P.2d 579. In so appraising the factual situation here, the trial judge found on substantial evidence contrary to plaintiffs' claim as to McKnight's pursuit of his employer's business at the time of the happening of the accident, and such finding is conclusive on appeal. See Gomez v. Cecena, 15 Cal.2d 363, 367, 101 P.2d 477; Hansen v. Bear Film Company, Inc., supra, 28 Cal.2d 154, 184, 168 P.2d 946.

[27] It is true that because of the conflicting findings made in the two trials on the scope of employment issue, two opposite judgments arising from the same automobile accident have been entered, but the propriety of such result cannot be disputed. The same judge presided at both trials and, as the record here reveals, he expressly declared that in his opinion the evidence presented was "not * * * the same" in each instance, there was "different testimony" and "some testimony that wasn't in the other case." As the application of the principle of res judicata has been heretofore discussed, the prior adjudication of plaintiffs' cause of action against defendant Wilcox did not bind his co-partners, defendants Bower and Thorley, who were not in legal privity with him, and consequently they were entitled to their day in court on the issues raised by the pleadings.

This is not a situation where (1) two conflicting judgments arising out of the same events were both before this court at the same time, (2) the essential facts were similarly presented, and (3) the evidence to a large extent was undisputed. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850; Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847. With such prevailing combination of factors, this court recognized the anomaly of "two lower courts, dealing with substantially the same evidence" and "reaching diametrically opposite conclusions as to the legal effect of the same occurrence," and therefore the two conflicting judgments were not permitted to stand. Southern Pacific Co. v. City of Los Angeles, supra, 5 Cal.2d 545, at page 548, 55 P.2d 847, 849. But here, (1) the judgment entered on the first trial has long since become final and only the judgment entered on the second trial is presented for review; and (2) it cannot be said from the record that the "essential facts" were "similarly presented" in the second trial and were "in most particulars undisputed." Ibid. Rather, to the latter point the contrary appears, for the trial judge plainly correlated his opposing views in disposition of factual conflicts in the case with the observation that in his opinion the evidence in the two trials was "not * * * the same" and there was "different testimony." Accordingly, this court is in no position to undertake the elimination of any inconsistency between the findings entered upon the conclusion of the respective trials and achieve a harmonious result premised upon the determination of the legal effect of "substantially the same evidence." Ibid.; see Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 780, 135 P.2d 569. In these circumstances, and in view of the record's disclosure of substantial evidence in support of the challenged finding, plaintiffs cannot prevail on this appeal. Morris v. Fortier, 59 Cal.App.2d 132, 136–138, 138 P.2d 368; see, also, Shutz v. Western Wholesale Liquor Distributors, 24 Cal. App.2d 659, 664, 76 P.2d 135.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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93 Cal.App.2d 658

BANDUCCI v. FRANK T. HICKEY, Inc.

Civ. No. 3779.

District Court of Appeal, Fourth District, California.

Sept. 19, 1949.

Rehearing Denied Oct. 18, 1949.

Hearing Denied Nov. 17, 1949.

Fabio Banducci sued Frank T. Hickey, Inc., for breach of oral agreement to level land.

The Superior Court of Kern County, W. L. Bradshaw, J., entered judgment on a verdict in favor of plaintiff and defendant appeals.

The District Court of Appeal, Griffin, Acting P. J., affirmed the judgment holding that questions as to breach of contract and waiver of claim for damages were for jury and that there was no error in admission of testimony.

1. Appeal and error 🔑1002

Jury's finding from conflicting evidence that failure to level land in accordance with agreement was due to poor workmanship by defendant and not the fault of engineer employed by landowner could not be disturbed on appeal.

2. Contracts 🔑322(3)

Where jury found from sufficient evidence that contract to level land had been breached by defendant because due to poor workmanship by defendant the land could not be efficiently irrigated when planted to row crops, absence of evidence as to recognized land levelling practice in the county was immaterial.

3. Contracts 🔑305(1)

Mere acceptance of completed work under land levelling contract did not necessarily preclude landowner from recovering damages for breach of contract on ground that the work was done in an unworkmanlike manner, particularly where the defects were latent or owner had no reasonable means of ascertaining such defects and, when ascertained, gave timely notice thereof, even though owner had paid contract price.

4. Contracts 🔑303(5)

A contractor is bound to discover defects that are reasonably discernible or patent, and where he knows, or has reason to believe, that plans are defective and follows such plans without pointing out the defects to owner or architect, he cannot recover if the building proves insufficient because of such defects.

5. Contracts 🔑323(1)

Whether defendant perfected work under land levelling contract according to plans and specifications furnished by owner's agents, whether owner unqualifiedly accepted workmanship of defendant and accordingly waived any right to recover for damages, or whether there were in fact latent defects which were subsequently discovered were questions of fact for jury.

6. Contracts 🔑323(1)

Whether a waiver of any claim for damages for breach of contract is to be implied from payment for work and the taking of possession of the property is a question of fact to be determined from all the surrounding circumstances.

7. Evidence ⚷145

Where evidence in action for breach of land levelling contract warranted inference that conditions preventing efficient irrigation of land, as reflected by second survey almost one year later, existed when contract was completed, maps of second survey and testimony of engineer based thereon were admissible over objection that such evidence was too remote to show condition of land when contract was completed.

8. Evidence ⚷145

If connection established is sufficient to support a reasonable inference that conditions shown to exist at later time also existed at earlier date, the element of time between the two dates does not necessarily preclude evidence of conditions existing at later time as showing conditions at earlier date.

9. Evidence ⚷117

Conditions complained of may be shown by evidence of conditions existing at a later date if a prima facie showing is made that the conditions complained of did not change during period of time involved.

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B. E. Ahlport, Los Angeles, L. R. Deadrich, Bakersfield, for appellant.

Mack & Bianco, Bakersfield, for respondent.

GRIFFIN, Acting Presiding Justice.

This is an action to recover damages for breach of an oral agreement to level land. On February 21, 1946, plaintiff bought from one Murdock 160 acres of land in Kern County. Plaintiff, who spoke but little English, orally authorized Murdock to arrange for grading and leveling the land. He set a limit of $50 per acre as the cost price. Plaintiff entered into a written agreement with one Claborn to employ a licensed civil engineer to survey the 160 acres, and Claborn agreed to level that land at $50 per acre and according to the grade map or grid sheet prepared by such engineer, and "in accordance with recognized land-leveling practice in this area", so that plaintiff "may be able to farm said land with row crops and to irrigate same fully and efficiently", and Claborn agreed "to use every effort to have said work completed within one month from date of this instrument" (February 24, 1946) "* * * it being understood" that plaintiff "is desirous of getting land prepared in time to plant a crop of cotton * * * for the 1946 season." An engineer, since deceased, was employed by Murdock. He surveyed and prepared a map or grid sheet showing the contour. Elevation stakes were set and marked at each 100-foot square. Claborn was to farm the 160 acres under a share-cropping lease executed April 1, 1946. Irrigating water came from a well located in the southeast corner of the south 80 acres. Claborn leveled this portion. His progress was so slow that the job threatened to drag into the planting season before he could grade the north 80 acres. Plaintiff, through his agent Murdock and Claborn, besought defendant corporation to undertake the grading and leveling of the north 80 acres through its representative, Mr. Davis.

The conversation surrounding the execution of the oral agreement is at variance. Davis testified that he agreed to do a good job of leveling according to the map; that he noticed the stakes on the property; that Claborn produced the map and the three of them looked it over carefully and took the yardage figures; that Claborn was going to plant cotton; that he never saw the Claborn agreement and did not know its terms; and that nothing was said about the land having to be leveled in accordance with recognized land-leveling practices in Kern County and to adequately and effectively irrigate to row crops. Murdock testified that Davis said he would help Claborn out and level the north 80 acres for the agreed price of $4,000; that he would "level it so it would irrigate for row crops" and in accordance with the best practice of land leveling in this area and according to the terms of the written agreement between Banducci and Claborn; that he did not believe this written contract was produced at any time but that he "stated" to Davis the "terms" of it.

Defendant Company immediately set about executing the oral agreement as to the north 80 acres while Claborn was finishing the south 80 acres. Murdock examined the job on many occasions. Claborn also checked the north 80-acre job. Midway through it, Davis asked Claborn for a progress payment. Plaintiff paid $2,000 on April 16th. On termination of the work (April 30, 1946) he paid defendant $2,000. Claborn farmed the south 80 acres and during the time he was on the property the north 80 acres were never farmed nor planted. Apparently, it was too late to plant it that season, and Claborn's crop on the south 80 acres was a failure. He left the property late in 1946. On December 6, 1946, plaintiff leased the 160 acres to one Sanders who attempted to run water on the north 80 acres but found it would not run and he was unable to irrigate it so he gave up his lease. Plaintiff engaged another engineer to survey the north 80 acres to bring the cuts and fills left by defendant to a level condition. He found depressions and rises to the extent of ½ foot. There was no uniform fall and it was impossible to irrigate under the conditions existing so he redesigned the lay of the land. In February, 1947, Banducci told Davis about the discovery, showed it to him, and demanded that it be corrected. Davis disclaimed responsibility and claimed the fault and inaccuracies were due to the workmanship of the previous engineer employed by Murdock under the Claborn agreement.

Plaintiff testified that prior to irrigating the north 80 acres he had spent $1125 for gypsum and that by re-leveling that acreage this gypsum would be lost; that the cost of such re-leveling so that it would irrigate when planted to row crops was about $3,000. According to Davis, Claborn, who left the county and was not available as a witness, stated that the work was satisfactory to him when the final payment was made. The jury returned a verdict for plaintiff for $2890.

On appeal from the judgment defendant argues mainly that the evidence does not support the judgment in that there is no proof that defendant breached its contract; that there is no evidence as to what the recognized land-leveling practice was in that county; and that since plaintiff accepted and took possession of the completed work, in the absence of fraud or mistake, plaintiff cannot recover, citing such cases as Mannix v. Wilson, 18 Cal. App. 595, 123 P. 981; Atowich v. Zimmer, 218 Cal. 763, 25 P.2d 6; and Blethen v. Blake, 44 Cal. 117.

[1, 2] There is testimony that defendant company agreed to do the work according to the terms of the Claborn agreement, which terms were stated to defendant's agent and which contained a proviso that the land should be leveled so that it could be adequately and efficiently irrigated when planted to row crops. It is apparent it was not so leveled. The evidence produced is in conflict as to whether this fault was due to the engineer's figures or due to poor workmanship on the part of defendant corporation. The jury apparently decided this issue against defendant. We are unable to disturb this finding. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. Under the circumstances related, testimony as to what the "recognized land-leveling practice in that county" was, would seem to be superfluous. There is sufficient evidence to support the jury's finding that the contract was breached by the defendant because the land could not be adequately and efficiently irrigated when planted to row crops.

[3] A mere acceptance, without more, does not necessarily preclude the owner from showing that the work was done in an unworkmanlike manner, especially when the defects were latent or where the owner had no reasonable means of ascertaining such defects and, when ascertained, gave timely notice thereof, even though he has paid the contract price. An instruction to this general effect was properly given. Leonard v. Home Builders, 174 Cal. 65, 68, 161 P. 1151, L.R.A.1917C, 322; Summers v. L. F. S. Syndicate, 46 Cal.App. 250, 255, 189 P. 286; Bryson v. McCone,

121 Cal. 153, 53 P. 637; Howard v. Thompson Lumber Co., 106 Ky. 566, 50 S.W. 1092; 17 C.J.S., Contracts, § 514, pages 1102–1105; Stephens v. Weyl-Zuckerman & Co., 33 Cal.App. 566, 165 P. 975; Page on Contracts, Vol. 3, p. 2320.

[4, 5] It has been held that a contractor is bound to discover defects that are reasonably discernible or patent, and where he knows, or has reason to believe, that the plans are defective and follows such plans without pointing out the defects to the owner or architect, he is not entitled to recover if the building proves insufficient because of such defects. Northern Pacific R. Co. v. Goss, 8 Cir., 203 F. 904; 17 C.J.S., Contracts, § 515, page 1108, and cases cited. The trial court gave an instruction to this effect, to which defendant objects. The cited cases are sufficient authority for the rule stated. The question whether defendant perfected the work according to plans and specifications furnished by Claborn and Murdock, or whether plaintiff unqualifiedly accepted the workmanship of defendant and accordingly waived any right to recover for damages, or whether there were in fact any latent defects which were subsequently discovered, were all factual questions for the jury to determine under proper instructions. 17 C.J.S., Contracts, § 514, page 1101.

[6] Defendant takes exception to certain instructions given, refused and modified. The court refused defendant's instruction "* * * that if the plaintiff paid for the work done by the defendant and thereafter took possession of the land by their tenant * * * there was an acceptance of defendant's work, and in the absence of any showing of fraud or mistake, implies a waiver of any claim for damages against the defendant and your verdict should be for the defendant." It will be noted that the instruction thus refused does not contain any of the exceptions above noted and, as worded, it tells the jury it should, without exceptions, return a verdict for the defendant if payment was made and possession was taken, and no fraud or mistake was shown. The court did give an instruction bearing on the subject-matter, that is: "* * * that payment by the plaintiff to the defendant for its work in leveling the land created a presumption that the defendant's work was accepted." This instruction was modified by taking that portion from an instruction offered by defendant, but which omitted the statement that, in the absence of fraud or mistake payment "implies a waiver of any claim for damages * * * and your verdict should be for the defendant." It is argued that the court's "evisceration" of this portion of the instruction deprived the jury of an instruction on the legal effect of acceptance and its consequences. No case has been cited which holds, that mere payment for work and the taking of possession of the property thereafter is, as a matter of law, a waiver of any claim for damages for delay or imperfections. The general rule is that whether or not a waiver is to be implied is a question of fact which must be determined from all the surrounding circumstances of the case. Leonard v. Home Builders, supra, 174 Cal. 65, page 68, 161 P. 1151, L.R.A.1917C, 322. Considering this instruction, together with the other instructions given, the subject matter was sufficiently covered.

[7-9] Finally, it is contended that the trial court erred in receiving into evidence maps of the survey of the land made in 1947 and the testimony of the engineer based thereon. The argument is that such evidence was remote and would not show what the condition of the land was, as to grade, etc., in April, 1946, when defendant completed its work upon the land. There was evidence of the condition of the land in 1946; that it had not subsequently been farmed; that its subsequent condition, as reflected by the second survey in 1947, was not due to erosion, application of water, or other causes; and that date was the first opportunity plaintiff had to actually know that water would not flow effectively to irrigate row crops. This was sufficient to support a reasonable inference that the same condition existed in 1946. If the connection established is sufficient to support a reasonable inference that the conditions shown to exist

at the later time also existed at the earlier date, the element of time between the two dates is not necessarily important. There was a prima facie showing that the conditions complained of did not change during the period involved. No error in this respect appears. Koyer v. Detroit Fire & Marine Ins. Co., 9 Cal.2d 336, 343, 70 P.2d 927.

Judgment affirmed.

MUSSELL, J., concurs.

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93 Cal.App.2d 605

REMBOLD et al. v. GOODWIN et al.

Civ. 7631.

District Court of Appeal, Third District, California.

Sept. 16, 1949.

Hearing Denied Nov. 14, 1949.

H. G. Rembold and another sued Wilvin E. Goodwin and others for injuries sustained by named plaintiff and death of his wife in automobile collision.

The Superior Court of San Joaquin County, R. M. Dunne, J., entered an order granting named defendant's motion for new trial on ground that evidence was insufficient to justify verdict for plaintiffs, and plaintiffs appeal.

The District Court of Appeal, Adams, P. J., held that granting a new trial was not abuse of discretion in view of conflicting evidence as to circumstances of collision, and affirmed the order.

1. Appeal and error 🔑1015(1, 3)

In passing on a motion for new trial based on insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony and weigh evidence.

2. Appeal and error 🔑1015(1)

Only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment will an appellate court reverse order granting a new trial on ground of insufficiency of evidence.

3. Appeal and error 🔑979(2)

An order granting a new trial on ground of insufficiency of evidence to sustain judgment will not be disturbed on appeal, unless there is a clear showing of abuse of discretion.

4. Appeal and error 🔑933(1)

All presumptions are in favor of an order granting a new trial on ground of insufficiency of the evidence and order will be affirmed on appeal if sustainable on any ground.

5. New trial 🔑71

Where evidence was conflicting as to whether defendant's truck and trailer were moving or stationary, lighted or dark, and as to their position on highway when following automobile collided with trailer, granting a new trial on ground of insufficiency of evidence to justify verdict for plaintiffs for death of occupant of automobile and injury to driver was not abuse of discretion.

Forrest E. Macomber, Stockton, for appellants.

Honey & Mayall, and Len H. Honey, Stockton, for respondents.

ADAMS, Presiding Justice.

This is an appeal by plaintiffs from an order granting defendant's motion for a new trial after a jury verdict in favor of H. G. Rembold, the surviving husband of Thelma Rembold, deceased, and Verne Marie Rembold, daughter of decedent, in an action to recover damages for the death of said Thelma Rembold who was killed in an automobile collision alleged to have been due to the negligence of defendant Goodwin; also granting said defendant a new trial after a verdict in favor of H. G. Rembold for damages for injuries sustained by him in the same collision.

The order granting a new trial was based upon all of the grounds stated in the notice of motion, including insufficiency of the evidence to justify the verdict and judgment.

The evidence shows that the accident occurred on a highway in San Joaquin County, about 10:15 p. m., on a clear, moonlight night in May, 1947. Defendant was driving a truck to which was attached a trailer laden with bailed hay. Plaintiff H. G. Rembold was driving an automobile following the truck. He ran into defendant's trailer. Mrs. Rembold, who accompanied her husband, was killed and Rembold sustained injuries. The evidence is conflicting as to whether defendant's vehicles were moving or were stationary when plaintiff's automobile ran into the trailer, as to whether they were lighted or dark, and as to their position on the highway.

Appellants' sole contention is that the trial court abused its discretion in granting a new trial.

[1-4] In the recent case of Yost v. Johnson, 91 Cal.App.2d 849, 206 P.2d 13, this court considered a similar question and affirmed the order of the trial court granting a new trial. We there cited and quoted from the opinion of the Supreme Court in Brooks v. Metropolitan Life Insurance Co., 27 Cal.2d 305, 307, 163 P.2d 689, in which latter case it was said that in passing upon a motion for a new trial based upon the insufficiency of the evidence it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence; that in such cases it is only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court. We also quoted from Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722, to the effect that an order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal unless there is a clear showing of abuse of discretion; that all presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground; and that only when, as matter of law, there is no substantial evidence to support a contrary conclusion may an appellate court reverse it.

[5] Other cases are cited in Yost v. Johnson, and reference thereto is sufficient without repetition here. Our conclusion in the case before us is the same as was drawn in that case, to wit, that we cannot say, as matter of law, that there is no substantial evidence to support a judgment for the party moving for a new trial; that the trial court saw and heard the witnesses and it was its province, as well as its duty, to weigh the evidence and reach its own conclusion as to the probative value thereof.

The order appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

ENGLISH v. CITY OF LONG BEACH et al.

Civ. 16798.

District Court of Appeal, Second District,
Division 1, California.

Sept. 7, 1949.

Rehearing Denied Sept. 29, 1949.

Hearing Granted Nov. 3, 1949.*

Petition by Henry W. English against the City of Long Beach, a municipal corporation, and others, for a writ of mandate directing the Civil Service Board of the City to set aside an order sustaining petitioner's discharge from police service and to reinstate the petitioner.

The Superior Court of Los Angeles County, Thomas J. Cunningham, J., ordered the writ to be issued, and the defendants appealed.

The District Court of Appeal, White, P. J., affirmed the judgment, holding that the action of the board in considering evidence at times and places other than set forth for final hearing respecting the ability of the petitioner to perform his duties deprived the petitioner of a fair hearing.

Doran, J., dissented.

*Subsequent opinion 217 P.2d 22.

1. Administrative law and procedure ⚷477

Administrative tribunals exercising quasi judicial powers, which are required to make a determination after a hearing, cannot act on their own information and cannot treat as evidence anything which has not been introduced as such, inasmuch as a "hearing" requires that party be apprised of evidence against him so that he may refute, test and explain it.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Hearing".

2. Administrative law and procedure ⚷477

Papers in files of administrative tribunal exercising quasi judicial powers, which is required to make a determination after a hearing, which papers are not introduced into evidence, may not be considered by tribunal.

3. Mandamus ⚷168(4)

Evidence established that final decision of the Civil Service Board respecting ability of policeman to perform his duties was continued for 90 days, and that its action in thereafter receiving and considering evidence at times and places other than set for the final decision, and in denying policeman the opportunity for cross-examination or of introducing rebutting evidence, deprived him of a fair hearing upon the issue of fitness.

4. Administrative law and procedure ⚷322, 476
Municipal corporations ⚷185(5, 9)

Civil Service Board of Long Beach may not make dismissal or retention of a policeman who has been absent from duty for six months or more dependent solely upon findings of medical board as to his physical fitness, since to do so would be an unwarranted delegation of power to medical board, but board may consider reports of medical board together with other evidence, and policeman is entitled to an opportunity to examine and rebut reports.

5. Administrative law and procedure ⚷390
Municipal corporations ⚷185(4, 14), 216 (2)

Under Rules of Civil Service Board of Long Beach, policeman returning to duty after six-month absence may be required to take a physical examination, and results may form basis for dismissal on ground of unfitness, and dismissal is to be accomplished only upon written charges, with policeman having right to appeal to Civil Service Board, and rule is not void as conflicting with city charter prohibition against discharging employee until he has been presented with reasons for discharge stated in writing and given opportunity to be heard before Civil Service Board in his own defense.

6. Administrative law and procedure ⚷390
Municipal corporations ⚷216(2)

Rule of Civil Service Board of Long Beach relating to physical examination given to policeman returning to duty after six-month absence is not void because it fails to provide a standard whereby board of physicians can determine whether policeman has passed physical examination, since final determination of physical fitness rests with Civil Service Board.

7. Mandamus ⚷176

Where trial of mandate action did not take place until more than two years after Civil Service Board discharged policeman as being physically unable to perform duties upon his return to duty after six-month absence, and court found that policeman had not been accorded a fair hearing, trial court properly ordered reinstatement of policeman rather than remanding cause to Civil Service Board for proper hearing. Code Civ.Proc. § 1094.5(d, e).

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Irving M. Smith, City Attorney, Clifford E. Hayes, Deputy City Attorney, Dewey L. Strickler, Deputy City Attorney, Long Beach, for appellants.

Kenneth Sperry, Long Beach, for respondent.

WHITE, Presiding Justice.

This is an appeal from a judgment ordering the issuance of a writ of mandate by which the Civil Service Board of Long Beach was directed to "set aside its purported order and decision sustaining petitioner's dismissal" from service and to "reinstate petitioner to his position as a patrolman in the Long Beach Police Department as of August 3, 1945."

In a previous action between the same parties a judgment denying a writ of mandate without prejudice to the filing of another petition subsequent to a hearing before the Civil Service Board was upheld on appeal to this court. English v. City of Long Beach, 77 Cal.App.2d 894, 176 P.2d 940. This court in its opinion declared applicable to members of the police department and valid as there construed a rule of the Civil Service Board requiring any employee who had been absent from duty for any reason for a period of six months or more to pass a physical examination before he should be entitled to return to duty.

Respondent was appointed to the position of patrolman on July 16, 1942. On December 24, 1944, he was absent from duty on authorized sick leave which continued until January 9, 1945, at which time he was permitted to take a vacation until January 23, 1945. On the latter date he was granted six months' leave of absence. Prior to the expiration of this leave, on July 16, 1945, he reported for duty and filed with the city health officer a certificate of his attending physician that he was sufficiently restored to health to be able to perform efficiently the duties of his position. By reason of the rule above referred to, respondent was not permitted to resume his duties. On August 3, 1945, he filed in the superior court a petition for writ of mandate, which, as above stated, was denied without prejudice. On the same date, August 3, 1945, the city manager filed with the civil service board and thereafter served on respondent a notice of dismissal based upon charges that respondent had failed to pass the required physical examinations given respondent by the board of physicians of the city on the 16th and 19th days of July, 1945, indicated that he had contracted a physical ailment or defect which incapacitated him for the proper performance of the duties of his position.

Respondent's absence from duty had been occasioned by a toxic thyroid condition, for which he underwent an operation, and his asserted physical defect was a valvular heart condition resulting from the toxic thyroid. The only proper issue of fact for determination was whether his heart's valvular leakage condition had been sufficiently "compensated" so as to enable respondent to perform satisfactorily the duties of patrolman.

Pursuant to the civil service rules and regulations, respondent filed a notice of appeal to the civil service board and his objections to the sufficiency of the charges on which his dismissal was based. The objections were overruled and respondent filed an answer to the charges. A hearing was held before the Civil Service Board on September 12, 1945. The matter was then continued to September 25, 1945, to permit respondent to file certain documentary evidence. On September 25, 1945, the board rendered its decision which, as set forth in a communication received by respondent from the secretary of the board, was as follows:

"The Board, by a majority of its members, at the regular meeting of September 25, 1945, approved and sustained the charges filed and found that on the 19th day of July, 1945, the date on which you submitted to a physical examination, you were unable to perform the duties of the position of patrolman and that, on the 3d day of August, 1945, you had contracted a physical ailment or defect which incapacitated you from the performance of the duties of said position.

"However, the Board continued final decision on the matter for a period of 90 days from and after the 25th day of September, 1945, during which time you shall be suspended from the service of the City. At the end of said 90 day period, you shall be restored to the position of patrolman, provided you pass a physical examination to be given by a Board of Physicians as provided in Sec. 12, of Rule V, of the Civil Service Rules & Regulations. If you fail to submit to the physical examination after notice to do so, or if the Board of Physicians finds that you are unable to perform the duties of the position of patrolman, then the suspension shall be set aside and your dismissal from the service of the City as of the 3d day of August, 1945, shall be approved and sustained."

It appears, however, from the record that the order actually made by the civil service board, as shown by its minutes, on September 25, 1945, was as follows:

"*Final decision* in the matter of the dismissal of Henry W. English *continued* for a period of ninety days: Directed, received and filed a letter of September 25, 1945, from attorney Kenneth Sperry with which he transmitted a communication of September 24, 1945, from A. C. McKinney, M.D., Professional Building, Long Beach, citing his medical findings in an examination of Henry W. English, dismissed patrolman, whose trial was held September 12, 1945. Commissioner Brown then moved, seconded by Commissioner Sullivan, that Mr. English be restored to duty as patrolman. A substitute motion was made by Commissioner Spencer, seconded by Commissioner Williams, which was carried by a majority of the board, that the *final decision* in the matter of the dismissal of Henry W. English *be continued* for a period of ninety days from and after the 25th day of September, 1945, during which time Mr. English shall be suspended from the service of the City. At the end of the ninety-day period Mr. English may be restored to the position of patrolman *provided he* pass a physical examination to be given by a Board of physicians as provided in Section 12 of Rule 5 of the Civil Service Rules and Regulations. *If he fails to submit* to the physical examination after notice to do so, *or if the Board of Physicians finds that he is unable to perform the duties of patrolman,* then the suspension shall be set aside and his dismissal from the service of the City as of the 3rd day of August, 1945, shall be approved and sustained." (Emphasis added.)

Following this decision respondent submitted to several physical examinations by members of the "Board of Physicians" and medical reports were made to the board. On January 23, 1946, the board adopted a motion "approving the medical reports furnished to the Board", and found that (respondent) was "physically unable to perform the strenuous duties of patrolman," and "set aside the suspension" and "approved and sustained" respondent's dismissal from service as of August 3, 1945.

In his petition for writ of mandate respondent alleged that in rendering the foregoing orders and decisions the board acted without and in excess of its jurisdiction, in that:

1. Under the provisions of Rule XIV, sections 12 and 13, of the rules and regulations of the board, it is provided that upon sustaining the charges against the employee the board shall either (a) remove him from service, or (b) order him suspended or reduced in rank; and in the event of the latter order, upon the expiration of the period of suspension or reduction the employee shall be restored to his former position and rank unless the head of the department with the approval of the appointing power, files with the board written objections to such restoration.

2. That by its order of September 25, 1945, the board sought to delegate its authority to a board of physicians and make respondent's dismissal wholly dependent upon the result of a physical examination by such board, whereas under section 106 of the City Charter and the rules and regulations of the board, such dismissal could be accomplished only by the decision of the board itself based solely upon the evidence introduced at a public hearing at which the employee has the right to appear with his attorney and defend himself.

It was further alleged that the board abused its discretion in that they failed to proceed in the manner required by law, and that the decisions of the board and the purported findings upon which they are based are not supported by any substantial evidence. Respondent further charged that he was deprived of a fair trial, in that the board received and considered evidence, both oral and documentary, at various times and places other than at the time and place set for hearing; that such evidence was received without the knowledge or consent of respondent or his attorney, and no opportunity for cross-examination or of rebutting such evidence was offered. It was further charged that the city health officer and two other members of the board of physicians abused their discretion in that "the sole purpose of the physical examination provided by Rule V, sections 12 and 13, is to determine the present ability of the employee at the time of such examination to perform the duties of his position, whereas said respondents in conducting and reporting their respective examinations of petitioner construed and interpreted said rules to mean that he should be free from all organic defects."

It was further alleged in the petition that "insofar as Rule V, section 13 of said Rules purports to provide that an employee in the classified service of the City 'shall be required to submit to and pass the physical examination as provided in Section 12 of this Rule before he shall be eligible or entitled to return to active duty', and/or that 'failure to pass such an examination shall constitute grounds upon which such employee may be either temporarily suspended or permanently dismissed from the classified service of the City', said Rule is null and void as being contrary to and in conflict with the provisions of Section 106 of the City Charter." Further, it was alleged, the rule is void for failure to provide a reasonably certain standard for determination whether an applicant for employment should "pass" the physical examination; that "according to its literal terminology, this determination is left to the uncontrolled discretion of the Board of Physicians."

The trial court found all of the allegations of the petition for writ of mandate to be true, but further found, pursuant to stipulation, that at all times subsequent to December 24, 1945, the petitioner had been gainfully employed at a salary equal to or in excess of the salary he woud have received from the City of Long Beach "except for the fact that such outside employment did not offer pension benefits as provided by section 187 of the Long Beach City Charter." The judgment provided that a writ issue directing the board to set aside its purported order sustaining petitioner's dismissal, and that the repondents to the petition "be ordered thereby to reinstate Petitioner to his position as patrolman * * * as of August 3, 1945; and further, * * * pay * * * the salary attached to said position from August 3, 1945, to December 24, 1945."

It is at once apparent that if any of the trial court's findings on the material allegations of the petition for writ of mandate, as above set forth, are supported by the record—for instance, if in fact the petitioner was "deprived of a fair trial" before the Civil Service Board, Code Civ. Proc., sec. 1094.5, or if the trial court was correct in holding that there was no substantial evidence to support the finding that petitioner was unable to perform the duties of patrolman or had contracted a physical ailment or defect which incapacitated him from performing the duties of patrolman—then the judgment should be affirmed.

The evidence before the trial court, while presenting some conflict, was ample to support the conclusion that the board received and considered evidence at times and places other than the time and place set for the hearing; that evidence was received without the knowledge of the employee; that he was denied the opportunity of cross-examination or of rebutting such evidence; and that such evidence not only was considered by the board in rendering its decision, but was virtually the evidence which determined its decision.

There is no dispute here but that petitioner was accorded a hearing, but the question is whether he was accorded a fair hearing. Code Civ. Proc., sec. 1094.5. It is true that a hearing was held on September 12, at which petitioner was present and represented by counsel and evidence was received. Thereafter, the matter was continued until September 25 to enable petitioner to file documentary evidence, consisting of a report from a Dr. McKinney. But, as appears from its own minutes, the board did not then conclude the hearing and render its decision upon the evidence then before it, but *continued final decision* for 90 days, without making any finding that the charges were sustained. During this period of 90 days it received evidence (reports of members of the Board of

Physicians) which petitioner was not permitted to test, explain or rebut, and, as is admitted, considered such evidence in rendering its final decision.

Appellants contend that the construction to be given the minute order of September 25 is that the charges were sustained, but that the board as an act of grace granted petitioner 90 days in which to improve his physical condition. This was the purport of the letter to petitioner prepared by the secretary of the board in collaboration with one of counsel for appellants. Assuming but not deciding that such a procedure would be proper, that is not what was done.

As heretofore noted, the board through its secretary advised the employee that on September 25, 1945, it had "sustained" the charges that petitioner was unable to perform the duties of patrolman and had contracted a physical ailment which incapacitated him, but that it had "continued final decision" for 90 days pending the result of an examination by the Board of Physicians. However, the minutes of the board of September 25, hereinbefore quoted, fail to show that any charges were "sustained". The board merely continued the hearing "for final decision."

It was alleged in the petition for writ of mandate that on or about September 25, 1945, one of the members of the board telephoned Dr. McKinney and asked him questions concerning petitioner, and gave the information he received to other members of the board, and that other members of the board also asked similar questions of their own attending physicians, and that the information so received was used by the board in arriving at its decision. This the trial court found to be true. The testimony of the various members of the board as to their recollection of when the phone call to Dr. McKinney was made was vague and somewhat conflicting, as would be expected at a hearing held some three years after the event took place. There can be no doubt, however, that the phone call was made on or after September 25, and before January 23. Moreover, the answer to the petition for writ of mandate contained the following admission: "The respondents admit that on a date subsequent to September 25, 1945, that members of the Board did call Dr. A. C. McKinney, and did discuss with Dr. McKinney the effect of strenuous exertion upon the petitioner, and that one member of the Board did discuss with other physicians the effect of a valvular heart disease upon the ability to perform the extra-ordinary physical exertion of a police officer as he might be called upon to perform from time to time. The respondents admit that said conversations were held subsequent to September 25, 1945, and prior to January 23, 1946, *and that the information so obtained was considered by the members of said Board in determining the issues before them at the meeting on January 23, 1946.*" (Emphasis added.)

It was further charged in the petition that between September 25, 1945, and January 23, 1946, petitioner was examined by various physicians at the request of the board; that the reports of the physicians were received and considered by the board; but that petitioner was not furnished with copies of any of such reports and neither he nor his attorney was permitted to see the same. This charge was admitted, but it was denied that petitioner was not allowed to see the reports. On this point the secretary of the board testified:

"Q. (By Mr. Sperry) Recall Mr. English and myself coming over there and asking to see these medical reports in December, 1945? A. I believe you did. I'm not sure of the date.

"Q. You refused us permission to see them at that time? A. As I recall I refused unless I had authority from the Board.

"Q. You didn't get authority, did you. I say you didn't get authority, did you? A. I don't recall at the time."

[1] As was said in La Prade v. Department of Water and Power, 27 Cal.2d 47, 51, 52, 162 P.2d 13, 16: "Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence

against him in order that he may refute, test and explain it." In the cited case, the board based its action upon the report of an investigator which was considered at a meeting at which the petitioner was not present and of which he had no notice. It was held that "the action of such a tribunal based upon the report of an investigator, assuming it is competent evidence, see Walker v. City of San Gabriel, [20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383], supra, when forming the basis for the tribunal's determination, is a denial of a hearing, unless it is introduced into evidence and the accused is given an opportunity to cross-examine the maker thereof and refute it."

[2] Further in the same decision the court said: "Therefore, it must be concluded that in the instant case petitioner was denied a hearing. The board's determination was based upon the report of their investigation which although on file with the board was not introduced in evidence at the September 16th meeting. If it was introduced at the September 22d meeting the result is the same inasmuch as petitioner was not present and had no notice of the meeting. Olive Proration Program Committee v. Agricultural Prorate Comm., 17 Cal.2d 204, 109 P.2d 918. It has squarely been held that papers in the files of the administrative tribunal, but not introduced into evidence may not be considered. United States v. Abilene & So. Ry. Co., supra [265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016]."

[3] It is a fair conclusion from the record that on September 25 the board members came to no definite decision, although several of them had serious doubts as to respondent's fitness. There can be no question but that it was their desire to give the employee every opportunity to fit himself for duty and that they acted in the utmost good faith at all times. It must be held, nevertheless, that by their subsequent proceedings they deprived the employee of his right to a fair hearing upon the issue of his fitness—an issue which remained open until their decision of January 23, 1946.

[4] The conclusions arrived at render it unnecessary to consider the contention of respondent that the medical evidence received at the hearing of September 12 was insufficient, or the contention that the Civil Service Board "sought to delegate its authority to a Board of Physicians", other than to say, with reference to the last mentioned contention, that while the administrative board may refer the matter of respondent's condition of health to a Board of Physicians, it may not make respondent's dismissal or retention dependent solely upon the findings of such a medical board. To do so would amount to an unwarranted delegation of the power of the administrative tribunal to the Board of Physicians. The administrative board may consider the reports of such medical board together with other evidence, if any, and respondent is entitled to an opportunity to examine such reports and to rebut the same, if possible. However, the ultimate decision as to respondent's dismissal or retention must be made by the administrative board itself upon all the evidence submitted to it at a fair hearing or hearings. City Charter, sec. 106.

[5, 6] We are not in accord with respondent's contention that Civil Service Rule V (Sections 12 and 13) is *void* as being in conflict with section 106 of the City Charter. Section 106 provides that an employee may not be discharged until he has been presented with reasons therefor stated in writing and has been given an opportunity to be heard before the Civil Service Board in his own defense. As was held in English v. City of Long Beach, supra, 77 Cal.App.2d at page 899, 176 P.2d at page 943: "Nor does the rule requiring a physical examination 'automatically' disqualify the appellant from resuming employment; on the contrary the right of appeal to the Civil Service Board fully protects the appellant's rights." This court then held in the cited case that since patrolman English reported for duty on July 16, and no written charges were served upon him until August 3, he was entitled to compensation for the period from July 16 to August 3. A fair construction of section

13 of the rule, therefore, is that a returning employee may properly be required to take the examination and that the results thereof may form the basis for a dismissal on the ground of unfitness, but that such dismissal shall be accomplished only in the manner provided by the Charter, that is, upon written charges, with the right in the employee to appeal to the Civil Service Board. So construed, the rule is not in conflict with the Charter. The same considerations apply to section 12 of the rule, which respondent contends fails to provide a reasonably certain standard whereby the Board of Physicians can determine whether an applicant has "passed" the examination. Regardless of the outcome of the examination, as heretofore pointed out, the final determination of the fitness of the employee must be made by the Civil Service Board.

[7] It is suggested by appellants that the trial court should have remanded the cause to the Civil Service Board to conduct a proper hearing instead of ordering reinstatement. Code Civ. Proc., sec. 1094.5, subds. (d) and (e); La Prade v. Department of Water and Power, supra, 27 Cal.2d at page 53, 162 P.2d 13. Such a course appears wholly impracticable, not only at this time but as of the time when the writ of mandate was granted. The trial of the mandate action did not take place until March, 1948. It was sound discretion by the trial court to conclude that after such a lapse of time a hearing fair to either side could not be had. Further, the appellant city chose to comply with the directions of the mandate. As stated in the closing brief, "The order was not resisted, as it was believed best to permit the respondent to return to the service of the City and to perform certain limited duties rather than to take chances on having to pay respondent a salary and not receive any benefit in return." Under the construction we have placed upon the Civil Service Rules and the City Charter, the sole question property before the board was whether the employee had an ailment which incapacitated him from performing his duties —not whether he had failed to "pass" a physical examination. Since he has been employed by the city since the issuance of the writ, the question of his former fitness is, for all practical purposes, moot. With the question of his present fitness this case has nothing to do, and such fitness may be determined in a proper proceeding instituted under the provisions of the City Charter and the Civil Service Rules and Regulations and after a trial or hearing legally conducted.

The judgment is affirmed.

DRAPEAU, J., concurs.

DORAN, Justice.

I dissent. I am not in accord with the judgment of the trial court as affirmed by the prevailing opinion. If, as contended by respondent, a fair trial was not had for the reasons stated, then in my judgment, the trial court should have remanded the cause for further consideration. Nor am I in accord with the contention that a consideration of medical evidence amounts to a "delegation of the power of the board." The phraseology adopted by the board may be a little vague and confusing, but there is no indication of a "delegation of power." What the board did was simply to decide the issue on the evidence of medical experts.

In my judgment, the matter should be retried by the board and respondent given every opportunity to be present and examine all witnesses.

93 Cal.App.2d 504

HUNT v. SUPERIOR COURT IN AND FOR STANISLAUS COUNTY et al.

Civ. 7686.

District Court of Appeal, Third District, California.

Sept. 2, 1949.

Hearing Denied Oct. 31, 1949.

Joe Barnhill was defeated by Paul A. Hunt in an election for the office of Director of Division Three of the Oakdale Irrigation District and thereafter filed a contest of the election in the Superior Court of Stanislaus County proceeding under the general election laws.

Paul A. Hunt petitioned for a writ of prohibition to arrest the court and B. C. Hawkins and others, as Judges thereof, from proceeding with the irrigation district election contest.

The District Court of Appeal, Third District, Adams, P. J., issued the writ on the ground that the provisions of the general election law were inapplicable to an election contest in irrigation districts and the defeated candidate was confined to the remedy of demanding a recount of votes as provided in the Water Code.

1. Waters and water courses 🔑227

"Irrigation district" is not a "county" or a "city" within meaning of general election laws confining election contests to any election held therein so that losing candidate for office of director of an irrigation district was confined to remedy of recount of votes as provided in Water Code. Elections Code, § 8511; Water Code, § 21706.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "City", "County" and "Irrigation District".

2. Statutes 🔑225¾.4

Where a statute which has been judicially construed is re-enacted in same or substantially same terms, legislature is presumed to be familiar with its construction and to have adopted it as a part of law unless a different construction is expressly required.

3. Statutes 🔑147

In revision of statutes, alteration of phraseology, omission or additions of words will not necessarily change operation or construction of former statutes, and language of statute, as revised or legislative intent to change former statute, must be clear before it can be pronounced that there is a change of such a statute in construction and operation.

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Bush & Ackley, Oakdale, for appellant.

Nathan B. McVay, Modesto, F. M. Brack, A. M. Frad, Modesto, for respondent.

ADAMS, Presiding Justice.

This is a petition for a writ of prohibition to arrest the Superior Court of Stanislaus County from proceeding with an Irrigation District election contest.

The facts are that petitioner and one Joe Barnhill were rival candidates for the office of director of Division Three of the Oakdale Irrigation District. An election was held on February 2, 1949, and after the votes were counted the Board of Directors declared petitioner elected. A certificate of election was issued to him. On or about February 10th said Joe Barnhill filed in said Superior Court a contest of the election and in his statement of contest, proceeding under Section 8511 of the Elections Code, he alleged: "* * * that the greater number of legal votes and ballots cast at said election were for contestant herein, and that at said election contestant received a plurality of the total of legal votes cast for the candidates for said office; that a number of illegal ballots were cast at said election for defendant [Hunt], which said illegal ballots, if taken from him, will reduce the number of his legal votes below the number of legal votes which were given to contestant [Barnhill] for the same office."

Petitioner demurred to the statement of contest and charged: "(1) That the Court has no jurisdiction of the contest filed by said contestant; and (2) that the contestant has not legal capacity to contest said election by the proceeding taken; for the following reasons: That said Statement of Contest is filed in the above entitled

Court under the provisions of Division X, Chapter 2, of the Elections Code * * * entitled 'Election Contests'. That no contest of an election for Director of an Irrigation District * * * is authorized by said Division, or any other provisions of said Elections Code. That the manner of contesting the election * * * is set forth in Section 21706 of the Water Code * * *; that the statement of contest on file fails to show compliance with said section, and in fact no such compliance was ever made."

On March 28th the trial court overruled the demurrer and it is alleged in the petition and not denied by respondents that unless restrained by order of this court, the trial court will proceed to try and decide the contest.

It is petitioner's contention that the Elections Code provisions have no application to election contests in Irrigation Districts and that the contest here involved is controlled by Section 21706 of the Water Code which reads: "If any voter by affidavit filed with the board shows facts sufficient reasonably to justify the belief that the vote of any precinct has not been correctly counted to the extent that a recount would change the result of the election, he may appear on the day appointed for the board to open and canvass the returns and demand a recount of the vote of the precinct that is claimed to have been incorrectly counted."

Respondents rely upon Section 8511 of the Elections Code enacted in 1939, which, in material part, reads: "Any elector of a county, city, or of any political subdivision of either, may contest any election held therein, for any of the following causes: * * * (d) That illegal votes were cast."

The question for determination is whether this contest may be prosecuted under said Section 8511 or whether contestant is limited to the procedure prescribed by Section 21706 of the Water Code.

[1] An irrigation district is not a county or a city; and this court, in Huck v. Rathjen, 66 Cal.App. 84, 85, 225 P. 33, said that, "an irrigation district is not a political subdivision at all." In that case an election contest was instituted under the provisions of Section 1111 of the Code of Civil Procedure to determine whether the plaintiff or the defendant was elected to the office of director of an irrigation district. At that time Section 1111 read in material part: "Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein." In that decision we held: "* * * it clearly appears that an irrigation district is not a political subdivision of a county, and that a contest of the right of a person declared elected to the office of director thereof is not authorized by the provisions of section 1111." In other words, it was held that a contest for the office of director of an irrigation district was not authorized by the general election laws.

Respondents argue that Section 8511 of the Elections Code has broadened the scope of the statute so as to authorize a contest of an election to the office of director of an irrigation district thereunder. With that argument we cannot agree. Section 8511 relates to elections held in a county, city, or any political subdivision of either, and confines its provisions to contests of "any election held therein." Since an election in an irrigation district is not held in "a county, city, or of any political subdivision of either," we are unable to perceive that there has been such a change in Section 1111 of the Code of Civil Procedure as it existed when we decided Huck v. Rathjen, supra, as to enable us to say that that decision is not presently applicable. No change in the law has been made that renders it inapplicable; and we are impelled to hold that it controls and that the writ prayed for should be issued.

Section 21706 of the Water Code above quoted provides for a recount of ballots cast in an irrigation district election, and that is as far as the legislature saw fit to go; and under the authority of Puccinelli v. Superior Court, 183 Cal. 775, 777, 192 P. 707, the inquiry is limited to a recount. Furthermore, Huck v. Rathjen, supra, was decided in 1924, while said Section 8511 was not put into the Elections Code until 1939; and it contains no substantial change from the provisions of Section 1111 of the Code of Civil Procedure.

[2, 3] The legislature was presumed to be familiar with the construction put on said Section 1111 in Huck v. Rathjen, supra, and if it had intended to broaden its scope by Section 8511 so as to include election contests in irrigation districts, it would have so stated. The rule set forth in 23 California Jurisprudence, page 795, section 173, is: "It is a familiar rule that where a statute which has been judicially construed is re-enacted in the same or substantially the same terms, the legislature is presumed to be familiar with its construction and to have adopted it as part of the law, unless a different construction is expressly required." See also, In re Estate of Escolle, 134 Cal.App. 473, 476, 25 P.2d 860, in which the above text from California Jurisprudence was cited with approval; and McCarthy v. Superior Court, 64 Cal.App.2d 468, 471, 149 P.2d 55, which cited the Escolle case. In Bertozzi v. Swisher, 27 Cal.App.2d 739, 744, 81 P.2d 1016, 1018, the court said: "* * * on neither of those subsequent occasions did the Legislature attempt to make any material change in the wording of that portion now constituting section 690.7. Therefore, its omission to make any material alteration therein may safely be taken as a confirmation by the Legislature of the judicial construction theretofore placed on said provisions by the early decisions, and as proof that it had no intention of widening the scope thereof * * *." This court, in Childs v. Gross, 41 Cal.App.2d 680, 688, 107 P.2d 424, 428, (hearing in Supreme Court denied), quoted 59 Corpus Juris, page 894, section 493, as follows: "No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes. The language of the statute as revised, or the legislative intent to change the former statute, must be clear before it can be pronounced that there is a change of such statute in construction and operation."

It is ordered that a writ issue prohibiting the Superior Court of Stanislaus County from proceeding further in said election contest.

PEEK and THOMPSON, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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93 Cal.App.2d 527

MILANI v. SOUTHERN PAC. CO. et al.

Civ. 7615.

District Court of Appeal, Third District, California.

Sept. 6, 1949.

Hearing Denied Nov. 3, 1949.

Dante Milani, as administrator of the estate of Caesar Milani, deceased, sued the Southern Pacific Company and the conductor and engineer of a train that ran over and killed the decedent, who was an employee of the city water department of the City of Vallejo, while he was engaged in placing a new water main under spur track of the defendant railroad.

The Superior Court of Solano County, Harlow V. Greenwood, J., granted a non-suit at the conclusion of plaintiff's case on the ground that the decedent was guilty of contributory negligence.

On the plaintiff's appeal, the District Court of Appeal, Schottky, J., pro tem., reversed the judgment, holding that the question of negligence and contributory negligence should have been submitted to jury.

1. Appeal and error 🔑927(3), 989

On appeal from judgment of non-suit the appellate court must consider the evidence and the inferences which may be reasonably drawn therefrom in the light most favorable to the plaintiff, and the fact that other evidence may be found in the record which would support equally reasonable inferences to the contrary is of no consequence.

2. Death ⚷58(1)

In action for wrongful death, plaintiff was entitled to the presumption that decedent took ordinary care of his own concerns unless such presumption is irreconcilable with the evidence before the court. Code Civ.Proc. § 1963, subd. 4.

3. Negligence ⚷122(1)

The burden of proving contributory negligence rests upon the defendant.

4. Negligence ⚷136(9)

Contributory negligence is not established as a matter of law, unless the only reasonable hypothesis is that such negligence exists and that reasonable or sensible men could draw no other conclusion.

5. Railroads ⚷400(6, 12)

In action for wrongful death of employee of city water department, who was struck by backing engine and killed while engaged in placing water main under spur track of railroad where there was evidence that no bell was rung and no whistle was blown, that there was no one on the front of the tender to warn workmen of approach of the tender or the engineer of the presence of workmen and that the deceased was facing the other way, negligence of the defendant and contributory negligence of the decedent should have been submitted to the jury.

6. Railroads ⚷383(1), 400(12)

A man working upon a railroad track is bound to take reasonable precautions for his own safety, but what is reasonable care under the circumstances is primarily for the jury.

Rutherford, & Rutherford, Napa, Thos. F. O'Hara, Vallejo, for appellant.

Leo C. Dunnell and William H. Herbert, Fairfield, for respondents.

SCHOTTKY, Justice pro tem.

Caesar Milani was an employee of the City Water Department of the City of Vallejo. Some time prior to June 28, 1946, the city decided to replace the existing four inch water main into the Sperry Flour Mill with an eight inch main. The new water main was to be placed under spur tracks of the Southern Pacific Company used for service to the flour mill premises owned by General Mills, Inc. There are six spur tracks on said premises, spur tracks numbered 1, 2 and 3 being fed by number 3 track lead, spur tracks 4, 5 and 6 being fed by number 6 track lead. Each of these spur tracks serves a different building on the Sperry Flour Mills' grounds. The Southern Pacific Company's single track, leading from Lemon Street in South Vallejo to said flour mill premises at a point about 200 feet northerly of the entrance to said premises, divides into two tracks. One is called number 3 track lead; and in order to move a switching engine from spur tracks 1, 2 and 3 on to spur tracks 4, 5 and 6, it is necessary to leave the mill premises over number 3 track lead and return on number 6 track lead.

After the replacement work had been in progress for two or three weeks, at about 1:15 p. m. on June 28, 1946, while Caesar Milani and other employees of the city water department were engaged in placing the new water main under spur track number 5 the engine and tender of defendant Southern Pacific Company backed down that spur track and ran down Milani, severing one of his legs and inflicting other injuries from which he died.

Dante Milani, the administrator of the estate of Caesar Milani, brought an action against the Southern Pacific Company and the engineer and conductor, to recover damages resulting from said death. At the conclusion of plaintiff's case defendants made a motion for a nonsuit upon the ground that decedent was guilty of contributory negligence as a matter of law, which motion was granted by the trial court. This appeal is from the judgment of nonsuit in favor of defendants, and the sole question to be determined is whether the trial court erred in granting the nonsuit.

[1] Upon appeal from a judgment of nonsuit it is the duty of this court to consider the evidence, and the inferences which reasonably may be drawn therefrom, in the light most favorable to the

plaintiff. That other evidence may be found in the record which would support equally reasonable inferences to the contrary is of no consequence. Bearing in mind these familiar and well settled principles we shall summarize briefly the evidence introduced in the trial court.

At the time of the fatal accident the engine was backing, and deceased was struck by the rear of the tender. The train crew consisted of the engineer, fireman, conductor and two brakemen, Engineer Whitaker testified that during the last 40 feet of where deceased was working, he was looking in the direction he was traveling but did not see deceased, and also that he knew the City of Vallejo water department employees were working at the place where decedent was struck. Conductor Lentz testified that he knew the men had been working for the city along the spur tracks for about three weeks; that he had warned them to keep off the tracks during switching operations.

Witness Robert Burns testified that he saw the tender when it was about one foot from decedent and he looked at the engineer to see what he was doing and saw the engineer "looking in the opposite direction"—in a direction opposite from which the engine was traveling. The Southern Pacific Company switched cars in there every day, both morning and afternoon.

Witness Ewing testified that he was working with decedent at the time of the accident and saw the tender backing up, and when it was 10 to 15 feet from deceased he yelled: "Milani, look out, look out, look out, look out, as loud as I could holler," but deceased was struck; he saw a man in the cab of the engine who was looking in the direction opposite from that in which the engine was going; the train was moving 3 to 5 miles per hour; the train made no noise at all and he couldn't hear it; there was nothing wrong with decedent's hearing; when hit, decedent had his back toward the train; witness heard no bell.

Witness Camaniti was working with deceased at the time of the accident; a little before noon, their superior, Mr. Jeffers, told them to clean out between the tracks because they were supposed to leave the tracks like they found them (after the new water main was installed); the engine had switched there in the morning; he saw the engine standing still about 5 minutes before the accident about 184 feet from where deceased was struck; he heard Ewing holler to deceased, and when he looked, deceased had already been hit; the bell was not ringing; the whistle was was not blown; when the engine was switching in the morning the bell was ringing but not in the afternoon when the accident happened; deceased was not hard of hearing; witness heard no noise from the engine as it backed toward deceased.

It appears further that it was 1:15 o'clock p. m. on a clear day; that no one rode on the front of the tender to warn the workers or signal the engineer in case of danger to workmen; that the deceased was working between the tracks of track number 5 with his back toward the approaching engine and tender; that shortly before noon the engine backed out of the mill premises on track number 3, and that during the noon hour, when deceased and other workmen were away for lunch, the engineer returned to the mill premises over number 6 track lead.

[2] Furthermore plaintiff was entitled to the benefit of the presumption that the decedent took ordinary care of his own concerns (C.C.P. sec. 1963, sub. 4), for, as said by our Supreme Court in Westberg v. Willde, 14 Cal.2d 360, at page 367, 94 P.2d 590 at page 594: "But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care of his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction."

[3, 4] We have found no clearer statement of the rules applicable to the granting or denying of nonsuit than is set forth in the case of Anthony v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, at page 829: "Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered. The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." (Citing cases.)

[5, 6] We believe that the trial court erred in granting defendants' motion for a nonsuit, thus taking away from the jury the issue as to whether or not the acts and conduct of decedent constituted contributory negligence. The trial court no doubt fell into the error of regarding decedent as being a person who was trespassing upon the right of way of the defendant railroad company, when as a matter of fact decedent had a right to be working where he was, and was entitled to a reasonable and timely warning of any danger from respondents' engine. The evidence shows that whereas the bell of the engine was ringing as it moved along the track in the morning, yet in the afternoon as the engine was approaching decedent who was facing the other way, no bell was ringing and no whistle was blown. Nor was any one riding on the front of the tender to warn the workmen of its approach or the engineer of the presence of workmen. Under such circumstances it is clear that the issues of the negligence of defendants and the contributory negligence of decedent should have been submitted to the jury. For, as stated in Barboza v. Pacific Portland Cement Co., 162 Cal. 36, at page 40, 120 P. 767, at page 769: "Whether or not, under all the circumstances, a due regard for the safety of the men on the track required the defendant to give warning of the approach of its train by ringing a bell or blowing a whistle, or by having upon the front car of its train a man who could see persons or objects on the track, were questions of fact to be determined by the jury. * * *

"Nor can it be said as a matter of law that the deceased was guilty of contributory negligence. A man working upon a railroad track is, of course, bound to take reasonable precautions for his own safety. Knowing that trains are likely to pass, he must use the care which an ordinarily prudent man would exercise to avoid being struck by such train. But what is reasonable care under the circumstances is, like the question of defendant's negligence, primarily to be determined by the jury. The work in which Augustus was employed required that he be in the middle of the track and in a stooping position. Obviously he could not perform his work properly if he were constantly looking to see whether a train was approaching."

Counsel for respondents make numerous contentions in an effort to sustain the ruling of the trial court, but it would serve no useful purpose to prolong this opinion unduly by discussing these contentions, as a most casual reading of the evidence compels the conclusion that it was a case for the jury to decide. Even without the presumption that decedent took ordinary care of his own concerns there is suffcent evidence to submit the issue of contributory negligence to the jury.

In view of the foregoing the judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

93 Cal.App.2d 549

PEOPLE v. BENNETT et al.

Cr. 2122.

District Court of Appeal, Third District, California.

Sept. 7, 1949.

Robert Stewart was convicted in the Superior Court of Lassen County, Ben V. Curler, J., of the crimes of burglary and grand theft, and he appealed.

The District Court of Appeal, Peek, J., affirmed the judgment on the ground that evidence was sufficient to sustain the conviction.

1. Burglary 🔑41(1)
Larceny 🔑65

Evidence sustained conviction for grand theft and burglary.

2. Criminal law 🔑511(3, 7)

The statutory requirement that testimony of an accomplice must be corroborated by such other evidence as shall tend to connect defendant with the commission of the offense does not require corroboration to be supplied by direct evidence but may be found in defendant's extra-judicial statements and from circumstances such as possession of stolen goods. Pen.Code, § 1111.

3. Criminal law 🔑622(1)

Where defendant's motion for separate trial was denied, and extra-judicial statements of codefendant were admitted against him only, but other evidence sustained defendant's conviction, denial of motion was not an abuse of discretion. Penal Code, § 1098.

4. Criminal law 🔑338(1), 1169(1)

Evidence that accused had brother living about one mile from cabin which accused was charged with burglarizing was improperly admitted, in absence of evidence that accused had ever visited his brother, since no inference that accused was familiar with burglarized premises arose, but no prejudicial error resulted from its admission in view of fact that other evidence was sufficient to sustain judgment.

5. Criminal law 🔑1037(1, 2), 1063(5)

Where defendant assigned part of district attorney's closing argument to jury as misconduct, but had not objected to asserted misconduct, or requested trial court to disregard it and had not moved for new trial on that ground, alleged error could not be raised for first time on appeal.

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Grover C. Julian, Susanville, for Stewart.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy Attorney General, and James A. Nutting, Susanville, for Kenneth Bennett,

PEEK, Justice.

Defendant Robert Stewart appeals from a judgment convicting him of the crimes of burglary and grand theft. The record reveals that he and one Kenneth Bennett were jointly charged with the commission of said crimes and in addition, the crime of concealing stolen property, by an information filed by the district attorney of Lassen county on August 10, 1948. After the trial court denied their motion to set aside the information, pleas of not guilty were entered. Stewart moved for a separate trial which motion also was denied by the trial court. The case then proceeded to trial before a jury which returned a verdict finding defendant Bennett guilty of all three crimes and defendant Stewart guilty of burglary and grand theft but not guilty of concealing stolen property as alleged in the information. Stewart was sentenced on each crime for the term prescribed by law, the sentences to run concurrently.

[1, 2] Stewart now attacks the sufficiency of the evidence to sustain the verdict, alleging in this regard that the only evidence of his guilt is the testimony of his codefendant which he asserts was not corroborated as required by Penal Code section 1111. By such contention he overlooks evidence contained in the record other than that of the testimony of his codefendant. Such evidence discloses that a

Mr. Glenn was the owner of a summer cabin at Eagle Lake in Lassen county which he had closed in the fall of 1947. When he returned in May, 1948 he found that many items of furniture and other personal property were missing which, he testified, had a total value in excess of $200. An investigation by the sheriff resulted in the detention of the defendants, each of whom made a written statement, subsequently received in evidence, in which each defendant admitted going to the cabin, removing the property and selling it, but each claimed to be working as the employee of the other. A furniture dealer testified that he had purchased certain of the property from both defendants, giving his check payable to appellant in payment therefor. The sheriff testified that he found certain of the property in appellant's home. It is readily apparent from the mere narration of the foregoing evidence that the requirement of Penal Code section 1111 that the testimony of an accomplice be corroborated "by such other evidence as shall tend to connect the defendant with the commission of the offense", is amply satisfied. The required corroboration does not have to be supplied by direct evidence. People v. Rice, 29 Cal.App.2d 614, 85 P.2d 215. It may be found in the defendant's extra judicial statements, People v. White, 48 Cal.App.2d 90, 119 P.2d 383, and from circumstances such as the possession of the stolen goods. People v. Machabie, 33 Cal.2d 67, 198 P.2d 681. We therefore hold that the evidence is sufficient.

[3] Appellant next asserts that the trial court erred in denying his motion for a separate trial and in support of such contention refers to the fact that an extrajudicial statement by his codefendant was received into evidence, which statement tended to implicate appellant in the crimes charged. Appellant concedes that a motion for a separate trial is addressed to the discretion of the trial court (Penal Code section 1098) but argues that where it appears that as a result of the denial of a separate trial a defendant was convicted when, if he had been allowed a separate trial, he would not have been, that therefore a miscarriage of justice results and under such circumstances it is an abuse of discretion to deny separate trials. The court instructed the jury that such statement was admissible only against appellant's codefendant but appellant asserts that juries composed of laymen are unable to segregate these matters as proficiently as lawyers and judges. We are not so convinced of the infallibility of lawyers and judges and the fallibility of jurors as appellant appears to be. Moreover, appellant fails to point out in his brief wherein his conviction was due to the admission of such statement or that a separate trial would have led to his acquittal. In view of the evidence above stated which amply supports the verdict without considering such extrajudicial statement, we do not think that the trial court abused its discretion in denying appellant's motion for a separate trial. As stated in People v. Isby, 30 Cal.2d 879, 897, 186 P.2d 405, 416: "It is not an abuse of discretion to refuse to grant a demand for separate trials because damaging testimony, admissible against one defendant and not against the other, may be received in the case, but it is then incumbent upon the court to limit such evidence in its application to the defendant to whom it is referable."

[4] Appellant next contends that the trial court improperly refused to strike the testimony of one Shields to the effect that appellant's brother lived in a trailer in a public camp located approximately one mile from the cabin which appellant was convicted of burglarizing. While it is the rule, as respondent asserts, that the familiarity of the accused with the premises is a circumstance which may be considered by the jury, People v. Carroll, 79 Cal.App.2d 146, 179 P.2d 75, there is no inference that the accused was familiar with the burglarized premises from the fact that his brother lived nearby, since there is no evidence that the accused ever visited his brother at such residence. Such evidence therefore should have been stricken but no error results from its admission since the evidence, after eliminating the erroneous part, is more than sufficient to sustain the judgment. People v. Burnett, 21 Cal.App.2d 613, 620, 69 P.2d 1028.

[5] Appellant lastly assigns part of the closing argument of the district attorney to the jury as misconduct. The record shows that appellant did not object to the asserted misconduct, did not request the trial court to instruct the jury to disregard it and did not move for a new trial upon that ground. The rule is well established that under such circumstances the alleged error cannot be raised for the first time on appeal. People v. Fisher, 86 Cal.App.2d 24, 194 P.2d 116.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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93 Cal.App.2d 532

PAYNE v. REAL ESTATE COM'R OF CALIFORNIA et al.

3 Civ. 7655.

Sac. 6013.

District Court of Appeal, Third District, California.

Sept. 6, 1949.

Hearing Denied Nov. 3, 1949.

Reno Rawlton Payne filed a petition for a writ of mandate against the Real Estate Commissioner of the State of California and Reginald Davis, Acting Real Estate Commissioner, to compel the commissioner to restore petitioner's real estate license and his business opportunity license which had been revoked because of petitioner's conviction of a felony. From an adverse judgment of the Superior Court of Sacramento County, Malcolm C. Glenn, J., petitioner appealed.

The petitioner contended that because the commissioner issued renewal licenses to the petitioner while the administrative proceeding for revocation of licenses was pending, the commissioner could not revoke licenses on ground that hearing was on a moot question.

The District Court of Appeal, Schottky, J., affirmed the judgment, holding that renewal of the licenses was a matter of right until licenses were revoked, and that therefore renewal of the licenses did not prevent revocation of licenses.

1. Brokers 🔑3

The renewal of a real estate broker's license is a matter of right on the part of one who holds an unsuspended and unrevoked license which is in force at time of application for renewal.

2. Brokers 🔑3

Where Real Estate Commissioner instituted administrative proceeding against real estate broker to revoke his real estate broker's license and business opportunity license because of his conviction of a felony, and, before hearing was had, time for renewal of licenses for following fiscal year arrived, and licenses were issued by commissioner to broker, such issuance did not prevent revocation of licenses on ground that hearing was on a moot question. Business and Professions Code, §§ 10176, 10177, 10201, 10203, 10204, 10302.

3. Statutes 🔑47

Statutory provisions authorizing Real Estate Commissioner to suspend or revoke the license of any real estate licensee who has willfully used the term "realtor" without legal right to do so, or who has conducted himself in a manner which would have warranted denial of his application for a real estate license or for a renewal thereof, are not void for uncertainty. Business and Professions Code, § 10177(e)(f).

4. Brokers 🔑3

In passing on license applications, Real Estate Commissioner may require proof of honesty, truthfulness, and good reputation of the applicant.

Busick & Busick, Sacramento, for appellant.

Fred N. Howser, Attorney General, Leonard M. Friedman, Deputy, for respondents.

SCHOTTKY, Justice, pro tem.

Petitioner, Payne, filed a petition for a writ of mandate against the Real Estate

Commissioner of the State of California to compel him to restore petitioner's real estate license and his business opportunity license which had been revoked by the Commissioner. A demurrer to the petition was sustained without leave to amend, and petitioner appeals from the judgment entered against him.

A real estate broker's license and a business opportunity broker's license were issued to petitioner several years prior to July 1, 1947, and on said date licenses for the fiscal year 1947-1948 were issued to petitioner. On June 21, 1948, respondent instituted an administrative proceeding against petitioner appellant for the revocation of the two licenses. The accusation charged violation of subparagraphs (b) and (f) of section 10177, Business and Professions Code, and subparagraphs (b) and (e) of section 10302 of the same code. The proceeding was based upon appellant's conviction of a felony, bigamy, December 12, 1947, in the County of Sacramento. Appellant had been placed on probation, serving five months in the county jail of Sacramento County as a condition of the probation.

Before a hearing was had on the accusation, the Real Estate Commissioner issued real estate and business opportunity licenses to appellant for the fiscal year 1948-1949 on July 1, 1948. The hearing took place July 9, 1948, and on August 11, 1948, a decision was rendered revoking appellant's licenses effective September 1, 1948.

Section 10177 provides: "Additional grounds for suspension or revocation of license. The commissioner may suspend or revoke the license of any real estate licensee, who within three years immediately preceding has done any of the following: * * *

"(b) Been convicted of a felony, knowledge of which the commissioner did not have at the time of last issuing a real estate license to him. * * *

"(f) Acted or conducted himself in a manner which would have warranted the denial of his application for a real estate license, or for a renewal thereof."

Section 10302 contains similar provisions pertaining to business opportunity licenses.

Appellant contends that revocation of the licenses could not be based upon subparagraph (b) of section 10177 because after the filing of the accusation and while it was pending, the licenses for the fiscal year 1948-1949 were issued to appellant by respondent, and under these circumstances, respondent had knowledge of the conviction of a felony when the 1948-1949 licenses were issued. Appellant then argues that the hearing of July 9, 1948 was directed to the 1947-1948 licenses which expired June 30, 1948, and therefore, the hearing was on a moot question.

Respondent argues the hearing was not directed to the license of any particular year, and that a broker is under a continual licensed status subject to the payment of a yearly renewal fee on the same license. Respondent contends only one license is involved, and each license is not distinct from the license of the previous year. This interpretation would place the respondent's action within the letter of section 10177 since the felony had not been committed when the "last" or original licenses were issued. Respondent points out that sections 10203 and 10204 contain separate definitions of "original real estate broker's license" and "renewal real estate broker's license".

[1,2] The learned trial judge filed an opinion which, we believe, correctly analyzes and determines the issues involved in this appeal, and because such opinions are always helpful to an appellate court, we quote from it as follows:

"It seems apparent to the Court that the position thus taken by petitioner is to stress the letter of the law rather than its spirit and purpose. It is not the purpose of the Court to attempt to go into the question of whether or not the Commissioner has the discretion to segregate felonies into those which he might determine warranted a revocation or a refusal to renew a license and those which do not. We may assume, for the purpose of the demurrer, that he may have such a discretion; but in the instant case when the renewal was issued there was a proceeding pending to cancel his license. Whether this proceeding was initiated by the Real Estate Commissioner, or his deputy, or some other person, does not appear. It is sufficient, either way, to indicate that the proceeding was pending at the time when a renewal of the license was in order.

"The renewal of such a license as the one held by petitioner is a matter of right, unless for cause he is not entitled thereto. 'The proper construction of the several code sections is that the renewal of a real estate broker's license is a matter of right on the part of one who holds an unsuspended and unrevoked license which is in force at the time of the application for renewal.' (Hall v. Scudder, 74 Cal.App.2d 433, at page 438 [168 P.2d 990, 993].)

"Under the provisions of the various sections of the Business and Professions Code, a distinction is drawn between an original license and a renewal. (See section 10203, referring to original real estate broker's license, and section 10204, referring to a renewal license.) As a matter of fact there is only one license, and the renewal is merely what it purports to be, a renewal of the original. If a person fails to apply for a renewal of his license prior to the expiration of the date thereof, he must make another original application, except that within one year of such expiration a renewal license may be issued upon payment of a fee double the amount otherwise required for renewal. (Section 10201.)

"Petitioner's position would lead to an anomalous situation: The accusation proceedings had been noticed at the hearing of which it is proposed to show that petitioner was convicted of a felony, but in the meantime and before the hearing can be had, the time for a renewal of the license has arrived, and, hence, the charge not having been heard, the petitioner is entitled as a matter of right to the issuance of a renewal of his license. Even if the Commissioner had refused to issue the license, he would have been entitled to an order of the Court to that effect. The license itself is merely evidence of the right thereto. Thus, the Commissioner had no alternative but to issue the renewal. He could not order a revocation thereof without a hearing, and he could not refuse to issue a renewal until it had been determined that the licensee had violated some provision of the statute justifying such revocation. Furthermore, let us assume that the Commissioner had concluded to attempt to revoke the license before the hearing, or after the hearing for that matter, and, after he had decided that the license should be revoked, or a renewal thereof should not be permitted, the licensee would be deprived of his right to conduct his usual business for an undetermined length of time and until the matter had been finally disposed of, and, it might eventually appear and be determined that the revocation of the licensee, or the refusal to renew the same was erroneous. Thus, a great injustice would have been perpetrated upon the licensee.

"In Hall v. Scudder, supra, the court states: 'The question as to petitioner's rights was not and is not moot. Under a proper interpretation of the law, petitioner had a right to a renewal of his license which expired in 1943 and for each succeeding year. He is now without a license, although he is entitled to one. The right which he asserts here is one that did not expire at the end of the year for which his license was first denied. The holder of an unsuspended and unrevoked license occupies a status which entitled him to annual renewals, and for that reason it is important to petitioner that that status be maintained. The order of the commissioner and also the judgment of the trial court denied him that status. We think it should be restored to him. The question is also one of interest to the public and to the commissioner. A final decision upon review would be difficult to obtain within a year following the denial of a license renewal.'

"When the original license has been granted it continues to operate and the licensee continues to have all the rights and privileges thereby bestowed, not only during the year following, but upon each renewal thereof. It is the renewal of an existing right, and the right to such renewal dates back to the original application. When a renewal is secured the matters required and determined prior to the granting of the original application are not again inquired into.

"The limitation specified in Sections 10176 and 10177 is three years immediately preceding the acts complained of.

"From the foregoing it is concluded that there is but one license, which may be renewed from year to year, provided the proper steps are taken as pointed out in the sections of the Business and Professions Code."

[3, 4] In view of the foregoing we are convinced that the revocation of appellant's licenses under subparagraph (b) of sections 10177 and 10302 was legally proper and it is, therefore, unnecessary to determine whether subparagraphs (f) and (e) afford additional grounds for revocation. We are, however, unable to agree with appellant's contention that said subparagraphs (f) and (e) are void for uncertainty and unconstitutional. These provisions permit revocation or suspension of a license on any ground which would justify denial of an application. In passing upon license applications, the Commissioner may require proof of honesty, truthfulness and good reputation, and in Riley v. Chambers, 181 Cal. 589, 595, 185 P. 855, 8 A.L.R. 418, it was contended that these provisions invested the Real Estate Commissioner with arbitrary and undefined powers and hence was unconstitutional. The court upheld the statute upon the ground that the discretion of the Commissioner to refuse a license was not arbitrary, and that his action must be predicated on facts which justify the conclusion that the applicant lacked good character and reputation. See also McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. Since the statutory standards of truth, honesty and good reputation have been held to be constitutional in license application cases it follows that they are constitutional in so far as the lack of these qualities constitutes a cause for disciplinary action under sections 10177(f) and 10302(e).

Our conclusion is that the trial court did not err in sustaining respondent's demurrer without leave to amend, and that the judgment should be and it is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting; GIBSON, C. J., not participating.

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93 Cal.App.2d 516

KENNEDY v. MORRISON et al.

Civ. 3946.

District Court of Appeal
Fourth District, California.
Sept. 2, 1949.

Action by James H. Kennedy against Wilton M. Morrison, Eugene E. Phipps and others, to recover attorneys' fees incurred by the plaintiff-lessor in litigation based on breach of a lease.

The named defendants demurred to the amended complaint on the ground that it showed that in action between same parties to foreclose a mortgage judgment had been rendered against them for attorneys' fees and that plaintiff's cause of action had thereby been split.

The Superior Court of San Diego County, Robt. B. Burch, J., sustained demurrers without leave to amend, and plaintiff appeals.

The District Court of Appeal, Mussell, J., reversed the judgment with directions to permit amendment of the complaint. It was held that the complaint was not fundamentally deficient, since it did not show that attorneys' fees for other services were in fact recoverable in action to foreclose chattel mortgage.

1. Appeal and error 🔑917(1)

On appeal from judgment sustaining demurrers to amended complaint without leave to amend, the allegations of amended complaint must be regarded as true.

2. Mortgages ⚷218.1

The principal purpose of statute permitting but one form of action for recovery of debt or enforcement of right secured by mortgage is to require exhaustion of security afforded by a mortgage before a personal action may be brought on the debt. Code Civ.Proc. § 726.

3. Judgment ⚷660

Mortgagors were bound by final judgment foreclosing a chattel mortgage and determining that mortgagee's right under lease to recover for attorneys' fees incurred for other services were not in issue in the action, even though judgment erroneously determined that mortgagee could split his cause of action for attorneys' fees, and mortgagors could not on such ground challenge mortgagee's separate subsequent action for attorneys' fees for other services.

4. Pleading ⚷225(2)

In action to recover attorneys' fees incurred by lessor in litigation based on breach of lease, complaint, which did not show that attorneys' fees for other services were in fact recoverable in action to foreclose chattel mortgage given by lessees, was not fundamentally deficient so as to justify sustaining demurrer without leave to amend. Code Civ.Proc. § 726.

5. Pleading ⚷225(2)

While leave to amend after a demurrer is sustained to complaint is ordinarily within discretion of trial court, sustaining a demurrer without leave to amend is abuse of such discretion, where complaint is not fundamentally deficient in alleging facts showing a right to some relief which can properly be given, but is only defective with respect to manner or form in which the facts warranting relief have been pleaded.

◆

Stickney & Stickney, Edward Strop, San Diego, for appellant.

McInnis & Hamilton, Renwick Thompson, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment entered on sustaining demurrers without leave to amend in an action for attorneys' fees.

Plaintiff as lessor, and defendants Morrison and Phipps as lessees, entered into a written lease of real property in the city of San Diego. The lessees, with the written consent of lessor, assigned the lease to defendants George and Genell Styliano who conducted a business on the property known as the "New Paris Inn". The Stylianos took possession July 1, 1946, and operated the business until October 27th, at which time they ceased to pay rent, committed other breaches of the lease, closed and locked the doors and ceased to operate the establishment.

The present action is for attorneys' fees for legal services rendered to plaintiff, as lessor, in litigation arising by reason of the breach of the provisions of the lease by the defendants and is based upon the provisions of paragraph 19 thereof, which is as follows: "Litigation Involving Lessor —Lessees agree that should Lessor be made a party, without his fault, to any litigation brought by or against Lessees, or any of them, or because of the violation of or the refusal by Lessees to perform or observe any one or more of the covenants or conditions of this lease on their part, or should Lessor be compelled to employ an attorney or agent to enforce the payment of rent, or to enforce the performance or observance of any of the covenants or conditions of this lease on the part of Lessees, or to recover possession of the leased premises or any part thereof, then, and in each and every such instance, Lessees will pay the amounts reasonable incurred or expended by Lessor, including a reasonable fee to such agent and/or attorney, and the expense of preparing and serving any notice or demand required or permitted by law; and that the same will be so paid upon demand, or may be included as a part of the judgment in any action or proceeding then brought or pending, or in any separate action brought for that purpose. In the event a declaratory relief action should be filed in which the Lessors and Lessees are parties and in which this lease would be involved, the court shall on final judgment award to the prevailing or successful party reasonable attorneys fees."

The lease contains the following language in Paragraph 12: "Lessees, contemporaneously with the execution of this lease, have executed a chattel mortgage to Lessor covering all of said fixtures, furniture, furnishings and equipment to secure the faithful and prompt performance of all the terms, conditions and covenants contained in this lease."

It is further provided in paragraph 20, that: "Mention in this lease of any particular remedy shall not preclude Lessor from any other remedy, in Law or in Equity." And in paragraph 27: "It is further agreed that the rights and remedies given to Lessor by this lease are cumulative, and are not intended and shall not operate to deprive Lessor of any other rights or remedies available to them, whether in law or equity, or pursuant to special proceedings."

Plaintiff in his amended complaint alleged the execution of the lease and set forth the terms thereof by reference. It is alleged that the lease was assigned to the Stylianos; that they took possession and operated the business until October 27, 1946, when the premises were closed and locked without the consent of plaintiff; that defendants failed to pay the rent and committed other breaches of the lease; that by reason of the breach and default of defendants, plaintiff employed attorneys who performed various legal services for him (exclusive of legal services rendered in foreclosing the chattel mortgage mentioned in the lease), which services included the bringing of an action to collect rent, preparation and service of various notices, appearances in court in preliminary matters, and the defense of a damage action brought by the Stylianos against plaintiff, the trial of which consumed ten days time. It was alleged that the legal services, exclusive of those rendered in the foreclosure suit, were reasonably worth $3400 and judgment was prayed for in that amount. It was further alleged that in the action to foreclose the chattel mortgage the findings of fact and conclusions of law entered by the court, which have become final, contained the following provisions: "The Court further finds that under the provisions of Section 6 of the Chattel Mortgage, the right of the plaintiff, James H. Kennedy, to recover in this action from the defendants a sum covering attorneys' fees is fixed at $600.00, and is limited to legal services in bringing this action to foreclose the Chattel Mortgage; the Court further finds that other and further legal services have been rendered to plaintiff by his counsel, in addition to bringing this action to foreclose the Chattel Mortgage, which services were made necessary by reason of the default of the defendants, but no finding is made in this action as to the right, if any, of the plaintiff to recover from the defendants under the provisions of the Lease, and particularly Section 19 thereof, a reasonable sum for attorneys' fees for such legal services so rendered to the plaintiff, for the reason that such right is not an issue in this action; that by reason of the default of said defendants, there has become due, owing and payable, under the terms and provisions of said Chattel Mortgage, from the defendants Wilton H. Morrison, Eugene E. Phipps, George Styliano and Genell Styliano, to the plaintiff, James H. Kennedy, the sum of One Hundred Thirty-Three and 43/100 Dollars ($133.43), representing costs and expenses exclusive of legally taxable costs, and Six Hundred Dollars ($600.00), representing attorneys' fees for legal services rendered to the plaintiff in bringing this action to foreclose said Chattel Mortgage."

Plaintiff appeals from the judgment of the trial court entered in favor of the defendants Morrison and Phipps, by which judgment the demurrers of said defendants to plaintiff's amended complaint were sustained without leave to amend.

The grounds stated in the demurrers are that the complaint fails to state a cause of action against defendants Morrison and Phipps in that it is shown upon the face of the complaint that in another action between the same parties judgment has been rendered upon the same cause of action, and plaintiff's cause of action, if any, has thereby been split.

Defendants take the position that plaintiff was permitted to bring but one action for liability secured by the chattel mortgage and that any claims not included in that action were barred. They rely principally upon the provisions of section 726 of the Code of Civil Procedure that, "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter."

The first question presented is whether the liability for the attorneys' fees here sued for was secured by the terms of the chattel mortgage. The recital in the lease that a chattel mortgage was executed to secure the performance of all of the terms, conditions and covenants contained in the lease does not necessarily establish that a mortgage in that form was actually executed which did in fact secure the payment of the attorneys' fees in question. The findings of fact and conclusions of law made by the trial court in the foreclosure action are to the effect that the right of plaintiff to recover attorneys' fees therein was limited to the recovery of such fees for the foreclosure of the mortgage and that the right of plaintiff to recover attorneys' fees under the provisions of paragraph 19 of the lease was not in issue in that action.

[1] Since this case is before us on demurrers, the allegations of plaintiff's first amended complaint must be regarded as true, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 41, 172 P.2d 867, and we therefore assume for the purpose of passing upon the action of the court in sustaining the demurrers without leave to amend that plaintiff did not seek to recover the attorneys' fees here involved in his complaint for foreclosure and that no such fees were recoverable therein since there was no provision in the mortgage permitting such recovery. In this connection it must also be assumed from the findings and conclusions alleged that the sum of $600 was the full amount which was or could be allowed as attorneys' fees in the foreclosure action, leaving a balance of $3400 owing and unpaid from defendants to plaintiff.

[2, 3] The principal purpose of section 726 of the Code of Civil Procedure is to require that the security afforded by a mortgage must be exhausted before a personal action may be brought on the debt. As was said in Merced Security Sav. Bank v. Casaccia, 103 Cal. 641, 644, 37 P. 648, 649: "The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action." If at the time plaintiff commenced the present action the unpaid balance of the attorneys' fees was not secured by the chattel mortgage, the provisions of section 726 of the Code of Civil Procedure are not applicable. Nelson v. Bank of America, 76 Cal.App.2d 501, 508, 173 P.2d 322. Where, as here, the mortgage was foreclosed and the judgment has become final the defendants are bound by it, even though the judgment may be erroneous and a determination that a splitting of causes of action was proper. Stark v. Coker, 20 Cal.2d 839, 844, 129 P.2d 390.

The provisions of the chattel mortgage involved, the terms of the judgment in the action to foreclose it, and the pleadings therein are not before us for consideration in determining this appeal and are all matters which may be considered upon a trial of the instant action.

[4, 5] While the amended complaint is objectionable on the special grounds stated, we are unable to say that the defects in the pleading cannot be cured by amendment. We conclude that the amended complaint is not fundamentally deficient in showing a right to some relief and that the court should not have sustained the demurrers without leave to amend. As was said in Katz v. Driscoll, 86 Cal.App.2d 313, 316, 194 P.2d 822, 825: "While the

granting of leave to amend after a demurrer is sustained to a complaint is ordinarily within the discretion of the court, it will be held an abuse of discretion to sustain without leave to amend a demurrer where the complaint is not fundamentally deficient in alleging facts showing a right to some relief which can properly be given, but is only defective with respect to the manner or form in which the facts warranting relief have been pleaded."

Judgment reversed and the trial court is directed to permit amendment to the complaint.

BARNARD, P. J., and GRIFFIN, J., concur.

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93 Cal.App.2d 553

BARNETT et al. v. GARRISON et al.

Civ 14026.

District Court of Appeal, First District, Division 2, California.

Sept. 8, 1949.

Action by William A. Barnett and another against Jesse Lee Garrison and others for wrongful death of plaintiffs' 18 year old daughter in automobile accident. The action as to other defendants was dismissed with prejudice.

The jury returned a verdict in favor of defendant and the Superior Court of Santa Clara County, John D. Foley, J., granted a new trial and the named defendant appeals.

The District Court of Appeal, Nourse, P. J., affirmed the order holding that the granting of a new trial for error in refusing a requested instruction as to burden of proving defense of assumption of risk was not abuse of discretion.

1. Appeal and error 🔑1015(1)

If evidence as a whole is insufficient as a matter of law to support a verdict in favor of moving party, an order granting motion for a new trial cannot be sustained.

2. Automobiles 🔑245(18)

In action against driver of disabled automobile for death of occupant of automobile which went out of control and plunged over embankment while towing disabled automobile, evidence was sufficient to take case to jury, on question of defendant's negligence.

3. Death 🔑103(1)

Evidence as to loss of earnings, society and comfort of 18 year old daughter was sufficient to take parents' action for wrongful death of daughter to jury on question of compensable loss.

4. Death 🔑95(4)

The damages recoverable for wrongful death of a minor child consist of the pecuniary loss to parents in being deprived of the services, earnings, society, comfort and protection of the child.

5. Death 🔑31(7)

Mother was not a proper party plaintiff in action for wrongful death of minor daughter in automobile accident in absence of statute expressly authorizing mother to sue. Code Civ.Proc. § 376.

6. New trial 🔑15

Misjoinder of mother as a party plaintiff in action by father for wrongful death of minor daughter in automobile accident was not decisive as to correctness of order granting a new trial after verdict in favor of defendant. Code Civ.Proc. § 376.

7. Parties 🔑88(4)

Objection to misjoinder of mother as a party plaintiff in action by father for death of minor child was waived when such misjoinder was not objected to by special demurrer or answer. Code Civ. Proc. § 376.

8. Appeal and error 🔑977(3)

The granting of a new trial rests so completely within discretion of trial judge that appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears.

9. Appeal and error ⚿854(6), 933(4)

On appeal from order granting a new trial, all presumptions favor the order as against the verdict and order will be affirmed if it may be sustained on any ground, though reviewing court might have ruled differently in the first instance.

10. New trial ⚿39

A new trial may be granted on ground jury was erroneously instructed upon matters of law.

11. Appeal and error ⚿978(1)

Where court instructed upon defense of assumption of risk, granting, after verdict in favor of defendant, a new trial for error in refusing to give requested instruction as to burden of proving such defense was not abuse of discretion, though general instruction was given that party who asserts the affirmative of an issue must carry the burden of proving it.

12. Trial ⚿260(1)

The giving of general instruction which covers subject in an abstract way does not justify refusal of a requested instruction correctly applying the law to a specific matter, unless general instruction so clearly and fully covers the subject matter, that requested instruction is unnecessary.

13. Appeal and error ⚿978(1)

Where question of whether a general instruction so clearly and fully covered subject matter that requested specific instruction was unnecessary is a fairly debatable matter of opinion, granting a new trial for prejudicial error in refusing requested specific instruction is not abuse of discretion.

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Campbell, Hayes & Custer, San Jose, and Frank L. Custer, San Jose (Edward J. Niland, Santa Clara, of counsel), for appellants.

James F. Boccardo, John E. Longinotti, San Jose, for respondents.

NOURSE, Presiding Justice.

This is an appeal by defendant from an order granting a motion for a new trial in a wrongful death action after a verdict in his favor. The court granted the motion on the ground of errors in law occurring at the trial, viz: 1. The giving of instructions upon the defense of assumption of risk; 2. having instructed on that defense the refusal of instructions proposed by plaintiffs upon the burden of proving said defense and upon the presumption that the deceased exercised ordinary care for her own concerns. Appellant contends that the giving and refusal of the instructions in question was not erroneous and at any rate not prejudicial because as a matter of law the evidence was insufficient to establish negligence of defendant or plaintiffs' right to any recovery.

Plaintiffs, the parents of Imogene Barnett, brought this action for the death of their eighteen year old daughter in an automobile accident.

Decedent at the time of the accident was living at the home of her uncle defendant Jesse Lee Garrison in Seaside, California, and worked as a secretary at Fort Ord. Her parents lived together in Campbell, California, but the mother had just obtained an interlocutory decree of divorce. On March 10, 1946, Imogene, her uncle and the uncle's family left Seaside for a visit to the parents in Campbell in a 1940 four-door De Soto sedan driven by defendant Jesse Lee Garrison. Past Santa Cruz the fuel pump of the car failed; defendant Elmer Garrison, a younger brother of Jesse Lee, was called to their assistance and came with a 1935 two-door Chevrolet coach, which was used to tow them back. Jesse Lee fastened the De Soto behind the Chevrolet tying the bumpers together by coiling the tow rope of the De Soto in ten loops around the center of the bumpers, leaving a six inch slack between them. Imogene Barnett and a daughter of Jesse Lee of her age rode with Elmer in the Chevrolet, Jesse Lee and the other members of his family in the De Soto. They drove back the same way they had come with a stop of 15–30 minutes in Santa Cruz to try to find a fuel pump. On a down-grade portion of the highway from Santa Cruz to Watsonville the accident happened. Down the long incline the cars reached a speed of 40 m. p. h., the heavier car pressing against the lighter car in front. Jesse Lee, in the De Soto, braked and thereafter the Chevrolet began to veer to the left over into the center lane of the three lane road. Jesse Lee braked with more force and when the Chevrolet, although slowing up, still went to the left, he applied the brakes forcibly and at the same time turned his wheels to the right. Notwithstanding the fact that Elmer also braked and tried to steer to the right, his car, whose front wheels, according to his testimony, seemed to be off the ground, went over the embankment at the left side of the road turning over and throwing the two girls out. The De Soto also rolled over the embankment and fell on the girls, killing them both.

Defendant Elmer Garrison testified that decedent had not seen the manner in which the cars were tied together but also that prior to the stop at Santa Cruz the Chevrolet "got out of control a little bit"; he and the girls talked about it mentioning it casually. He did not understand what caused it. This evidence is noted by the parties in relation to the alleged assumption of risk by decedent.

[1-4] However, if the evidence in the case as a whole would be insufficient as a matter of law to support a verdict in favor of plaintiffs, the order appealed from should be reversed irrespective of the correctness of the court's rulings on the instructions. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 168, 153 P.2d 338. But there is sufficient evidence supporting defendant Jesse Lee Garrison's negligence (the action as to the other defendants was dismissed with prejudice) and plaintiffs' loss to go to the jury. With respect to possible negligence there was evidence that Jesse Lee caused the heavier car to be towed by the lighter car on a road which he knew was winding and hilly and that he chose the manner in which he tied the cars together; that he permitted his heavier car to coast in neutral; that he continued the manner of towing although on every down-grade the heavier De Soto rested against the Chevrolet; that at the fatal moment he turned his wheels to the right because, as he testified, he "tried to cut them (the cars) in two." Whether, as contended by appellant, no ordinary, reasonable man could have foreseen that the above behavior might cause unreasonable danger is a matter of fact for the jury not of law for the court. Neither can it be said that the evidence as a matter of law did not support any compensable loss of either of the parents by the death of their daughter. "In an action for wrongful death of a minor child the damages consist of the pecuniary loss to the parents in being deprived of the services, earnings, society, comfort and protection of the child." Fuentes v. Tucker, 31 Cal.2d 1, 5, 187 P.2d 752, 755. Here there was evidence that decedent was an intelligent, healthy and well-liked girl in cordial relationship with her parents; that during her high school years she gave to her mother all money she earned by various activities, which included working in a cannery; that she also worked in a cannery from the end of her last high school term until Christmas, 1945. That in 1946 she stayed and worked in Monterey with the consent of her parents to whom she returned almost every weekend; that she had her first Fort Ord paycheck with her when she was killed on a trip intended as a visit to her parents. As against these facts, clearly indicating loss of earnings, society and comfort, a jury should weigh the circumstances relied on by appellant, mainly that Mrs. Barnett failed to list Imogene in her divorce complaint as a minor child because she thought she was old enough and quite on her own, and evidence of her "going steady with a young man." These circumstances do not exclude compensable loss as a matter of law.

[5-7] It is true that under the circumstances of this case the mother was not a proper party plaintiff. Section 376, Code Civ.Proc.; Fuentes v. Tucker, supra, 31 Cal. 1, 9–10, 187 P.2d 752. However, this is not a matter of substance excluding any recovery and therefore relevant to this appeal, but only a matter of misjoinder of parties which cannot be decisive as to the correctness of the granting of a new trial. Moreover objection to the impropriety of her joinder was waived when it was not

objected to by special demurrer or answer. House v. Pacific Greyhound Lines, 35 Cal. App.2d 336, 343, 95 P.2d 465.

[8-10] We therefore must review whether any errors justified the granting of the motion for a new trial. "It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict and the order will be affirmed if it may be sustained on any ground although the reviewing court might have ruled differently in the first instance. And since a new trial may be granted upon the ground that the jury was erroneously instructed upon matters of law, the question for decision is whether this wide discretion was abused in granting (plaintiff's) motion." Mazzotta v. Los Angeles Ry. Corp., supra, 25 Cal.2d 165, 169, 153 P.2d 338, 340; citations omitted.

[11-13] Assuming without deciding that there was some evidence which possibly could support defendant's theory of assumption of risk, in which case defendant was entitled to the instructions based on this theory, Ritchey v. Watson, 204 Cal. 387, 388, 390, 268 P. 345, it was no abuse of discretion for the court, having given such instructions, to hold that plaintiffs were entitled to a specific instruction requested by them as to the burden of proof with respect to that defense, notwithstanding the fact that a general instruction that the party who asserts the affirmative of an issue must carry the burden of proving it, had been given. No instruction was given to the effect that assumption of risk was an affirmative defense asserted by the defendant. At any rate the ruling was in line with the principle that the giving of a general instruction which covers the subject in an abstract way does not justify the refusal of a requested particular instruction correctly applying the law to a specific matter. 64 C.J. 890; 53 Am.Jur. 426. In Abelseth v. City and County of San Francisco, 129 Cal.App. 552, 557, 19 P.2d 53, this court held that an instruction that the burden of proving contributory negligence rested on the defendants should have been given, although the record in that case shows that an instruction had been given stating that in civil cases the affirmative of the issue must be proved. It is true that there are situations in which the general instruction so clearly and fully covers the subject matter that the refusal of a requested specific instruction need not be erroneous. Compare Sinclair v. Pioneer Truck Co., 51 Cal.App. 174, 176–177, 196 P. 281. However, whether that was the case here or whether plaintiffs were entitled to the requested clarification is a fairly debatable matter of opinion. The trial court's ruling that the refusal was prejudicial error can then not be disturbed as a manifest abuse of discretion. Pettigrew v. O'Donnell, 32 Cal.App. 2d 502, 90 P.2d 93. Other errors alleged to justify the order need not be discussed.

Order affirmed.

GOODELL and DOOLING, JJ., concur.

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93 Cal.App.2d 559

UNITED STATES FIDELITY & GUARANTY CO. v. SULLIVAN.

Civ. 16820.

District Court of Appeal, Second District, Division 3, California.

Sept. 8, 1949.

United States Fidelity & Guaranty Company sued Henry J. Sullivan on a foreign judgment.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., entered summary judgment for plaintiff and defendant appealed.

The District Court of Appeal, Vallée, J., reversed judgment, holding that under pleadings and affidavits there was a fact issue to be tried.

1. Judgment ⚿181(2, 6)

Issue to be determined upon a motion of a plaintiff for a summary judgment is whether defendant has presented any facts which give rise to a triable issue or defense and not to pass upon or determine the issue itself. Code Civ.Proc. § 437c.

2. Judgment ⚿185

On motion of a plaintiff for a summary judgment, plaintiff's affidavits are to be construed strictly and those of defendant construed liberally, and facts alleged in defendant's affidavits must be accepted as true. Code Civ.Proc. § 437c.

3. Judgment ⚿185

Affidavits filed by defendant in opposition to a motion by plaintiff for summary judgement need not necessarily be composed wholly of evidentiary facts. Code Civ.Proc. § 437c.

4. Judgment ⚿178

The purpose of a motion for a summary judgment is not to test the sufficiency of the pleadings. Code Civ.Proc. § 437c.

5. Judgment ⚿185

The plaintiff's motion for a summary judgment must be denied even if answer is insufficient, if affidavits filed by defendant in opposition to motion show facts sufficient to constitute a defense entitling defendant to defend, and the rule applies to a negative pregnant in defendant's answer. Code Civ.Proc. § 437c.

6. Judgment ⚿186

The procedure authorized by statute respecting a motion by plaintiff for summary judgment is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact, and if there is doubt as to whether motion should be granted, it should be denied. Code Civ.Proc. § 437c.

7. Judgment ⚿185

In action on foreign judgment where complaint alleged that judgment had not been paid and was due and payable, and answer denied that any part was due or payable, and defendant's affidavit stated that plaintiff had received from defendant's former wife, part or all the bonds included in judgment against defendant, and that plaintiff did not credit any part of them on judgment, fact issue was presented precluding granting plaintiff a summary judgment. Code Civ.Proc. § 437c.

Claude B. Morton and Henry J. Sullivan, Los Angeles, for appellant.

Hugh B. Rotchford and Henry A. Schultz, Los Angeles, for respondent.

VALLÉE, Justice.

Appellant here, defendant below, appeals from a summary judgment for plaintiff in an action on a foreign judgment.

The pertinent facts alleged in the complaint are these: Defendant, from about October 15, 1937, to about August 11, 1942, was guardian of the estate of a minor appointed by the superior court of Arizona. Plaintiff was surety on defendant's bond as guardian. About August 11, 1942, while the bond was in effect, the superior court of Arizona found that defendant as guardian was in default and indebted to the estate in the sum of $13,949.83 and rendered a judgment in that amount in favor of the estate and against defendant. Plaintiff as surety paid $14,024.83 to the estate in satisfaction of the obligation and accrued interest. The Arizona judgment was duly assigned to plaintiff by a successor guardian. No part of the judgment has been paid.

The answer among other things denies "that any judgment in favor of plaintiff and against this defendant, or any part of any such judgment, is due and payable." On the hearing of the motion for a summary judgment in addition to the pleadings two affidavits were before the court, one by an assistant claims manager of plaintiff and one by defendant. The affidavit of the claims manager stated with particularity the facts alleged in the complaint. It appears from the judgment, which is attached to the affidavit, that the $13,949.83 consisted of bonds and other items. The affidavit of defendant stated these matters: The bonds described in the Arizona judgment as not having been accounted for or turned over by defendant as guardian were taken by his former wife without his knowledge or consent while he was acting as guardian. She converted them to her own use and benefit and did not return them or their value to him. The successor guardian, represented by an agent of plaintiff, brought suit against his former wife and dismissed it with prejudice without explanation. Plaintiff failed to institute suit against the former wife but settled the claim against her for the bonds without the knowledge or consent of defendant, "and received a portion or all of said bonds or the equivalent thereof from her, and said plaintiff did not credit said amounts, or any amount to this defendant on the alleged judgment against affiant or make any allowances to affiant whatsoever."

[1-6] The issue to be determined by the trial court upon a motion of a plaintiff for a summary judgment is whether the defendant has presented any facts which give rise to a triable issue or defense and not to pass upon or determine the issue itself. Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 555, 122 P.2d 264. If the affidavit of a defendant on a motion of a plaintiff for a summary judgment shows facts sufficient to present a triable issue of fact, the motion should be denied. Code Civ.Proc. § 437c. Affidavits of the moving party are to be construed strictly and those of his opponent construed liberally. The facts alleged in the affidavits of the party against whom the motion is made must be accepted as true. D. E. Sanford Co. of San Francisco v. Cory Glass Coffee Brewer Co., 85 Cal.App.2d 724, 731, 194 P.2d 127. The affidavits of the opposing party need not necessarily be composed wholly of evidentiary facts. Eagle Oil & Refining Co. v. Prentice, supra, 19 Cal.2d page 556, 122 P.2d page 264. The purpose of a motion for a summary judgment is not to test the sufficiency of the pleadings. On such a motion by a plaintiff, even if the answer itself be deemed insufficient, the motion must be denied if the affidavits show facts sufficient to constitute a defense entitling the pleader to defend. This rule applies to a negative pregnant in a defendant's answer. Eagle Oil & Ref. Co. v. Prentice, supra, 19 Cal.2d page 561, 122 P.2d page 264. "The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." Eagle Oil & Ref. Co. v. Prentice, supra, 19 Cal.2d page 556, 122 P.2d page 265. Where there is doubt as to whether the motion should be granted, it should be denied. Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 632, 152 P.2d 774.

[7] Application of these rules to the pleadings and affidavits in the present case satisfies us that there is at least one issue of fact to be tried. The complaint alleges that the Arizona judgment "has not been paid, nor any part thereof, but that the whole thereof remains due and payable." The answer denies that "any part of any such judgment, is due or payable." The affidavit of defendant says that plaintiff received a part or all of the bonds included in the amount of the judgment or the equivalent thereof from defendant's former wife and that plaintiff did not credit any part thereof on the judgment. Since on a motion for a summary judgment the facts stated in defendant's affidavit must be accepted as true, it appears, for the purpose of the motion, that plaintiff has been paid part of the judgment and that defendant is not indebted to plaintiff in the full amount. It canont be said that defendant has not asserted a defense to a portion of plaintiff's claim. Under such circumstances the motion should have been denied. Code Civ.Proc. § 437c. For a somewhat similar factual situation, see Eagle Oil & Ref. Co. v. Prentice, supra, 19 Cal.2d 553, 122 P.2d 264.

Reversed.

SHINN, P. J., and WOOD, J., concur.

93 Cal.App.2d 538

In re LA BELLE'S ESTATE.

Civ. No. 14038.

District Court of Appeal, First District,
Division 2, California.
Sept. 7, 1949.

Minerva C. Birnie petitioned for decree determining interests in the estate in a tavern business of Wilfrid Joseph La Belle, also known as Wilfrid J. La Belle, also known as W. J. La Belle. Elizabeth M. La Belle, widow of deceased, was named as an adverse claimant.

The Superior Court, Contra Costa County, Harold S. Jacoby, J., entered a decree adverse to the widow, and she appealed.

The District Court of Appeal, Goodell, J., affirmed the decree, holding that the business was the deceased husband's separate property and that petitioner, as the daughter of decedent, was entitled to the whole thereof.

1. Husband and wife ⚷264, 273(12)

Evidence sustained finding that a tavern business conducted on realty owned by husband and wife as joint tenants was the separate property of the husband and that the wife who actively participated in the business had received a share of profits greater that those attributable to her individual exertions, so that on death of husband the business was properly awarded to a surviving daughter.

2. Husband and wife ⚷265

The rule allowing reimbursement to wife of community funds expended upon separate estate of husband is designed to protect wives who have been defrauded by their husbands, and wife may agree to application of community property to separate estate of husband and that community property should become a part thereof.

Sherman & Peters, San Francisco, for appellant.

Charles H. Baldwin, Norman A. Gregg, Richmond, for respondent.

GOODELL, Justice.

A petition was filed by respondent, the daughter of the testator, for a decree determining interests in the estate, in which she named appellant, testator's widow, as an adverse claimant. Findings were made determining that all the estate was separate property and that respondent was entitled to the whole thereof. A decree was entered accordingly and this appeal was taken.

Shortly after testator's death appellant petitioned for a family allowance. The transcript of that hearing was used in the proceedings for the determination of interests and by stipulation it is part of the record on appeal. Later appellant sued respondent seeking to establish that the tavern business now in question was a partnership between appellant and decedent, and the transcript of that trial was likewise used in said proceedings and by stipulation it is part of this record on appeal.

Wilfrid J. La Belle died on March 2, 1947, leaving a will dated September 10, 1946. He left a widow, the appellant Elizabeth M. La Belle, and a daughter by a former marriage, the respondent Minerva C. Birney. He left also three sisters and a brother, none of whom was named in the will. The will named respondent as executrix and she was appointed as such.

Testator devised and bequeathed to appellant the family home in Richmond, California, and half the community property.

He devised and bequeathed to respondent his place of business, a tavern known as "Tom's" in Richmond, together with all his separate property real and personal, also half the community property.

Testator and appellant married on January 10, 1943. At that time he owned and operated a tavern in Richmond known as "The Harbor". He disposed of that and in May 1943, purchased the tavern known as "Tom's" on San Pablo Road, for which he paid $8500, all from his separate property. For this $8500 he acquired the real property in which the tavern was located, the liquor license, the furnishings and fixtures, stock in trade and good will. Title to the real property was taken in the names of both spouses as joint tenants.

Four years later the inheritance tax appraiser valued the real property so acquired at $25,000, the liquor license at

$10,000, the furnishings and fixtures at $5,000, and the stock in trade at $22,000, a total of $62,000.

The real property in which the tavern is situated has become vested in appellant, as the surviving tenant, and is not part of the subject-matter of this controversy. Its rental value is somewhere around $175 or $200 a month.

The subject-matter of this litigation is the tavern business, found by the court to have been separate property and bequeathed to respondent. As a matter of fact the license is not in litigation, for by express concession "Appellant does not claim any community interest in the liquor license purchased with decedent's separate property and still used in the business". However, she "earnestly contends that the other assets in the estate are community property to the extent that they exceed reasonable interest on decedent's separate property investment."

That the business was exceedingly profitable is manifest.

Shortly after the purchase the testator instructed appellant how to keep a simple set of bookkeeping records the figures of which were supplied from time to time to an accountant employed on a part-time basis. At the hearings no consecutive or systematic showing was made of the net profits of the business from its inception to the time of death, but it was shown by appellant's testimony that the gross receipts for the last six months of 1946 were: July $2976.03; August $2655.25; September $2913.10; October $2589.08; November $2825.59 and December $2682.16. It also appeared that on appellant's application for family allowance she filed an affidavit showing that in 1946 the gross sales were $33,914.74, that income from music etc. was $5,602.35, making a total of $39,517.90, with expenses of $16,666.62, leaving a net profit of $22,850.47 for that year.

The business had a checking account at First National Bank of Richmond in the joint names of the spouses. Testator had this account before marriage and it was stipulated that at the time of the marriage there was $5988.46 therein.

Appellant had an account of her own in American Trust Company in Berkeley which she had had long before her marriage to La Belle. She had opened it while she was Mrs. Elizabeth M. Kimberly and never changed it from that name.

Appellant testified that when she married La Belle she owned a piece of property which yielded $75 (later $100) a month rental, and stock which brought in $2.50 a month in dividends. This income she deposited in her Kimberly account. However, before her daughter was married appellant gave her $100 a month for her support.

At the time of the marriage of appellant and La Belle on January 10, 1943, there was between $300 and $600 in her Kimberly account.

A few days after La Belle's death on March 2, 1947 there was $16,675 in appellant's Kimberly account, when she closed it out. Practically all this came out of the business with the exception of the deposits of $77.50 to $100 a month which came from her separate property (out of which she paid the $100 a month to her daughter part of that time).

The $16,675 balance had been built up by the accumulation of deposits made by appellant averaging about $600 a month, which was her share of the profits of the tavern business according to her testimony. Appellant testified that such $600 withdrawals constituted her monthly household allowances and spending money and that her husband knew of such withdrawals. To the question "In other words, you would take it out of the cash drawer and deposit it?" She answered, "Yes, the same as he took his money out."

On the same subject she further testified:

"Q. Now Mrs. La Belle, you testified earlier that you received a share of the profits in the business? A. Yes.

"Q. And where did you deposit your share of the profits? A. In my Kimberly account. * * *

"The Court: What percent of the profit did you get? A. Just when we needed some money.

"The Court: What percent? **A.** I can't tell. * * *

"Q. Mrs. La Belle, so far as you know did you receive a greater or smaller share of the profits from Tom's than Mr. La Belle? * * * A. *I think it is just about the same.*" (*Emphasis added).*

Neither spouse drew any salary from the business.

During the four year period the parties bought a home on San Pablo Dam Road in Richmond for $15,000. It was stipulated at the trial that its value had increased to $25,000. This, too, was held in joint tenancy and became the sole property of appellant as surviving tenant. The record is not clear how much money came out of the business to pay for this home. Appellant testified that she sold 100 shares of Union Carbide stock (which was her separate property, apparently owned before marriage) for something under $8000 and used the proceeds to pay off a loan on the home. In addition to that it would seem that money taken from the profits of the business also went into the home. She was asked: "Well, how much did you put in the bank and how much did you put in the ranch?" and answered: "We put everything we made, with the exception of what it cost to sell it, we put on that loan * * *. On the home * * *." From this it would appear that money taken from the business was used to pay off the loan on the home. How much does not appear.

In July, 1945, the La Belles acquired a vacant lot adjoining the "Tom's" property, for which $2000 was paid out of the business funds. This property was bought after appellant had proposed and urged its purchase, her husband having been slow to accede. Title, as in the other two instances, was taken in joint tenancy and it is now appellant's as surviving tenant.

Improvements were made to the place. A fireplace was built in and a new bar and back-bar were installed.

From the beginning appellant took an active interest in the business and according to her testimony put in long hours at the place, at times even helping out behind the bar. During the last few months of decedent's life when he was ill and in the hospital she put in much time at the place, and he seldom went there. For a part of the time before decedent's illness they lived in the living quarters in the place.

Appellant, in disclaiming any community interest in the liquor license "earnestly contends that the other assets in the estate are community property to the extent that they exceed reasonable interest on decedent's separate property investment." She relies on such cases as Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; In re Estate of Gold, 170 Cal. 621, 151 P. 12, and In re Estate of Fellows, 106 Cal.App. 681, 289 P. 887.

In discussing the Pereira case in Re Estate of Gold, supra [170 Cal. 621, 151 P. 13], Justice Shaw the author of the Pereira opinion, says: "The principle there stated is that the interest of the husband in the capital of the partnership, as it was at the time of his marriage, is the husband's separate property, and that the question what part of the subsequent profits arises from the use of this capital and what part from the personal activity, ability, and capacity of the husband is to be determined by the court from the circumstances appearing in the case, that whatever accrues from the latter source is community property, and that the remaining profits must be classed as separate estate."

The extraordinary circumstances in the case at bar led the court to the conclusion that all the estate was decedent's separate property. The question for decision is whether that finding is supported by the evidence.

Respondent states the question as follows: "The question is whether or not the trial court was justified on such a showing, in concluding, as it did, that appellant who as surviving joint tenant received the real property on which the business is conducted, worth twenty-five thousand ($25,000.00) dollars; the adjoining realty, worth two thousand ($2000.00) dollars; the home worth in the neighborhood of twenty-five thousand ($25,000.00) dollars; plus one-half (½) of the remaining profits, six hundred ($600.00) dollars per month being taken by her from the till, had already received a share of the profits greater than should be attributed to the individual exertions of the parties and hence community property."

[1] We agree with this statement and are convinced that the question must be answered in the affirmative.

The cases on which appellant relies are based, of course, on the premise that as said in Dunn v. Mullan, 211 Cal. 583, 590, 296 P. 604, 607, 77 A.L.R. 1015, the "right of reimbursement is granted to the wife upon the theory that to permit a husband to appropriate the community property under his management to his own separate use operates as a constructive fraud upon his wife. McKay, Community Property, 2d Ed., § 1017, p. 661. The reason underlying this distinction is well expressed in Provost v. Provost, 102 Cal.App. 775, 283 P. 842, 844. In that case findings had been made by the trial court that the husband after improving his separate property at the expense of the community had deeded the property to a daughter by a prior marriage for the fraudulent purpose of depriving his wife of her right to separate maintenance, and it was held therein that the wife, through proper proceedings and pleadings, had a right to compensation in the amount of her share in the community, measured by the improvement that such property had effected in his separate property."

[2] In the instant case the decedent took title to all three pieces of real property in joint tenancy and *appellant now owns all three.* In this connection it should be noted that the assets upon which appellant seeks to impress to some extent a community character are the furniture and fixtures valued at $5000 and the stock in trade valued at $22,000. The nucleus of these assets was the real and personal property bought by decedent for $8500 with admittedly separate funds in May of 1943. Manifestly the most valuable unit of such nucleus was the real property, which was put at once into joint tenancy. From the time of the purchase in May, 1943, to the death in March, 1947, this real property, *which housed the profitable tavern business,* clearly remained the most valuable capital asset of that business. Because of such ownership the business was rent-free for the four years which meant, of course (the rental value being approximately $200 a month), more profits were available for withdrawal. Appellant profited largely by this during that four-year period. On decedent's death the real property, which theretofore had been the most valuable capital asset of the business, went immediately to appellant as the surviving joint tenant and was lost to the business. It was valued by the inheritance tax appraiser at $25,000. Appellant thus became *sole owner of the major part of the capital itself* worth almost treble the $8500 originally paid by her husband out of his separate property for the whole thing—*real property and business.* Despite this, and despite the $16,675 fund in appellant's possession and the $2000 lot, and the money (from the profits) which went into the home, she now invokes *a rule designed to protect wives who have been defrauded by their husbands.*

In re Estate of Wooten, 64 Cal.App.2d 96, 101, 102, 148 P.2d 33, 35, this is said: "The rule allowing reimbursement to the wife of community funds expended upon the separate estate of the husband appears to apply only in cases where such application or expenditure has been made *without the wife's consent.* This is plainly indicated by the language in Wheeland v. Rodgers, 20 Cal.2d 218, 124 P.2d 816, in Dunn v. Mullan, 211 Cal. 583, 590, 296 P. 604, 77 A.L.R. 1015 and in Provost v. Provost, 102 Cal.App. 775, 283 P. 842. It has in effect been stated that the basis for allowing such reimbursement is to prevent a husband in his control of the community property from taking advantage of his position by divesting the wife of her interest. See Provost v. Provost, supra, 102 Cal.App. at page 781, 283 P. [842] at page 844. The Provost case, supra, also clearly indicates that *the wife may agree to the application of community* *property to the separate estate of the husband and that the community property should become a part thereof."* (Emphasis added.)

Estate of Wooten was cited on this point by respondent but in appellant's reply brief no attempt is made to challenge or distinguish it.

From appellant's own testimony it appears that soon after "Tom's" was bought she took an active interest in the business. Her husband showed her how to keep the books and she did that work. She probably drew and signed most of the checks on the joint checking account for the business. She attended to laying out the cash for the bartenders on opening up, and she checked it on closing. She accompanied her husband when he purchased liquor and other merchandise and at times did the buying alone. She took the inventories of the stock in trade either with her husband or alone. It was she who urged the improvement in the physical furnishings by the installation of a fireplace, and a new bar and back-bar, and she was active in approving the plans and designs for them. It was she, apparently, who decided that the business could stand the withdrawal, month after month, of her share of $600 and, as she testified, an equal sum by her husband. From all these facts the court could well have concluded that appellant knew practically as much about the business as did her husband and that any money (assuming it had a community property character) which went back into the business either in paying for improvements or in increasing the stock in trade, went back with her complete and unqualified consent. The court could likewise have concluded that this consent was given with the thought that the better equipped and more attractive the place, the better the business; the larger and more varied the stock on hand, the larger the sales, and the larger the sales the larger would be the profits in which appellant would take her share, not by asserting her rights later on by litigation, but then and there, month by month, as the practice in this case demonstrates. If ever there was a case where consent—more than that *active participation*—was shown, this case is it. "He who consents to an act is not wronged by it." Civ.Code, § 3515.

There is overwhelming evidence to support the findings and decree.

The decree is affirmed.

DOOLING, J., concurs.

93 Cal.App.2d 642

WEBB v. SERABIAN.

Civ. 16836.

District Court of Appeal, Second District,
Division 3, California.
Sept. 19, 1949.

J. W. Webb sued John Serabian to recover a balance due on a cost plus contract for moving and remodeling two store buildings, and defendant counter-claimed.

The Superior Court of Los Angeles County, Joseph M. Maltby, J., rendered judgment for the plaintiff, and defendant appealed.

The District Court of Appeal, Shinn, P. J., affirmed the judgment, holding that the evidence sustained the finding for the plaintiff and that there was no error in admitting evidence.

1. Pleading 🔑327

In action to recover balance due on cost plus contracts for moving and remodeling buildings, bill of particulars provided by plaintiff on demand of defendant was properly considered as a supplement to the complaint.

2. Evidence 🔑157(5)

In action to recover balance due on cost plus contracts for moving and remodeling buildings, plaintiff was not required to introduce books and records into evidence. Code Civ.Proc. § 1939.

3. Evidence 🔑157(5)

In action to recover balance due on cost plus contracts for moving and remodeling buildings, plaintiff's books and records was not only method by which costs incurred in remodeling operation could be proved.

4. Evidence 🔑157(5)

Oral testimony of a witness with personal knowledge of a transaction involved is compentent evidence of items of an open account not arising out of a written contract.

5. Evidence 🔑157(5)

In action to recover balance due on cost-plus contracts for moving and remodeling buildings, testimony of plaintiff purportedly based on personal knowledge and memoranda was admissible to show cost of remodeling operation.

6. Contracts 🔑350(1)

In action to recover balance due on cost-plus contracts for moving and remodeling buildings, evidence sustained finding for plaintiff.

Astor Elmassian, Los Angeles, for appellant.

James C. Webb, Long Beach, for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $2,416.00. The complaint set forth three separate causes of action of this amount on quantum meruit, account stated, and open account. Defendant's "answer and counterclaim" alleged that on February 10, 1947, plaintiff orally agreed to remove a two store wooden building from one location to another on defendant's premises; and that after the building had been moved plaintiff orally agreed to partition and remodel the building into four stores. It was further alleged that the total contract price for both agreements was $5,500.00, that defendant had paid to plaintiff on account of said contract price the sum of $2,972.03 and had paid $2,171.98 to subcontractors for materials and labor furnished, and that defendant owed plaintiff only $355.99 which amount defendant offered to pay. Upon demand by defendant a Bill of Particulars was provided by the plaintiff. It set forth, first, certain "items paid by John Serabian" for electrical work, plumbing, glass, painting and cement work in varying amounts totaling $2,350.00. Secondly, it listed some 18 "items paid by J. W. Webb" for materials and labor totaling $3,098.73. Pursuant to a statement in the Bill of Particulars that "this repair job was undertaken by plaintiff, J. W. Webb, by oral contract on the basis of cost plus fifteen (15%) per cent," 15 per cent of the foregoing totals was added to the total of the items paid by J. W. Webb, making a "grand total" of $3,916.00. Payment of $1,500.00 to plaintiff in three equal payments on March 15th, April 1st and April 21st, was credited upon the grand total, resulting in an alleged "balance due" plaintiff of $2,416.03.

The court found that plaintiff orally agreed to move defendant's building and convert it into four stores and that defendant orally agreed to pay the cost of all materials and labor, and in addition thereto, 15 per cent of such cost; defendant had paid $2,972.03 to plaintiff, and $2,171.98 to various third persons, for labor and materials furnished; and plaintiff had furnished defendant with labor, materials, and contactor's services in the amount of $2,416.00 over and above any payments, setoffs, claims or credits belonging or available to defendant. Judgment was thereupon rendered in favor of plaintiff for $2,416.00.

Upon the appeal defendant contends that the findings as to payments made by him are inconsistent with the finding that $2,416.00 is still due and owing to plaintiff, that the evidence does not support the findings, and that the court committed error in the admission of certain evidence. The claims of error are nebulous and unfounded. No grounds for reversal appear.

The findings that defendant paid the sums of $2,972.03 and $2,171.98 are supported by cancelled checks submitted in evi-evidence by defendant. Defendant makes no contention that any payments other than those evidenced by his cancelled checks were made at any time. The claimed inconsistency in the findings arises from the fact that the amounts found to have been paid to plaintiff and the amount found to have been paid by defendant to third parties for labor and materials, differ from the amounts stated in the Bill of Particulars. Defendant argues that, in view of these discrepancies between the court's findings and the Bill of Particulars, the ultimate finding that $2,416.00 was still due, as claimed in the Bill of Particulars, is inconsistent and erroneous. However, viewing the findings and the Bill of Particulars in the light of the evidence, and keeping in mind the finding, which appellant concedes to be supported by the evidence, that the contract was on a cost plus 15 per cent basis, there appears to be no inconsistency. The alleged material variance between the items of the Bill of Particulars and the corresponding sums specified in the findings is explained by the fact that the findings relate to the two contracts whereas the Bill of Particulars was founded only upon the agreement to remodel the building. Plaintiff testified a settlement had been made for moving the building and that his Bill of Particulars itemized only the cost of remodeling and conversion work after the building had been moved and set on its foundations. The credits given on account of this work plus defendant's payments on the moving job amounted to the total stated in the findings.

Manifestly, the controlling question is whether the findings as to the amounts paid by plaintiff, and the findings that $2,416.00 is still due and owing from defendant, find support in the evidence. With respect to his costs incurred in the remodeling operation, plaintiff undertook to prove the correctness of the items in the Bill of Particulars listed as having been paid by him, totaling $3,098.73. This task was simplified by defendant's admission that all but four of these charges were correct. Issue was taken only in respect to the following charges totaling $1,996.00: $720.00 for "concrete floor"; $225.00 for "plastering front"; $751.00 for "carpentry labor"; and $300.00 for "carpentry labor, finish work." The record contains ample evidence, consisting of the testimony of plaintiff, to verify these charges.

The testimony of both parties showed an understanding on their part that each was free to obtain bids for sub-contract work in the remodeling operations, and that whichever bid was most favorable would be accepted. Accordingly, several sub-contracts were entered into directly by defendant and paid by him. His payments to such sub-contractors and other suppliers of material and labor, including a $250.00 payment made through plaintiff, amounted to $2,421.98. This amount, as we shall see, fits into the findings and judgment.

[1, 2] Defendant urges, however, that "the court erred in admitting the Bill of Particulars as evidence over appellant's objection without the production of the books of account, records or evidence of payments of the items objected to by appellant." Although a careful search of the record discloses that the Bill of Particulars was not offered or received in evidence it was to be considered as a supplement to the complaint. It is affirmatively shown that plaintiff's books and records, such as they were, were produced at the trial and examined, in part at least, by defense counsel. Plaintiff was not required to introduce those records into evidence. Code Civ.Proc. § 1939.

[3-5] Insofar as defendant's assignment of error may be construed to mean that these four items could be proven only by introducing into evidence plaintiff's books and records. It is clearly without merit. The law has long recognized the oral testimony of witnesses with personal knowledge of the transactions involved to be competent evidence of the items of an open account not arising out of a written contract. Cowdery v. McChesney, 124 Cal. 363, 365, 57 P. 221. Here, the testimony of plaintiff, purportedly based upon personal knowledge and memoranda supplied the proof of the only items in dispute. Defendant has failed to point out, and we have not discerned, any error in the admission of evidence.

[6] The following calculations, based on the evidence as discussed above, disclose the judgment to be fully supported by substantial evidence: (1) defendant paid sole-

ly on account of remodeling and conversion work after the building had been moved, the sum of $2,421.98 to third persons and the sum of $1,500.00 to plaintiff, or a total of $3,921.98; (2) the cost of remodeling and conversion work after the building had been moved consisted of $2,421.98 for labor and materials paid by defendant, plus $3,098.73 for labor and materials paid by plaintiff, or a total of $5,520.71; (3) to the last stated figure should be added 15 per cent of $3.098.73, or $464.80, plus 15 per cent of $2,350.00 (this being the amount claimed in plaintiff's Bill of Particulars as having been the share of the cost paid by defendant, although the evidence shows the correct figure to be $2,421.98—the discrepancy obviously being favorable to defendant), or $352.50, thereby obtaining a total of $6,338.01 attributable to cost; (4) by subtracting the total of defendant's payments ($3,921.98) from the total cost ($6,338.01), the balance due to plaintiff is found to be $2,416.03. The findings are clearly consistent with these conclusions.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 664

PEOPLE v. LOPEZ.

Cr. 677.

District Court of Appeal, Fourth District, California.

Sept. 19, 1949.

Miguel P. Lopez was convicted of rape in the Superior Court of Riverside County, Russell S. Waite, J., and he appealed.

The District Court of Appeal, Griffin, Acting P. J., affirmed the judgment, holding that the evidence sustained the conviction and the rulings of the trial court in admitting and excluding certain evidence did not constitute prejudicial error.

1. Criminal law 🔑678(1)

In rape prosecution, state was not required to elect as to whether act of intercourse was committed either in early or late evening, where evidence established that act described by complaining witness took place at earlier time, notwithstanding contrary testimony of defendant. Pen. Code, § 261, subd. 5.

2. Criminal law 🔑703

Defendant could be convicted of rape on facts not stated in opening argument of prosecutor. Pen.Code, § 261, subd. 5.

3. Criminal law 🔑703

In criminal prosecution, opening statement of prosecutor need not include all evidence which prosecution expects to prove.

4. Criminal law 🔑703

A prosecutor in a criminal action is not required to make an opening statement.

5. Witnesses 🔑388(2)

Where trial court suggested manner in which counsel for defendant could properly proceed to lay foundation for impeachment of complaining witness in rape prosecution but counsel failed to follow suggestion, trial court properly refused to admit affidavit of complaining witness for impeachment purposes. Pen.Code, § 261, subd. 5.

6. Criminal law 🔑680(2)

In rape prosecution, trial court could admit purported admissions of defendant prior to establishment of corpus delicti, where evidence was sufficient to establish the corpus delicti. Pen.Code, § 261, subd. 5.

7. Criminal law 🔑680(2)

In criminal prosecution, where there was sufficient proof establishing corpus delicti, order of proof was discretionary with trial court.

8. Criminal law 🔑1141(2)

Appellant in a criminal case must produce a record which discloses that an error relied upon in fact has occurred. Rules of Appeal, rule 33(b).

9. Criminal law ⚷1122(5)

On appeal from conviction of rape, District Court of Appeal would not consider alleged errors of trial court's refusal to give requested instructions where such instructions were not in transcript. Rules of Appeal, rule 33(b).

10. Rape ⚷51(1)

Evidence sustained conviction of rape. Pen.Code, § 261, subd. 5.

11. Criminal law ⚷1167(2)

Where defendant was charged with offense of rape and also with assault with intent to commit rape, failure of trial court to dismiss charge of offense of assault with intent to commit rape, was not prejudicial error, where jury found defendant not guilty of that charge. Pen.Code, § 261, subd. 5.

12. Criminal law ⚷1023(12)

Order denying motion for arrest of judgment in rape prosecution was not appealable.

◆

Rosen & Taylor, Coachella, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

GRIFFIN, Acting Presiding Justice.

It was charged in Count One of the information that on December 22, 1948, defendant assaulted one Enriqueta Ortiz with intent to commit rape; and in Count Two with the violation of section 261, subdivision 5 of the Penal Code in that on the same day he did accomplish an act of sexual intercourse with her, and that she, at the time, was unconscious of the nature of the act, which condition of unconsciousness was known to the defendant. The jury returned a verdict of not guilty as to the first count, and guilty as to the second count.

The complaining witness testified that she was 22 years of age, unmarried, but the mother of two children; that she lived on the lower floor of a two-story house in Indio; that defendant and his mother lived upstairs; that on the night in question she came home from work and stopped in at her room and then went upstairs where defendant and other persons were assembled; that they had been drinking; that she consumed two drinks, went downstairs, had her "supper" and returned; that she had three more drinks but was not drunk; that she returned to her room and lay down on her bed fully dressed; that defendant appeared in the room at about 8:30 p. m. and stated he was going to bed with her; that she refused and he left, and that she then fell asleep; that soon thereafter she felt a blow on the head and lost consciousness; that she recalled that at the time the blow was inflicted she screamed but when she regained consciousness, at about 10 p. m. she found that her skirt, belt, and underclothes had been torn off of her; that her face was swollen, bleeding, and was bruised, and a tooth had been broken. There were many circumstances related, unnecessary to set forth in detail, that sufficiently indicate that an act of sexual intercourse had taken place with her. Defendant freely admitted on the witness stand that on the evening in question he was drunk; that about midnight on the day in question he tore the belt and clothes from the complaining witness and that he accomplished an act of sexual intercourse with her, but claims that she was not asleep or unconscious at the time. The complaining witness then testified that when she regained consciousness she screamed and cried and that she saw defendant, his mother, and other persons sitting at her bedside and that she asked "who it was that had been with me", and that defendant later said "It was I, it was I". Defendant confessed the act to the Chief of Police. The next-door neighbor corroborated this testimony in this, that he said he heard screams about the time indicated and heard a noise as though someone had been struck a blow, and that he heard screams which he believed to have been the complaining witness' voice, with which he was familiar. Defendant told a witness a story which corroborates the testimony of the complaining witness in many respects. Defendant told this witness that he had sexual intercourse with the complaining witness "without her consent." He denied hitting her, but admitted tearing her clothes from her.

Defendant produced witnesses indicating that the complaining witness might have fallen on the cement floor and obtained the injuries described.

[1] First, as we perceive the argument, defendant claims that the court erred in not compelling the prosecution to elect as to the time he claims the act was committed, that is, between 8:30 and 10:00 p. m. and 12 midnight, since defendant testified he was several miles away from the house between 8:30 and 10:00 p. m. and did not accomplish an act of sexual intercourse with her until about midnight. This argument should fall of its own weight. The prosecution's evidence establishes that the single act of intercourse described by the complaining witness took place at the earlier time notwithstanding the testimony of the defendant. Whether that act took place before or after 10:00 p. m. becomes immaterial. People v. Barton, 72 Cal.App. 421, 425, 237 P. 767; People v. Foster, 117 Cal.App. 439, 4 P.2d 173.

[2-4] The second point is that defendant was convicted on facts not stated in the opening statement of the prosecutor. Such opening statement need not include all of the evidence which counsel for the prosecution expects to prove. People v. Ellsworth, 92 Cal. 594, 28 P. 604. In fact, there is no provision of law compelling a prosecutor to make an opening statement. People v. Arnold, 199 Cal. 471, 486, 250 P. 168.

[5] Third, it is claimed that the court erred in refusing to admit in evidence an affidavit of the prosecutrix for impeachment purposes. The affidavit was written in English by some other person. She admitted signing it but on having it read to her through an interpreter she stated that "she didn't say some parts of it". The affidavit was marked for identification but was not brought up with the record. No request to have it before this court was made. The record does not disclose its contents nor indicate wherein it would impeach any statement made by the complaining witness. The trial court suggested the manner in which counsel could properly proceed to lay the foundation for impeachment, but counsel failed to follow the suggestion. The trial court may have properly sustained an objection to its admissibility. People v. Wade, 118 Cal. 672, 675, 50 P. 841; People v. Mabrier, 33 Cal.App. 598, 604, 165 P. 1044.

[6, 7] Fourth, it is argued that the trial court erred in admitting into evidence purported admissions of the defendant prior to the establishment of the corpus delicti. Since there was sufficient proof establishing the corpus delicti the order of proof was discretionary with the trial court. People v. Ray, 91 Cal.App. 781, 785, 267 P. 593; People v. Wiezel, 39 Cal.App.2d 657, 104 P.2d 70.

[8, 9] Fifth, defendant assigns as error the trial court's refusal to give certain instructions offered by the defendant. We find no request for the instructions, given or refused, to be included in the transcript, and our search reveals no properly certified copy of such instructions. It is well settled that an appellant must produce a record which discloses that an error relied upon has, in fact, occurred. People v. Ramirez, 139 Cal.App. 380, 382, 33 P.2d 848; Rule 33(b) of the Rules on Appeal. Under the circumstances, we are unable to consider them.

[10] Sixth, it is stated that there was no evidence that the complaining witness was unconscious of the nature of the act at the time it was being committed and therefore the verdict was against law, citing State v. Ely, 114 Wash. 185, 194 P. 988. The facts of that case are quite dissimilar to the facts in the instant case. The conviction there, nevertheless, was affirmed. The court pointed out that it would be enough for the prosecutrix to be unconscious in the sense that she had lost her senses, and would suffice if she might have all of her faculties but still not know the nature of the act at the time it was being done. The prosecutrix's testimony shows that she was struck in the face by a blow which rendered her unconscious, and that she remained unconscious during

the commission of the claimed act. The jury must have believed her testimony as opposed to that of the defendant. The testimony and circumstances show, and the inference would follow, that she was, during such period, unconscious of the nature of the act being committed and unconscious while the act was being perpetrated upon her, and that such condition of unconsciousness was then and there known to the defendant.

[11] Finally, defendant asserts that the trial court committed prejudicial error by refusing to grant defendant's motion to dismiss Count One of the information after the jury was selected. The grounds for such dismissal are not clear but it is indicated that since defendant was charged with the offense of rape, as set forth in Count Two, he could not also be convicted of assault with intent to commit such an act as charged in Count One. In disposing of the motion, the trial judge assured counsel that he would instruct the jury that it could not convict the defendant on both counts. Counsel for defendant then stated: "That is satisfactory." Since the jury found the defendant not guilty on Count One, the defendant could not well say that he suffered prejudice by the failure of the court to dismiss that count.

[12] This disposes of all questions properly raised on the appeal from the judgment and the order denying the motion for new trial. The attempted appeal from the order denying the motion for arrest of judgment is dismissed. People v. Bentson, 132 Cal.App. 295, 297, 22 P.2d 734.

Judgment and order denying new trial affirmed.

MUSSELL, J., concurs.

34 Cal.2d 292

SOCOL et al. v. KING.

L. A. 20832.

Supreme Court of California, in Bank.
Sept. 16, 1949.
Rehearing Denied Oct. 13, 1949.

Olivia Socol, as administratrix with the will annexed in the estate of Paraschiva Socol King, deceased, and another brought an action against Louis King.

From a judgment of the Superior Court of Los Angeles County, Ben V. Curler, J., for defendant, and an order denying plaintiffs' motion to vacate the judgment and enter a different judgment, plaintiffs appealed. Defendant moved to dismiss the appeals.

The Supreme Court, Traynor, J., dismissed the appeal from the judgment and denied the motion to dismiss the appeal from the order denying the motion, holding that a rule extending the time for filing notice of appeal from judgment did not grant extension beyond 120 days after entry of judgment, but that a notice of appeal from the order denying the motion within 60 days after such denial was timely.

Carter and Schauer, JJ., dissented.

Prior opinion, 202 P.2d 355.

1. Appeal and error 🔑346(1)

The rule extending time for filing notice of appeal from judgment until 30 days after entry of order denying motion to vacate judgment and enter different judgment or 120 days after entry of judgment, if motion is denied or not decided within 120 days after entry of judgment, did not grant extension of 30 days after 120 days following entry of judgment. Code Civ. Proc. § 663; Rules on Appeal, rule 3(b).

2. Appeal and error 🔑346(1)

Amendment of rule as to time for appeal from judgment, if motion to vacate it and enter different judgment is denied or not decided within 120 days after entry of judgment, by extending time from 120 to 150 days thereafter, must be made by Judicial Council and cannot be accomplished by strained construction of plain language of rule by Supreme Court. Code Civ.Proc. § 663; Rules on Appeal, rule 3(b).

3. Appeal and error 🔑356

Where plaintiffs failed to file notice of appeal from judgment for defendant within 120 days after entry thereof, as required by Rule on Appeal, appeal must be dismissed, notwithstanding plaintiffs' pending motion to vacate judgment. Code Civ.Proc. § 663; Rules on Appeal, rule 3(b).

4. Appeal and error 🔑113(2)

An order denying motion to vacate judgment and enter different judgment under statute is appealable, though grounds of motion could be urged on appeal from judgment. Code Civ.Proc. § 663.

5. Appeal and error 🔑82(3), 346(1)

An order denying motion to vacate judgment and enter different judgment after expiration of time limited by rule for appeal from judgment was appealable as special order after final judgment, and notice of such appeal within 60 days after denial of motion was timely and valid. Code Civ.Proc. §§ 663, 963; Rules on Appeal, rule 3(b).

6. Stipulations 🔑14(12)

A stipulation, after filing of plaintiffs' notice of intention to move for vacation of judgment for defendant, that parties would dispense with oral presentation of motion and submit it to trial judge on points and authorities, and such submission thereof within 60 days, established substantial compliance with requirements of statute and rule that such notice specify time when motion will be made and that it be made orally in open court within such time. Code Civ.Proc. § 663a; Rules on Appeal, rule 3(b).

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Porter C. Blackburn and Shelby Lee Chambers, Los Angeles, for appellants.

Chas. T. Rippy, Torrance, for respondent.

TRAYNOR, Justice.

Respondent moves to dismiss plaintiffs' appeals from a judgment of the superior court and from an order denying their motion to vacate the judgment and enter a new and different judgment under section 663 of the Code of Civil Procedure.

All of the following events took place in 1948. Judgment was entered in the trial court on April 28th. Notice of entry was filed by respondents on May 8th and by appellants on May 24th. On May 17th, appellants filed notice of intention to move for an order vacating the judgment and entering a new and different judgment under subdivision 1 of section 663 of the Code of Civil Procedure.[1] On September 13th the trial court filed a written order denying the motion. Appellants filed on September 24th, a notice of appeal from the judgment and on October 16th, a notice of appeal from the order denying the motion to vacate the judgment. Respondent moves to dismiss the appeals on the grounds that (1) the appeal from the judgment was taken too late and (2) the order denying the motion to vacate under section 663 is not an appealable order.

[1] 1. *The appeal from the judgment.* Rule 3(b) of the Rules on Appeal provides: "When a motion to vacate a judgment or to vacate a judgment and enter another and different judgment is made by any party on any ground within 60 days after entry of judgment, (1) if the motion is denied or not decided by the superior court within 120 days after the entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion to vacate or 120 days after entry of the judgment, whichever shall be less."

The 120th day after the entry of the judgment was August 26th. Under Rule 3(b) an appeal from the judgment had to be filed by that time, and the notice of appeal filed on September 24th was therefore too late. Appellants contend, however, that the purpose of Rule 3(b) was not to establish an ultimate limit of 120 days from the entry of the judgment within which an appeal might be taken but to grant 30 days additional time from the denial of the motion however that denial might occur. It is urged that the rule be read as granting an extension of 30 days after denial of the motion "*or after* 120 days after entry of judgment." The plain language of the rule does not admit of such construction.

Rule 3(a), relating to extension of time to appeal from the judgment when there has been a motion for new trial, provides: "When a valid notice of intention to move for a new trial is served and filed by any party within 60 days after entry of judgment, (1) if the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after denial of the motion by order of court or by operation of law." This rule accomplishes by its express terms the result that appellants would reach by their construction of Rule 3(b). It is reasonable to assume that had the Judicial Council intended to accomplish that result in section (b) of Rule 3 it would have expressed that intention as it did in section (a). The failure to do so indicates that this was not the intention of the Council in adopting Rule 3(b) as written.

[2] It must be conceded that the operation of Rule 3(b) as it is presently written may constitute a pitfall for the unwary. Before the adoption of the rules, a motion to vacate the judgment under section 663 did not extend the time for appeal from that judgment. Consequently, an appellant, who wished to preserve his right of appeal when the trial court did not act on the motion had to invoke the slower and more costly method of appeal from the judgment, even though in doing so, he deprived the trial court of jurisdiction to act on the motion and to correct its

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[1] "A judgment or decree, when based upon findings of fact made by the court * * * may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes * * *

"1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected."

own error. Patch v. Miller, 125 Cal. 240, 57 P. 986; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805; Sacks v. Superior Court, 31 Cal.2d 537, 190 P.2d 602; Modoc Co-Operative Association v. Porter, 11 Cal.App. 270, 104 P. 710; In re Shafter-Wasco Irrigation District, 55 Cal.App.2d 484, 130 P.2d 755. It was sought, in the adoption of Rule 3, to eliminate the necessity for this costly double-barrelled attack upon the judgment. In so far as motions for new trial are concerned, Rule 3(a) accomplishes that result. Rule 3(b), however, does not. "[W]here the court fails to rule on the motion within 120 days after entry of the judgment: the time to appeal is extended to 120 days after entry of the judgment, the identical period. In other words, the extension expires as soon as it begins and counsel must therefore file notice of appeal before the end of the 120 days if the court does not act." Witkin, New Rules on Appeal, 17 Southern California Law Review 81, 98. Although appellants choose initially to avail themselves of the more inexpensive and expeditious method of asserting the defect, they must nevertheless file their notice of appeal within 120 days after entry of judgment, if the court fails to rule on the motion before that time. The rule should be amended so that future appellants will not experience the same difficulty.[2] Such amendment, however, must come from the Judicial Council, and cannot be accomplished by a strained construction of the plain language of the rule.

[3] In Spotton v. Superior Court, 177 Cal. 719, 171 P. 801, decided before the adoption of the Rules on Appeal, the court dismissed an appeal from the judgment taken more than 60 days after entry thereof notwithstanding the pendency of a motion under section 663, stating that the pendency of the motion did not extend the time for appeal. This 60 day limit was extended to 120 days by Rule 3(b), but the time to appeal from the judgment was not otherwise affected. Since appellants, notwithstanding their pending motion for vacation of the judgment, failed to file notice of appeal from the judgment within this extended time, the appeal from the judgment must be dismissed.

[4, 5] 2. *The appeal from the denial of the motion.* This operation of Rule 3(b) does not, however, leave an appellant who has failed to take a timely appeal from the judgment completely remediless. Section 963 of the Code of Civil Procedure provides, in part, that an independent appeal may be taken from "* * * any special order made after final judgment * * *". Respondent contends that the order in question does not come within the section, but he cites no cases and we have found none that supports this contention.

It will be noted that section 663a provides for an appeal from an order granting such a motion, but is silent on the subject of an appeal from an order of denial. Accordingly, it might be contended that it was not intended to provide for an appeal in such case, under the general rule that there can be no appeal from an order of denial of a motion to vacate when the same grounds are available on an appeal from the judgment. It was so held in Modoc Co-Operative Association v. Porter, 11 Cal.App. 270, 104 P. 710, a case strongly relied upon by respondent. The later decisions, however, have established the rule that an order of denial of a motion to vacate under section 663 is appealable, notwithstanding that the same grounds could be urged on an appeal from the judgment. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714; Funk v. Campbell, 15 Cal.2d 250, 100 P.2d 762; California Delta Farms, Inc., v. Chinese American Farms, Inc., 201 Cal. 201, 255 P. 1097; Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas.1912C, 50; Karsh v. Superior Court, 124 Cal.App. 373, 12 P.2d 658; Westervelt v. McCullough, 64 Cal.App.

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[2] Amending Rule 3(b) to read: "* * * the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion to vacate or *150* days after entry of the judgment, whichever is less" would eliminate the difficulties involved in the present rule and make the extension pattern consistent with that embodied in Rule 3(a).

362, 221 P. 661; Potter v. Pigg, 35 Cal.App. 707, 170 P. 1066. The denial of the motion herein was on September 13th, and the notice of appeal, coming within 60 days thereafter, was timely and valid. See Rounds v. Dippolito, 34 Cal.2d —, 206 P.2d 1083.

In re Estate of Corcofingas, 24 Cal.2d 517, 150 P.2d 194, and In re Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, relied upon by respondent, do not support his contention. These cases were decided under Probate Code section 1240, which enumerates specifically what judgments and orders in probate matters are appealable. That section has no application to appeals from judgments or orders in ordinary civil proceedings, which are controlled by Code of Civil Procedure section 963.

The expiration of the 120 day limit terminated the extension of time within which an appeal could be taken from the judgment under Rule 3(b). It did not purport to affect the power of the trial court to rule on the motion to vacate the judgment, and the statutes prescribe no time limit within which the power must be exercised. The formal order of September 13th denying the motion was, therefore, an order of denial appealable as a special order after final judgment under section 963.

[6] Finally, respondent urges that even though the order is otherwise appealable, the appeal should be dismissed because appellants failed to comply with section 663a in that their notice of intention to move for an order vacating the judgment did not specify the time the motion would be made, and because the motion was not made orally in open court within 60 days, under Rule 3(b). Appellants' reply brief clearly discloses the reasons for failure to comply. It appears that the trial judge was temporarily on duty in Los Angeles County, from his home county of Lassen to which he returned periodically, and it was not certain that he would be available to hear the motion. Accordingly, subsequent to the filing of the notice of intention, all parties stipulated that they would dispense with the oral presentation of the motion, and would submit it to the trial judge on points and authorities. In view of this stipulation, and the fact that the motion was in fact submitted to the trial judge in the stipulated manner within 60 days, it must be held that there has been substantial compliance with these requirements. In re Estate of Grivel, 208 Cal. 77, 81, 280 P. 122.

The appeal from the judgment is dismissed. The motion to dismiss the appeal from the order denying the motion to vacate the judgment is denied.

GIBSON, C. J., and EDMONDS and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The only rational and fair interpretation of Rule 3(b) of the Rules on Appeal is that where the denial of a motion to vacate a judgment is not made within 120 days after the entry of judgment, then the time to appeal is extended for 30 days after the 120 days, making a total of 150 days.

The rule is fairly and reasonably susceptible of that construction. The whole purpose of it is to provide an *extension* of time to appeal where a motion to vacate a judgment is made. No extension is achieved if the time within which the motion may be passed upon and for taking an appeal expire simultaneously. If the motion is denied or not decided within 120 days, the time for filing notice of appeal is *extended* until *"30 days after* entry of the order denying the motion * * * or 120 days after entry of the judgment". Grammatically, the clause "30 days after" modifies and is applicable to *both* situations, a denial of the motion by the court and a failure to act within 120 days.

That such construction should be placed upon the rule is clear to me. It is conceded by the majority that to construe it otherwise "constitute[s] a pitfall for the unwary". No rule or law should be given an interpretation having that result. The injustice which may result from such an interpretation is further emphasized when we realize that it means that if the court has not ruled on the 120th day, the notice of appeal must be filed on the same day or the right to appeal is lost. But it would not be possible to file a notice of appeal on that day inasmuch as the day would have to end before it was known whether a ruling would be made, and then it would be too late to appeal. Suppose counsel does not have his office in the county seat. It may well be physically impossible for him to get his notice of appeal filed in time, even if he was notified during the 120th day that his motion to vacate had been denied.

The majority argue that since the rule as to extension of time by new trial proceedings by "express terms" provides for a maximum of 150 days within which an appeal may be taken, and the rule on vacation of judgment proceedings contains no such express provision, it cannot be so construed. This argument is squarely refuted by the following comments of one of the draftsmen of the Rules: "Under our former statute, only new trial proceedings served to extend time to appeal. In view of the general policy favoring applications for relief in the trial court, the draftsman suggested that *motions made under Section 663 of the Code of Civil Procedure, which are analogous and complementary to new trial motions, should likewise receive the benefits of the extension provision.* One objection, of course, was that the statute fixes a time limit for deciding motions for new trial, but no such limit is placed upon the other type of motion. Accordingly the rule, as drafted, specifies a maximum period of 120 days after entry of the judgment, in which the motion to vacate must be made and decided, if the proceeding is to operate as an extension of time to appeal. *This period corresponds to the maximum possible under the new trial statute.*" 17 So. Cal.L.Rev. 96. The maximum time for appealing where there are new trial proceedings is *150 days.* Mellin v. Trousdell, 33 Cal.2d 858, 205 P.2d 1036. To carry out the purpose, that is, to give *the same* extension where there is a motion to vacate a judgment, compels the conclusion that the maximum should be *150 days.* Correctly construed, therefore, the rule provides for a period of 30 days after the 120 days which would make a total of 150 days within which an appeal may be taken after the entry of judgment where a motion is made pursuant to the provisions of section 663 and denied on or after the 120th day.

The interpretation placed by the majority upon Rule 3(b) postulates an unjust reflection upon the able and eminent jurists who constitute the Judicial Council of California and the learned and able draftsman of said rule.

I would deny the motion to dismiss the appeal from the judgment.

SCHAUER, J., concurs.

34 Cal.2d 264

SIMMONS v. CALIFORNIA INSTITUTE OF TECHNOLOGY et al.

L. A. 19484.

Supreme Court of California, in Bank.

Sept. 16, 1949.

Rehearing Denied Oct. 13, 1949.

Edward E. Simmons, Jr., sued the California Institute of Technology, a corporation, and Donald S. Clark to have certain royalty and license agreements declared void.

The Superior Court, Los Angeles County, John Beardsley, J., rendered judgment for plaintiff and defendants appealed.

The Supreme Court, Edmonds, J., affirmed the judgment, holding inter alia, that royalty contract was not supported by consideration; that evidence sustained finding that it was induced by misrepresentations; that the license contract could be rescinded in part only, and that licensee was not an indispensable party.

Schauer and Spence, JJ., dissented.

Prior opinion, see 194 P.2d 521.

1. Evidence 🔑419(11)

The true consideration of a contract may be shown by extrinsic evidence.

2. Patents 🔑209(1)

Past employment of inventor by institute of technology was inadequate consideration to support contracts whereunder inventor agreed not to grant license to make and sell apparatus or methods embodying his inventions unless license was approved by institute, and providing for royalties paid under license to be paid to institute.

3. Contracts 🔑50

The consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise.

4. Patents 🔑209(1)

Gratuitous promises of inventor not to grant licenses to make and sell apparatus or methods embodying his inventions unless licenses were approved by institute of technology, and that royalties paid under licenses, should be paid to institute, could be revoked by cancellation or rescission of contracts containing the promises.

5. Patents 🔑214

In action to have declared rescinded contract whereunder inventor agreed that licenses to make or sell apparatus or methods embodying inventions of plaintiff should be approved by institute of technology and providing for royalties under license to be paid to institute, and to have a license agreement declared void in so far as it conferred benefits upon the institute, evidence sustained findings that plaintiff was induced to enter into contracts in reliance upon misrepresentations of a faculty member of the institute that royalties would be used in furtherance of research.

6. Appeal and error 🔑1010(1)

Fact findings of trial court supported by substantial evidence could not be disturbed on appeal.

7. Principal and agent 🔑156

Rescission of a contract may be had against even an innocent principal because of unauthorized misrepresentations by his agent.

8. Contracts 🔑94(6)

Where execution of a contract has been induced by a promise made without any intention of performing it, the contract may be declared void for fraud.

9. Evidence 🔑417(9)

In action to have declared rescinded a contract whereunder inventor agreed that licenses to make or sell apparatus or methods embodying inventions of plaintiff should be approved by institute of technology, and providing for royalties under license to be paid to institute, and to have a license contract declared void in so far as it conferred benefits upon institute, parol evidence that a faculty member of institute induced contracts by misrepresenting that royalties would be used in research, was not inadmissible as at variance with written contracts.

10. Contracts 🔑273

Generally one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions.

11. Contracts 🔑273

The theory underlying general rule that one must rescind all of his contract and may not retain rights under it, which he deems desirable to have and repudiate the remainder of its provisions, is that retention of only benefit of transaction amounts to unjust enrichment and binds parties to a contract which they did not contemplate.

12. Contracts 🔑171(1)

Generally the test of whether a contract is divisible is that if the consideration is single, the contract is entire, but if the consideration is apportioned, the contract may be regarded as severable.

13. Contracts 🔑171(1)

A contract may be severable as to some of its terms, or for certain purposes, but indivisible as to other items or for other purposes.

14. Contracts 🔑273

Where a good cause for rescission exists as to one part of a divisible or separable contract such portion may be rescinded in equity without disturbing the remainder.

15. Patents ⚷214

A license contract whereunder inventor agreed that royalties should be paid to an institute of technology, could be rescinded for cause only as to the part conferring benefits upon institute, and was not required to be entirely rescinded by inventor.

16. Patents ⚷214

An institute of technology which received royalties from license contract involving plaintiff's inventions, under a contract induced by fraud and executed in mistaken belief that plaintiff owed an obligation to institute, was not entitled to retain the money.

17. Declaratory Judgment ⚷297

In action to have a contract licensing plaintiff's inventions declared void in so far as it conferred benefits upon defendant, which was to receive royalties paid by licensee, licensee was not an indispensable party.

◆

O'Melveny & Myers, Louis W. Myers, Pierce Works, John Whyte and Lyon & Lyon, Los Angeles, for appellants.

Samuel L. Kurland and A. Arnold Klein, Los Angeles, for respondent.

EDMUNDS, Justice.

Edward E. Simmons is an inventor who devised a strain sensitive element which is used in the measurement of impacts. He entered into a contract with California Institute of Technology concerning the payment of royalties under any licensing agreement made by him for its use and, subsequently, a contract with Baldwin Locomotive Works for the manufacture of his apparatus. The present action for declaratory relief was brought to have the first agreement declared rescinded, the second one declared void insofar as it confers benefits upon the Institute, and for damages to the extent of benefits already received by the Institute. The appeal is from a judgment in his favor.

Following attendance at the Institute as a student, Simmons was graduated in 1934 and received his Master's Degree in 1936. During the summer and fall of the latter year, he occupied an office in the electrical engineering department on the campus and did work for various persons at the Institute and some others who had no connection with the organization. He was paid for his services upon an hourly basis.

At that time Dr. Donald S. Clark, a member of the faculty of the Institute, was in charge of a commercially sponsored project carried on by it and known as "Impact Research". In the course of developing a method for measuring and determining the force of time relations which occur to metals during impact loading, Simmons, who had a reputation for ingenuity, was consulted and made a suggestion for the use of a strain sensitive element. The evidence shows that Simmons' ideas were used and, under his supervision, an apparatus embodying them was constructed which operated successfully.

A few months later, Simmons became a member of the staff of the Institute, on a part-time basis, for work with Impact Research but, at the time he conceived the idea of his invention and put it to practical use, he was not employed by, nor did he receive any compensation for services rendered to the research project. However, in June, 1938, Simmons was employed by the Institute to work with Impact Research on a fellowship basis and received a re-appointment for the following academic year.

In the fall of 1939, Baldwin Locomotive Works became interested in the Simmons invention and its representative had conversations with Simmons and Dr. Clark which culminated in the two agreements which are the basis of the present controversy. By this time, Simmons had become greatly interested in the work of Impact Research and its continuation, and suggested to Dr. Clark that the Baldwin offer would be a good proposition if the income received from royalties could be used to pay for materials and the expense of carrying on further research. Dr. Clark agreed that this would be most desirable.

Simmons and Dr. Clark had many conversions in regard to the terms and conditions which should be embodied in a contract and the provisions as to the use of the royalties. Dr. Clark told him that all royalties should be paid directly to the Institute but that they would be used for Impact Research. He explained to Simmons that the project could receive money only from the Institute, but that any sums paid by Baldwin would be used for Impact Research.

A memorandum entitled "Agreement", bearing date of February 21, 1940, prepared by counsel for Baldwin and executed only by Simmons, recites "that as to my inventions involving an electrical strain gauge * * * I will not grant any licenses to make, use or sell apparatus or methods embodying any of said inventions unless such licenses are approved by the California Institute of Technology, * * * any license so granted to be subject to such terms and conditions as may be reasonably required by [it] * * * The royalty on said inventions shall be paid to the * * * Institute * * * unless at my option I shall request in writing * * * at least thirty (30) days prior to the end of any three (3) months' period in which royalty accrues that up to and including forty per cent (40%) of the total royalty paid by a licensee shall be paid to me by the said licensee." Dr. Clark signed this document as a witness to the signature of Simmons, and it was received in evidence marked Exhibit "A".

A contract executed by Simmons and Baldwin "as of March 13, 1940" declares that it is "subject to approval" of the Institute. This contract, designated in the record as Exhibit "B", grants to Baldwin, with specified reservations, the exclusive license to make for use, rental and sale the inventions covered by the patent for a royalty of five (5) per cent of the sale price or income from rentals of that portion of apparatus embodying the invention. All royalty "shall be paid to the Institute, unless Simmons at his option shall request in writing to Baldwin and to the Institute, at least thirty (30) days prior to the end of any three (3) months' period in which royalty accrues that any portion up to and including forty per cent (40%) of said royalty shall be paid to him by Baldwin." Following this contract is a statement which reads as follows: "The granting of the foregoing license is approved by the California Institute of Technology in accordance with an agreement between [it and] Edward E. Simmons, Jr., * * * dated February 21, 1940. California Institute of Technology By: A. C. Balch Pres." It appears from the evidence that this approval was given by direction of the executive council of the Institute, but there was no action by it authorizing or ratifying a similar approval of the memorandum executed by Simmons.

Simmons testified that Dr. Clark had told him "the thing to do is to use the income from this invention of yours for the further development of impact testing and dynamic test procedures, and that * * * would make the continuation of the Impact Research project a possibility." Simmons stated that his reply was: "I told Doctor Clark I was very much interested in having the Impact Research project continue, and I would be glad to have the income from this patent go to the Impact Research fund for further use in the development of equipment and tests in the laboratory." Dr. Clark assured Simmons that the royalties, although paid to the Institute would be used solely for the maintenance of Impact Research, and it appears from the evidence that this promise of continuing development of the project, made by Dr. Clark to the young scientist, was the major inducing force behind the agreements here in controversy.

Not until April or May of 1941 did Simmons know that Baldwin's royalty payments were not being, and never had been, used in Impact Research. Simmons then called Dr. Clark's attention to his promises on the subject. Shortly thereafter, Simmons was informed by Dr. Clark that his fellowship would not be renewed after July, 1941, because the project's funds were running low. When Simmons pointed out that the sums being paid by Baldwin were more that the amount of his salary, Dr. Clark replied that the Institute, and not Impact Research, was receiving these royalties and he could do nothing about it. Moreover, said Dr. Clark, there was no need for any further discussion of the subject.

Although the project continued for some time after his discharge, Simmons was not again employed by it although subsequently, upon Dr. Clark's recommendation, he did some work in connection with research being done by the Institute for the government. In January, 1942, Simmons served notice of rescission upon the Institute and this action followed.

From this and other evidence, the trial court determined that Simmons is entitled to the amount of the royalties received by the Institute, and it decreed that the Institute has no right to any royalties accrued, or to accrue. This conclusion is based upon findings that Simmons received no consideration for the execution of the document designated Exhibit "A" nor for the licensing agreement (Exhibit "B") in so far as the latter contract purports to confer rights upon the Institute; that Dr. Clark made fraudulent statements which Simmons believed and relied upon and that Dr. Clark's acts and representations were neither authorized nor ratified by the Institute.

As justifying a reversal of the judgment, the Institute and Dr. Clark contend that there is insufficient evidence to support the findings as to lack of consideration for the benefits conferred upon the Institute, or the findings that the execution of the writings was induced by fraud. They also assert that no evidence should have been admitted upon the charge of fraud, and that Simmons is not entitled to the relief sought.

The finding as to the first cause of action is that "there was and is no consideration for the said written instrument executed by plaintiff and defendant Clark * * * [Exhibit A]; that it is true that plaintiff has received nothing in consideration of, or for, said written instrument", and that "it is true that * * * plaintiff executed and entered into the licensing agreement * * * referred to * * * as Exhibit B, in pursuance and consideration of the aforementioned written instrument * * * Exhibit A; that it is true that there was, and is, no consideration for said licensing agreement, Exhibit B, in so far as said agreement purports to confer rights upon California Institute of Technology; that it is true that plaintiff has received nothing in consideration of, or for, said licensing agreement insofar as it purports to confer rights upon * * * California Institute of Technology". Another finding was stated in the following terms: "That it is not true that the aforementioned instrument * * * Exhibit A, was at any time and/or now is, supported by a valid and/or valuable consideration, or any consideration whatsoever; that it is not true that the aforementioned licensing agreement Exhibit B, insofar as the same purports to confer rights upon * * * [the] Institute, was at any time and/or now is, supported by a valid and/or valuable consideration, or any consideration whatsoever."

The findings clearly show that the trial court treated Exhibit "A" as a memorandum of a contract between Simmons and the Institute resulting from the negotiations between him and Dr. Clark. Exhibit "B" is a third party beneficiary contract between Simmons and Baldwin, under which the Institute is the beneficiary.

[1, 2] The finding that Exhibit "A" was executed by Simmons without consideration on the part of the Institute is supported by the evidence. The true consideration of a contract may be shown by extrinsic evidence, Shiver v. Liberty Bldg.-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4; Johnston v. Courtial, 216 Cal. 506, 14 P.2d 771, and the record includes testimony to the effect that both Simmons and Dr. Clark understood the phrase, "in consideration of employment," which appears in Exhibit "A" as referring to past employment. Such employment is inadequate consideration to support a contract, and the promises of Simmons to grant licenses to use his invention only upon approval by the Institute and to pay royalties to the Institute were made without any counter-promise by the Institute.

The appellants argue that there are three "aspects of consideration," any one of which is sufficient to support the promises of Simmons. First, it is said that Simmons was re-employed by the Institute after the term under which he was serving had expired. Secondly, the appellants assert that the agreements were made as a compromise of a dispute between Simmons and the Institute regarding the Institute's claim to an interest in the patent. Finally, they rely upon the services rendered by the Institute, through Dr. Clark, in handling the negotiations of the contract with Baldwin as constituting sufficient and adequate consideration.

[3, 4] But the consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise. Bard v. Kent, 19 Cal.2d 449, 122 P.2d 8, 139 A.L.R. 1032; Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; Lasar v. Johnson, 125 Cal. 549, 58 P. 161; Rest., Contracts, § 75; see Williston, Contracts, [rev. ed.] §§ 61, 100, 102, 102a. In the words of section 75 of the Restatement of Contracts (comment b): "Consideration must actually be bargained for as the exchange for the promise * * * The existence or non-existence of a bargain where something has been parted with by the promisee or received by the promisor depends upon the manifested intention of the parties * * * The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange." Language approved in Bard v. Kent, supra, 19 Cal.2d 449, page 452, 122 P.2d 8, 139 A.L.R. 1032. In the present case, the evidence shows, and the trial court necessarily found, that it was the past employment of Simmons, and not the promises or acts suggested by the appellants, which the parties contemplated as the consideration for Simmons' promises. His promises, therefore, were gratuitously and may be revoked by cancellation or rescission of the instruments. Baltimore & Ohio R. Co. v. Evans, 3 Cir., 188 F. 8; 1 Black on Rescission and Cancellation, 2d ed., § 157, pp. 458, et seq.

The trial court found that, in so far as the third party beneficiary provision of Exhibit "B" is concerned, it was executed "in pursuance and consideration of" the contract evidenced by Exhibit "A". It necessarily follows that if the prior contract was rescinded for lack of consideration, the beneficiary provisions of Exhibit "B", which were based thereon, are unsupported by consideration and also may be rescinded. The judgment was rendered upon this theory.

[5] The findings of the trial court in favor of Simmons on the issue of fraud are likewise supported by the record. It clearly appears that, apart from the question of the consideration bargained for, Simmons was induced to enter into the contracts in reliance upon certain misrepresentations by Dr. Clark. As a young man, experimenting on the borderland of what appeared to be a vast new field of scientific and engineering development, he was greatly impressed with the importance of the work being conducted at Impact Research. "It was a new field," he explained, "the matter of dynamic testing materials was just becoming of importance at that time, and I was extremely interested in that particular subject, and the instrumentation useful in such investigations, and I think we mutually agreed that the money could be well used in Impact work."

[6, 7] The substantial evidence which supports these findings places them beyond the reach of an appellate court. DeYoung v. DeYoung, 27 Cal.2d 521, 165 P.2d 457; Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 73 P.2d 217; Gane v. Gane, 6 Cal.2d 145, 56 P.2d 948; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Moreover, the determination that Dr. Clark was employed by the Institute, but that his acts and representations were not authorized or ratified by it is not inconsistent with other conclusions in favor of Simmons, for "the rule is now firmly established that a rescission of contract may be had against even an innocent

principal because of unauthorized misrepresentations by his agent." Greenberg v. Du Bain Realty Corp., 2 Cal.2d 628, 629, 42 P.2d 628; and see Weiner v. Roof, 10 Cal.2d 450, 453, 74 P.2d 736.

The Institute and Dr. Clark assert that it was error to have admitted parol evidence of such promissory fraud, because it is "at variance with the contractual features of the writing". The determinative question upon this issue is "whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject, and one of the circumstances of decision will be whether the one subject is so associated with the other that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing." 9 Wigmore on Evidence, sec. 2430, p. 97.

[8, 9] It is clear that "where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void" but that "a distinction must be made between * * * a parol promise * * *, which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof." Cobbs v. Cobbs, 53 Cal.App.2d 780, 783, 785, 128 P.2d 373, 374. Exhibit "A" provided that "the royalty on said invention shall be paid to the * * * Institute, or committees or other agencies or bodies which the * * * Institute may designate. * * *" The promises of Dr. Clark were that the money, although paid to the Institute as a matter of administrative procedure, nevertheless was to be used exclusively for Impact Research. Therefore, the promise was directed to the matter of the use of the money, whereas the terms of the memorandum dealt with nothing more than the form of the payment of it. These promises by Dr. Clark as to the use of the royalties were the fraudulent inducement, or motive, for the contract, but they were not incorporated in or superseded by the terms of the agreement as to payment. The two are not inconsistent or "at variance", inasmuch as they deal with wholly different matters. It was, therefore, proper to receive parol evidence to prove the promises of Dr. Clark. Stockburger v. Dolan, 14 Cal.2d 313, 94 P.2d 33, 128 A.L.R. 83; Buckner v. A. Leon & Co., 204 Cal. 225, 267 P. 693; Whittier v. Home Sav. Bank, 161 Cal. 311, 119 P. 92; Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 P. 1081; Lindsay v. Mack, 5 Cal.App.2d 491, 43 P.2d 350; Gardiner v. Burket, 3 Cal.App.2d 666, 40 P.2d 279.

The argument of the appellants that Simmons is not entitled to the relief which he seeks is in two parts. The first, directed to Exhibit "A", is that he failed to tender or return the benefits received. This argument assumes that something other than past employment was the intended consideration for the promises of Simmons. But as he received no benefits in return for his promise, he is not required to tender or return any amounts paid to him. The second part of the argument, directed to Exhibit "B", is that a rescission must be total and not partial; that Simmons may not rescind as to the burdens imposed upon him while retaining the benefits.

[10, 11] The general rule is that one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions. Buena Vista Fruit & Vineyard Co. v. Tuohy, 107 Cal. 243, 40 P. 386; Bohall v. Diller, 41 Cal. 532; Purdy v. Bullard, 41 Cal. 444; Jones v. Bay Cities Electric Co., 22 Cal.App. 81, 133 P. 492. The theory underlying such a rule is that retention of only the benefits of the transaction amounts to unjust enrichment and binds the parties to a contract which they did not contemplate.

[12-15] This rule, however, is not controlling in the case of a severable or divisible contract such as Exhibit "B". Generally speaking, the test of whether a contract is divisible is that if the consideration is single, the contract is entire, but if the consideration is apportioned, the con-

tract may be regarded as severable. Traiman v. Rappaport, 3 Cir., 41 F.2d 336, 71 A.L.R. 475. And a contract may be severable as to some of its terms, or for certain purposes, but indivisible as to other terms, or for other purposes. In re Marshall's Garage, 2 Cir., 63 F.2d 759; Ireland v. Craggs, 5 Cir., 56 F.2d 785; Cosden Oil Co. v. Scarborough, 5 Cir., 55 F.2d 634. Here there was a total rescission of the provisions relating to the Institute, and they are clearly severable from the terms and conditions applicable to Baldwin. And "where a good cause for rescission exists as to one part of a divisible or separable contract, such portion may be rescinded in equity without disturbing the remainder." Hesselberg v. Aetna Life Ins. Co., 8 Cir., 102 F.2d 23, 25. The rescission as to the Institute is total, not partial. No injustice is done the Institute by Simmons' failure to rescind as to Baldwin, and the Institute has incurred no injury if Simons and Baldwin, as between themselves, elect to be bound by Exhibit "B". By the terms of the decree of the trial court, the Institute and Simmons have been placed in status quo.

[16] As to royalties already received by the Institute, they were paid under a contract induced by fraud and executed in the mistaken belief that under the terms of Exhibit "A" Simmons owed an obligation to the Institute. In such a situation the principles of unjust enrichment and restitution require that such monies may not be retained. See Restatement of Restitutions, secs. 5, 133 [1].

[17] There is no merit in the argument, made for the first time upon appeal, that the judgment is improper because Baldwin was not made a party to the action. Exhibit "A" is a memorandum of an agreement between Simmons and the Institute; Baldwin has no rights or interests dependent upon or arising from that agreement. It is, therefore, only as the judgment may purport to affect Exhibit "B", the contract between Simmons and Baldwin, that the licensee could have any direct interest. However, the trial court made no finding as to Baldwin's interests under that contract; it expressly restricted the determination of the rights as between Simmons and the Institute to the amount of royalties paid or to be paid pursuant to the contract. Baldwin continues to receive the benefit it contracted for, the right to manufacture the invention; it is under obligation to pay the same amount in royalties for that privilege and probably it is of no consequence to Baldwin to whom that money is paid. If it is, that company may raise such defense in any action that might hereafter be brought by Simmons to collect royalties.

The interests of Baldwin under the contract are "so separable that a decree may be rendered between the parties before the court without affecting * * * [them, so that they] may perhaps be 'necessary' parties to a complete settlement of the entire controversy or transaction, but are not 'indispensable' to any valid judgment * * *. They should normally be joined * * * [b]ut, since the rule * * * [as to joinder of necessary parties] is one of equity, it is limited and qualified by considerations of fairness, convenience, and practicability. Where, for example, it is impossible to find these other persons or impracticable to bring them in, the action may proceed as to those parties who are present." Bank of California, Nat. Ass'n v. Superior Court, 16 Cal.2d 516, 523, 106 P.2d 879, 884. The fact that Baldwin is a foreign corporation may thave placed some difficulty in the way of making it a party to this litigation had Simmons been disposed to do so. But he was satisfied to proceed solely against the Institute and Clark and must accept the responsibility of a judgment which does not bind Baldwin. Any dispute between Simmons and Baldwin has not been settled by this judgment, and Baldwin is in no way bound by it.

The judgment is affirmed.

GIBSON, C. J., TRAYNOR, J., and PETERS, J., pro tem. concur.

CARTER Justice.

I concur in the conclusion reached in the majority opinion, but I do not agree with the reasons on which it is based.

From the facts as disclosed by the record it appears that we have what is, in effect, a third party donee beneficiary contract. There are, in the case, two Exhibits, "A" and "B". "Exhibit A" which was signed only by Simmons, the plaintiff, bears the date of February 21, 1940, and is entitled "Agreement". It appears that this instrument was prepared by counsel for The Baldwin Locomotive Works, and it recites that Simmons will not grant any licenses to make, use or sell his invention unless approval therefor is given by the Institute. It also recites that any royalties received for the use of such license to use, etc., shall be paid to the Institute, unless, he at his option, requests in writing a certain percentage thereof. Exhibit "B" is dated March 13, 1940, and purports to be an Agreement between plaintiff and the Baldwin Company and is signed by both of them. This Agreement reads, in part, as follows: "This Agreement made as of March 13, 1940, between Edward E. Simmons, Jr., of Pasadena, California, and The Baldwin Locomotive Works of Philadelphia Pennsylvania, a corporation organized and existing under the laws of the State of Pennsylvania hereinafter respectively referred to as 'Simmons' and 'Baldwin'. This agreement is subject to the approval of the California Institute of Technology, Or Committees Or Other Agencies Or Bodies Which The California Institute Of Technology May Designate, hereinafter referred to as 'INSTITUTE'." Clause (8) provides: "Any part of this agreement may be altered without effect on the remaining portions thereof by mutual agreement between Baldwin, Simmons and the Institute." Clause (11) provides that: "The terms and conditions herein set forth are not subject to change without the approval of the California Institute of Technology."

This is the situation with which we are confronted: Simmons, due to the representations of agents of the Institute, agreed that the royalties were to be paid to the Institute to be used by it for Impact Research. The funds were not so used. Under the rule set forth in the majority opinion, that even an innocent principal is bound by the unauthorized misrepresentations of his agent, we have the principal—the Institute—bound by the misrepresentations of its employees. We find a promise on the part of Simmons to grant a license to Baldwin to use his invention, and a promise on the part of Baldwin to pay the royalties to the Institute. The Institute, having given no consideration for this promised benefit is in the position of a donee beneficiary. Not only that, but it achieved this benefit through the fraud of its agents, even though that fraud may not have been authorized by it.

"There are two quite distinct types of cases which pass current under the name of promises for the benefit of a third person. To the first class belong promises where the promisee has no pecuniary interest in the performance of the contract, his object in entering into it being the benefit of a third person. To the second class belong promises where the promisee seeks indirectly to discharge an obligation of his own to a third person by securing from the promisor a promise to pay his creditor.

"The first class is properly called a contract for the benefit of a third person, and the phrase 'sole beneficiary' should be reserved for this class. As the promisee has no pecuniary interest in the performance of the promise, he can have, generally speaking, no other intention than to benefit the third person, to give him a right". Contracts for the Benefit of a Third Person, Samuel Williston, 15 Harv.Law Rev. 767.

It was proved at the trial that the words "in consideration of employment" found in Exhibit "A" were intended by both Simmons and Dr. Clark to mean Simmons' *past* employment by the Institute. In plaintiff's First Amended Complaint, as his first cause of action, he alleges that both Exhibit "A" and Exhibit "B" are without consideration and therefore null and void as to the Institute. In its Findings of Fact, the trial court found these allegations to be true. In plaintiff's second cause of action, the plaintiff alleges that he was induced to enter into the two agreements because of promises made by the Institute that he would be employed on a permanent basis and that the monies received by the Institute from Baldwin would be applied to Impact Research. He also alleged that the Institute never intended to perform these promises. These allegations the trial court, in its Findings of Fact, found to be true. The trial court, in its Conclusions of Law, found that both instruments, as to the Institute, were null and void, and that the Institute had no right, title or interest in or to the royalties accrued or to accrue from Baldwin.

If it is true that plaintiff entered into the contract upon the understanding *that he was to be given permanent employment* and that the royalties to be paid by Baldwin were to be used by the Institute for Impact Research, then at the time the contract was made, there was consideration. The Restatement of Contracts, section 274, provides: "In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such a discharge." Comment b: "Consideration, as used in the phrase, failure of consideration, means merely an exchange in fact agreed upon. Failure of consideration, therefore, is failure to receive such an exchange. In the formation of contracts, consideration is the exchange for a promise. In the present connection the consideration in question is the promised performance of one party agreed to be exchanged for that of the other." If the allegations in plaintiff's first cause of action are true, this is the situation: Plaintiff promises to grant a license to Baldwin. In consideration of this promise Baldwin promises to pay royalties to the Institute and in exchange for these promises, the Institute promises to employ Simmons on a permanent basis, and to use the money received from Baldwin for Impact Research. Thus, if this situation is the true one, there was consideration present at the time the contract was entered into. Section 473 of the Restatement of Contracts provides: "A *contractual promise* made with the undisclosed intention of not performing it is fraud." [Emphasis added.]

However, the trial court, in its Conclusions of Law, adjudged that both Exhibits were, as to the Institute, null and void, presumably because of lack of consideration. It would seem to me that the findings of fact with respect to the fact that neither Exhibit A nor Exhibit B were supported by consideration so far as the Institute was concerned is consistent with the Conclusion of Law that the Exhibits were null and void. However, if the Findings of Fact as to the fraud of the Institute mean that plaintiff was induced to enter into the agreements because of promises made without intention of performance, then the Conclusions of Law are inconsistent, *because there was, at the time of the formation of the contract, consideration.* And, due to the fraud of the Institute, there has been a *failure* of consideration in that Plaintiff did not receive what he bargained for, and thus he may rescind as to the Institute as to future monies to be paid by Baldwin, and be placed in status quo as to monies paid to the Institute prior to the Commencement of this action.

If, however, the findings of fact as to *lack* of consideration and the Conclusion of Law to the same effect are taken into consideration, then there is consistency. Since it was proved at the trial that plaintiff and the Institute were both referring to the *past* employment of plaintiff by the Institute, we have a finding of fact by the trial court which is not supported by the evidence. Disregarding that finding of fact, because it is inconsistent with the conclusion of law, we have this situation: Plaintiff intended the money paid by Baldwin to the Institute to be used by the Institute for Impact Research. That was his reason for entering into the agreement. The Institute did not so use the money. Plaintiff was under no obligation other than to grant the license to Baldwin. The general rule is that findings are to be harmonized and reconciled if it is possible and can be done reasonably. Stohr v. Stohr, 148 Cal. 180, 82 P. 777; Davis

v. Martin, 157 Cal. 657, 108 P. 866; Lasher v. Faw, 209 Cal. 726, 289 P. 821; Culjak v. Better Built Homes, Inc., 58 Cal.App.2d 720, 137 P.2d 492; Menghetti v. Dillon, 10 Cal.2d 470, 75 P.2d 596; Pacific Coast Joint Stock Land Bank v. Jones, 14 Cal.2d 8, 92 P.2d 390; 123 A.L.R. 695. Also, inferences which necessarily follow from findings may be resorted to. People v. Ocean Shore R. R., 22 Cal.App.2d 657, 72 P.2d 167. Where the facts found support the conclusions necessary to the judgment, inconsistent conclusions stated in the findings will be disregarded. Danziger v. Benson, 175 Cal. 565, 166 P. 313. "In many cases the purpose of the promisee in securing a promise for the benefit of a third party is to confer a gratuitous benefit upon that third party. In such cases this third party will usually be the only person who will be benefited by the promised performance; he will be the sole beneficiary. *Performance will not benefit the promisee; he is not to receive it,* and such performance will not discharge any duty of the promisee, for he owes none to the beneficiary." Arthur L. Corbin, Contracts for the Benefit of Third Persons, Selected Readings on the Law of Contracts, Association of American Law Schools, 1931 Ed.

The authorities are strangely silent on this state of affairs—where the fraud is that of a donee. The usual situation is where fraud on the part of either the promisor or the promisee has brought about the contract for the benefit of a third person. The problem is analogous to that of the fraud of a third person. The Restatement of the Law of Contracts, section 477, states the rule thus: "Fraud or material misrepresentation by a third person renders a transaction voidable by a party induced thereby to enter into it if the other party thereto (a) has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction, or (b) is effected by the fraud or misrepresentation under the law of Agency or Trusts." This is commented on as follows: "As between the original parties to a transaction induced by the fraud or material misrepresentations of a third person, the injured party has power of avoidance unless the other party is not only ignorant of the fraud or misrepresentation when he enters into the transaction, but has either parted with value or has changed his position materially in reliance on the transaction. A donee cannot conscientiously retain an advantage obtained from another because of a third person's misconduct, even if the donee neither knew nor had reason to know of it."

It would seem that under this rule the plaintiff could not rescind the contract as to Baldwin. Baldwin did not know of the fraud and was in no way concerned with it. The only fraud is that of the Institute who is the recipient of the royalties paid by Baldwin. If the case is viewed as one where a gift was made because of fraudulent representations, we find that such a gift may be avoided by the donor. "A gift obtained from the donor by fraud or by the pressure of undue influence upon his mind and will may be set aside in equity and the property recovered. * * *

"But it is to be remembered that an executed gift, even though procured through fraud, mistake, or undue influence, or made by one lacking in mental capacity, is voidable only. * * * It passes title to the property to the donee, where it remains until a disaffirmance by the donor, or perhaps by his executor after his death; * * *." Black, on Rescission and Cancellation, 2nd Ed., pages 1257-1258.

Or the situation may be considered as analogous to that of a contract of insurance. Let us assume that A induces B through fraudulent representations to make him the beneficiary of a contract of insurance between B and the X Company. B reserves no power to change the beneficiary. The contract between B and the X Company is perfectly valid, and yet had it not been for A's fraud, B would not have named him as beneficiary, but would have named his own estate.

The Restatement of the Law of Restitution, section 26, provides (1) A person is entitled to restitution from another to whom gratuitously and induced thereto by a mistake of fact he has given money or the mistake (a) was caused by fraud or material misrepresentation, * * *. The comment is as follows: "Fraud and misrepresentation: If the donor has been induced to make the gift because of the fraud or innocent misrepresentation of the donee although it would not have affected the conduct of a reasonable man, the transaction can be rescinded."

Although the general rule undoubtedly is that one must rescind all of his contract and may not retain rights under it which he deems desirable to have and repudiate the remainder of its provisions, there are certain exceptions where the circumstances justify a rescission only as to particular matters or particular parties involved in an entire transaction. Hoffman v. Kirby, 136 Cal. 26, 68 P. 321; 12 C.J.S., Cancellation of Instruments, § 78b, page 1080; Civ.Code, sec. 3414. In the present case, if the donee Institute were allowed to retain the fruits of its own fraud, it would be unjustly enriched at the expense of the plaintiff.

Plaintiff should, therefore, be entitled to restitution of the benefits previously received by defendant Institute as well as receive any which may accrue in the future.

SCHAUER, Justice.

I dissent.

This case has been a peculiarly difficult one for the court to resolve with any satisfaction either to itself or the parties. The condition of the record is lamentable in several respects. I dislike to add a dissent to the discussion in the majority opinion but because I think that opinion reaches certain erroneous conclusions of law and of fact and because such errors, with the implications of the opinion, may have a grave import to the Institute and to Dr. Clark, I deem it proper to show why I think a different result should be reached.

After extended study of the entire record I am of the view that the evidence does not support the finding that there was a total lack of consideration from the Institute for its benefits under the contract. On any tenable view of the evidence, in my opinion, the contract between Simmons and the Institute necessarily represents a settlement of their conflicting claims in the Impact Research project; the settlement of mutually conflicting claims constitutes legal consideration for the benefits thereby reciprocally given and received. Furthermore, it is my view that defendants are correct in their contention that Dr. Clark's asserted fraudulent promises cannot be shown to invalidate the agreement because "where the promise relied upon to establish the fraud is at variance with the contractual features of the writing, the same may not be proven either as an element of inducement or otherwise."

Impact Research at the Institute encompassed something more than Mr. Simmons, his inventions and his employment. The research in this field was well under way before Mr. Simmons was called into it. It was not a part of the Institute's regular educational curriculum; it was a commercially sponsored venture which "was to be divided into two phases, one the development of equipment [including the impact dynamometer], the method of procedure by which we could determine force time relations. The second phase was to be by applying that procedure, equipment and so forth, in the actual testing of a large number of metals and alloys to determine their response to rapid loading."

The development of Impact Research is described in the undisputed testimony of Dr. Clark. "That project had a gradual evolution, which started back, I presume, about in * * * 1934, when I became interested in the general subject. A little later on * * * Doctor Datwyler * * * became interested in this project of the dynamics of materials, and we set about to make some experiments at quite high velocities by using explosives and so on. Such work was principally paid for out of my own pocket, and a small amount out of the institute funds. We obtained some preliminary data for which also we acknowledge with gratitude the efforts of Mr. Simmons in the participation with us in our personal activities in that regard. * * * None of us were compensated.

His assistance was primarily in giving us some suggestions for this, that and the other thing [including the development of an explosive bomb device in the summer of 1935], and procuring from electrical engineering certain equipment that we wanted. That more or less congealed our ideas in respect to impact, and led us to the belief that we could get most from our experiment if we could determine the force acting during the impact over very short periods of time. We [Clark and Datwyler] proposed the details of our ideas to the Chairman of the Executive Council, who thought well of our fundamental plan for really going into the matter of Impact testing, whereupon a meeting was held with industrial firms to determine whether or not they would be willing to give support for such a project, and shortly thereafter—that was the fall of 1936, I believe,—some industrial firms saw fit to sponsor this project." In about October, 1936, Impact Research was organized under commercial sponsorship. Dr. Clark was its director. "Doctor Datwyler was the first paid research assistant on the project, and he proceeded to investigate the possibilities of various methods of determining force time relations * * * Doctor Datwyler examined into many different possible methods * * * Those tests in general were quite rank failures * * * and during that time Mr. Simmons was in consultation with us purely as a matter of discussion on those things."

The device which Dr. Datwyler was attempting to develop was an impact dynamometer; i.e., an instrument to translate "instantaneous forces into instantaneous electric impulses so that they will be recorded by means of an oscillograph." He was engaged in this particular phase of the work even before the completion in approximately October, 1936, of the more or less formal organization of Impact Research as a commercially sponsored project. The dynamometer itself was not a new device, but he was unsuccessful in finding a strain sensitive element which would make it workable in measuring impacts. After various experiments (frankly described in Dr. Clark's above quoted testimony as "rank failures") Clark and Datwyler, in the latter part of August, 1936, requested plaintiff's aid on this problem. Early in September, 1936, plaintiff conceived and communicated to Datwyler a proposed solution, the use of a thin wire bonded to the dynamometer bar with a material called glyptal. Pursuant to plaintiff's suggestions, and with plaintiff participating in the work of construction, Datwyler constructed a dynamometer. This instrument was improved in various respects pursuant to Datwyler's and plaintiff's further ideas as to how to overcome various defects, and within a month after plaintiff's original suggestion a successful instrument had been constructed. Plaintiff during this time was not employed by the Institute and he received no pay for his work in inventing the wire strain gauge and assisting in its application to the dynamometer, other than the consideration provided for in the contract evidenced by Exhibits A and B, hereinafter set forth in footnote 1.

On December 11, 1936, two months after the dynamometer had been completed, plaintiff for the first time was employed for pay in Impact Research. Nearly three years later, in the fall of 1939, a representative of Baldwin visited plaintiff and Clark at the Impact Research laboratory and informed them that Baldwin was interested in obtaining patent protection for, and exploiting, the wire strain gauge. Prior to this time, so far as the evidence shows, neither party had expressly stated any opinion as to, or claim of, ownership of the dynamometer using the wire strain gauge. The Institute, having successfully developed the dynamometer employing the gauge, which may be said to have constituted the first phase of the Impact Research project, had simply been carrying on the second phase of that project, which, as previously indicated, involved the use of the dynamometer. The gauge, according to Simmons' own language, "was voluntarily given to Impact." But after Baldwin suggested its interest in patenting and exploiting the impact-measuring device, there followed the discussions between plaintiff and Dr. Clark, and the negotiations with representatives of Baldwin, which culminated in the execution of Exhibits A[1] and B[2].

The discussions between plaintiff and Clark chiefly concerned three matters: Plaintiff's future employment at the Institute, the use of the Baldwin royalties in Impact Research, and the respective interests of plaintiff and the Institute in the invention. The evidence as to what was said and done by plaintiff and Clark as to these three matters shows, I think beyond question, that there was, as a matter of law, consideration bargained for and exchanged between plaintiff and the Institute by the mutual settlement of their disputed claims of interest in the invention. I have noted that plaintiff urges that "All that the evidence established was that Clark, himself, had the *belief* that the Institute had an equity or interest in the invention * * * Now, we submit, Clark's own belief, and the opinions of others on the Institute campus, certainly were not tantamount to the assertion of any claim by the Institute, through its properly authorized officials, that it had any interest in or to ownership of the invention or patent." But I think that the record, on any reasonable view, does not sustain plaintiff's position on this point.

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[1] Exhibit A was executed by plaintiff and signed by Dr. Clark as "Witness" on February 21, 1940. It reads in material part as follows: "In consideration of my employment by the California Institute of Technology I agree that as to my inventions * * * I will not grant any licenses to make, use or sell apparatus or methods embodying any of said inventions unless such licenses are approved by the * * * Institute * * * The royalty on said inventions shall be paid to the * * * Institute * * *, unless at my option I shall request * * * that up to and including forty per cent (40%) of the total royalty paid by any licensee shall be paid to me * * * I agree not to grant any license or make any assignment of said inventions or patent rights thereto without the express consent of the * * * Institute."

[2] Exhibit B is dated March 13, 1940, and reads in material part as follows: "Agreement * * * between * * * 'Simmons' and 'Baldwin.' This agreement is subject to the approval of the * * * 'Institute.'

"Whereas, Simmons has made certain inventions * * * Baldwin is desirous of obtaining an exclusive license to make or have made for use and/or sale apparatus embodying said inventions.

"Now, Therefore, in consideration of One Dollar ($1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, it is agreed as follows:

"1. Simmons hereby grants to Baldwin an exclusive license * * * Subject, However, to the following reservations: * * * [The Institute, Simmons, and Dr. Clark are each] licensed to make and use for his own use apparatus embodying said inventions * * * The sponsors of Impact Research [commercial firms which paid for the research project wherein the inventions were made; * * * are licensed to make and use for their own research and testing only, apparatus embodying said inventions * * * Gottfried Datwyler [who worked with Dr. Clark and plaintiff in Impact Research] may be granted a nonexclusive license for the country of Switzerland * * *

"2. Baldwin agrees at its own expense and without recourse whatsoever to Simmons or to the Institute to * * * prosecute an application * * * for United States Letters Patent on said inventions and to pay all fees in connection therewith. Baldwin shall have full control of the prosecution of such applications. Baldwin agrees not to permit any patentable item contained in the said application * * * to be lost by abandonment. * * *

"3. Baldwin agrees to prosecute or settle any interference or infringement matter * * * without recourse to Simmons or the Institute * * *

"4. Baldwin agrees to pay a royalty of five per cent * * * to the Institute, unless Simmons at his option shall request * * * that any portion up to and including forty per cent (40%) of said royalty shall be paid to him by Baldwin * * *

"Edward E. Simmons, Jr.
"The Baldwin Locomotive Works
"By ——————
Vice-President

"The granting of the foregoing license is approved by the California Institute of Technology in accordance with an agreement between Edward E. Simmons, Jr., and the California Institute of Technology dated February 21, 1940.

"California Institute Of Technology
"By: A. C. Balch
Pres.

[There seems to be no evidence that Baldwin, through its officers signed Exhibit B; this has not been mentioned by the parties to this action.]"

The writings define the rights of the three parties in "inventions involving an electrical strain gauge wire" and "inventions relating to the measurements and indications of various conditions including impact testing"; they refer to these inventions as having been made by Simmons. There is no doubt that the wire strain gauge element of the dynamometer was conceived by Simmons alone, at a time when he was not employed by or a student at the Institute, although he was then on campus and had been and expected again to be (and was again) both an employe and a graduate student. It is apparent from the writings' description of the "inventions" which are the subject of agreement that the devices which Baldwin agreed to patent, to exploit, etc., include not only the wire strain gauge but also that gauge set up in useful fashion with the dynamometer, oscillograph, etc. Of course, neither Simmons nor the Institute makes any claim to having "invented" such devices as the oscillograph and the dynamometer. But both Simmons and the Institute claimed rights in the applications of those devices, with the wire strain gauge, which were developed by Simmons and Datwyler. The following testimony shows that there was a bona fide dispute between Simmons and Clark as to the respective interests of Simmons and the Institute (such words as "equity," "owned," etc. are not, it is clear from the whole of the testimony, used therein in any technical sense):

Plaintiff testified that during the discussions which led up to the execution of the writings "Doctor Clark took the position that due to moral considerations, the Institute had a claim on * * * this patent * * * Doctor Clark made claims that the Institute had some sort of moral claim, and at no time did he make any claim that the Institute had a legal right to the inventions * * * [I]n substance [Doctor Clark] said that inasmuch as my work at the Institute and the fact I had been paid by the Institute for working, I had a moral obligation to assign the patent to the Institute, on which occasion I objected to that point of view, and I said that inasmuch as the actual invention of the gauge was made on my own time and *was voluntarily given to Impact* [italics added], that I felt that the patent was entirely mine, and also, as I had always understood it, the Institute was not engaged in the commercial or patent activity, and that they had never held any claims against anybody's inventions, that is, made by people at the Institute." It is thus apparent from plaintiff's own testimony that he had "voluntarily given to Impact" the invention in question and that, after becoming more aware of its possible value, he was seeking to get it back. He was asserting a claim to that which he had previously freely donated. Simmons was also asked the following question: "[Clark] claimed that the Institute was entitled to some equity in your invention, and you disputed that. That is the size of it at the present time?" He answered, "That is right," but further explained that the word "equity" was not used in his discussions with Clark. Simmons testified, further, that "Doctor Clark had the belief that the Institute owned everything that was developed there, and that opinion was held by other people on the campus * * * I don't think that Doctor Clark actually made the statement that the Institute owned everything; 'owned,' * * * there is a matter of words which I had no intent of them being strictly applied legally. Doctor Clark expressed at all times that the Institute had some sort of moral claim or right arising from patents developed at the Institute, in which case he stated that if he had a patent, why, he would give it to the Institute on moral grounds. He never at any time said that the Institute had a legal ground, nor did he ever discuss legal grounds; in fact, Doctor Clark told me on one occasion that he had no knowledge of legal matters and he wasn't bringing this matter of a legal matter of the Institute having an ownership, but purely as a matter of moral consideration * * * Prior to this interest by Baldwin * * * there had never been any discussions [between plaintiff and Clark] on patent matters or Institute rights or anything else * * * There was never any discussions about assigning the entire interest [in the inventions] to the Institute, or assigning any interest to the Institute * * * the discussions were that Doctor Clark told me that the Institute had a moral interest in the inventions * * * In one of the discussions along this line he stated that it would be nice to have these royalties paid to the Institute funds so that they could be used for Impact, and I agreed with that point * * * but inasmuch as it looked at that time * * * like it would be a fairly good commercial product, and I could see the proposition arising whereby there might actually be more funds than Impact could use at a given period, and I wanted to reserve the right to draw part of those funds * * * I suggested 40 per cent, and Doctor Clark agreed * * * There was no other discussion of 60 or 30 or 20 [per cent] or whatever it might be * * * I never had any discussions about assigning everything to Cal.Tech. Q. Have you ever had any discussion of assigning any particular amount other than 40 per cent? * * * A. No. In other words, when it came to a discussion, this percentage, it was set and fixed * * * Never had any discussion nor saw any writings * * * regarding an entire assignment or a partial assignment of the patent to California Institute of Technology. It was never discussed. * * * Nothing was said about the Institute's claim or 100 per cent [as opposed to 10 per cent or 60 per cent]; in other words, we had already months before agreed among ourselves that all the money would go to Impact." In his deposition plaintiff was asked, "[Doctor Clark] took the position * * * that the Institute was entitled to the sole patent right, is that it, did he go that far? A. Yes, that was his position * * * he, among all out there, was the strongest of that opinion, I believe, and these conversations from time to time over a period involved arguments why I should assign this, and what benefits I would derive from being at the Institute."

Counsel for the Institute stated, "We admit that Mr. Simmons was the owner of the patents or patent on the device *subject to our rights under these two agreements.*" (Italics added.)

Dr. Clark testified that after Baldwin expressed its desire to exploit the inventions "the matter of the Institute's interest in this whole matter was set forth by myself, and was discussed from that time on between Simmons and me * * * I pointed out what, in my belief, was the Institute's interest, not necessarily the Institute's position * * * The substance of what I said, insofar as I can recollect, is that this device had been devised as a result of our requirements, devised at the Institute in conjunction with the activities of Doctor Datwyler, and that it was my firm belief that the Institute had definite interests in such development, and that it was recognized that Simmons had conceived the idea. Simmons took issue with me on the point that the Institute had any interest or right in the matter, and that led to continual discussions * * * until the culmination of the final draft, or agreement, which was signed * * * [Simmons stated that] it was his invention, that the Institute had no right or interest, therefore, in the invention * * * Q. * * * you did tell Mr. Simmons * * * during the course of those conversations which led up to * * * Exhibit A * * * that the school had an interest in this invention because he had been paid for the time during which he had made the invention? A. Partially so; in addition, for doing it at the Institute with the Institute's facilities. Q. And you sincerely believe that the Institute did have an interest or equity of some kind by reason of those facts? A. Yes, I do * * * [M]y recollection is that the point being that this matter of paying all of the royalties to the Institute and my inability to agree that they would be devoted to Impact Research gave rise to Mr. Simmons' desire to withdraw forty per cent of those royalties for his own use."

The trial court, its findings indicate, disbelieved Dr. Clark's statement as to his "inability to agree that they [royalties] would be devoted to Impact Research" and believed plaintiff's statement that "we * * * agreed among ourselves that all the money would go to Impact." Whether Clark or plaintiff is believed as to this aspect of the controversy, the above quoted evidence, upon any reasonable view, shows indisputably that plaintiff and Dr. Clark were in disagreement as to the respective interests of plaintiff and the Institute in the inventions; that plaintiff had originally "voluntarily given to Impact" the invention in question but that he wished to reclaim it, or some interest in it, for his private account; that both plaintiff and Dr. Clark were sincere in their claims; that each had grounds for his position; that discussions as to the claims began contemporaneously with and continued during the negotiations with Baldwin which resulted in the execution of Exhibits A and B. It is beyond reason to say that, although Exhibits A and B dispose in detail of the respective interests of plaintiff and the Institute, those instruments were executed without plaintiff's and Clark's having considered, bargained as to, and mutually settled those very conflicting claims of which the agreement disposes.

I am of the opinion, also, that the evidence indisputably shows that the parties intended Exhibits A and B, executed only after much discussion and negotiation, to be the final written memorials of their understandings. Section 1625 of the Civil Code provides, "The execution of a contract in writing * * * supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." The asserted fraudulent promises of Clark, although they did not become part of the contract, directly concerned "its matter"; they did not concern independent or collateral subjects. The asserted promise of permanent employment concerned a subject —employment of Simmons—which was expressly referred to in Exhibit A. The asserted promise that the royalties would be devoted solely to Impact Research conflicts with the provision, found in both Exhibit A and Exhibit B, that royalties shall be paid to the Institute "or committees or other agencies or bodies which the California Institute of Technology may designate." I cannot agree with the strained point of view of the majority that, although the writings permit *payment* to anyone whom the Institute may designate, they are not inconsistent with Dr. Clark's asserted promise because the writings contain no reference to *use* of the funds.

The following discussion in Lindemann v. Coryell (1922), 59 Cal.App. 788, 791, 212 P. 47, 48, is pertinent: "While generally there are exceptions to all rules, the nonobservance of this particular one [the aspect of the parol evidence rule which forbids a showing by extrinsic evidence that a written memorial does not correctly represent the understanding of the parties] in certain cases has caused legal chaos, for the different construction given to it at times has resulted in great confusion and conflict in the authorities, and it would be an idle task to review in detail the various departures. There is no question that particular evidence is admissible to vary a writing when fraud is alleged. In discussing this subject, however, Wigmore, in his work on Evidence, states that the term 'fraud' must be understood in its legitimate narrow sense, and that failure knowingly to perform an extrinsic agreement not embodied in the writing cannot in strictness be legally included in the term 'fraud.' 4 Wigmore on Ev. § 2439. The rule that parol evidence is admissible where there is fraud on the part of the payee at the inception of the instrument is recognized, and the doctrine of estoppel has been applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. This doctrine, however, has been held to have no place for application when the statements relate to rights depending upon contracts yet to be made, to which the person complaining is a party, as under such circumstances he has it in his power to guard in advance against any and all consequences of a subsequent change of conduct by the person with whom he is dealing, and to admit evidence of extrinsic agreements would be to open the door to all evils that the parol evidence rule was designed to prevent."

Since the evidence shows, as a matter of law, that there was consideration for the benefits received by the Institute, and since plaintiff should not have been allowed to vary the terms of the writing by showing assertedly fraudulent promises inconsistent therewith, the judgment is without support and should be reversed and the cause remanded for a new trial.

SPENCE, J. concurs.

Rehearing denied; SCHAUER and SPENCE, JJ., dissenting.

GONZALES v. PACIFIC GREYHOUND LINES et al.

S. F. 17938.

Supreme Court of California, in Bank.

Sept. 20, 1949.

Rehearing Granted Oct. 20, 1949.*

Action for wrongful death by Kenneth David Gonzales, a minor, by Jeraldine Gonzales, his guardian ad litem, against Pacific Greyhound Lines, a corporation, and others.

The Superior Court of Monterey County, A. M. Runnells, J., entered judgment on verdict in favor of defendants, and plaintiff appealed.

The Supreme Court, Spence, J., held that defendants were precluded by statute from challenging plaintiff's status as deceased's legitimate son and that exclusion of stipulation at prior trial admitting liability was prejudicial error and reversed the judgment.

Prior opinion see 202 P.2d 135.

1. Bastards 🔑3

Defendants in wrongful death action, who were neither husband nor wife nor descendants of either, could not challenge the legitimacy of plaintiff who was born almost eight months after marriage of his mother and decedent who was not impotent and who had lived with plaintiff's mother as husband and wife from date of marriage until several months after plaintiff's birth, regardless of whether presumption of plaintiff's legitimacy was conclusive or disputable. Civ.Code, §§ 193, 195; Code Civ.Proc. §§ 1962, subd. 5, 1963, subd. 31.

2. Divorce 🔑156

After expiration of time for appeal, interlocutory divorce decree stood as a final adjudication between husband and wife on issues submitted, including custody of minor child and liability of husband to contribute to wife for his care and support.

3. Divorce 🔑308

Interlocutory divorce decree reciting that husband should not be required to contribute to support of wife's minor child was not conclusive of child's right to recover in action for wrongful death of mother's husband, since child was not a party to divorce proceedings.

4. Death 🔑64

In wrongful death action, interlocutory divorce decree between plaintiff's mother and deceased, reciting that deceased should not be required to contribute to plaintiff's support, was material on the question of amount of damages sustained by plaintiff as result of deceased's death. Civ.Code, § 3281.

5. Bastards 🔑5

Where defendants in wrongful death action were precluded by statute from challenging the legitimacy of plaintiff's birth, admitting in evidence for all purposes, including issue of plaintiff's legitimacy, interlocutory divorce decree between plaintiff's mother and deceased, reciting that deceased should not be required to contribute to plaintiff's support, was error. Civ.Code, §§ 193, 195.

6. Appeal and error 🔑1067

Where defendants in wrongful death action were precluded by statute from challenging plaintiff's status as the legitimate son of deceased, failure to so charge and submission to jury of issue of plaintiff's legitimacy constituted prejudicial error. Civ.Code, § 195.

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* Subsequent opinion 214 P.2d 809.

7. Stipulations ⚷19

Where a stipulation is distinctly and formally made for express purpose of relieving opposing party from proving some fact, and no provision is made indicating a limitation of scope or the duration of its effect, such admission is admissible upon a subsequent trial of the same action, unless court permits its withdrawal on proper application therefor.

8. Stipulations ⚷13

Relief from a stipulation on a prior trial may be granted in trial court's discretion where the facts stipulated have changed, or there is fraud, mistake of fact or other special circumstance rendering it unjust to enforce the stipulation.

9. Stipulations ⚷14(1)

Mere notice of a change of position does not affect the binding character of an unlimited stipulation, in absence of order permitting its withdrawal procured on an affirmative application for such relief upon a showing of circumstances constituting cause therefor.

10. Stipulations ⚷19

In wrongful death action, exclusion of defendants' stipulation, made without limitation at prior trial, admitting liability was error prejudicial to plaintiff, in absence of request by defendants to be relieved from stipulation or a showing of cause for such relief.

Robert G. Partridge, San Francisco, Noland & Lawson, Salinas, and Wallace O'Connell, San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion, San Francisco, for respondents.

SPENCE, Justice.

This is an action for damages for the wrongful death of Ralph Daniel Gonzales. It was originally commenced by Jeraldine Gonzales, as surviving widow, and Kenneth David Gonzales, a minor, claiming to be the son of the decedent. William Gonzales, admittedly the son of the decedent by a previous marriage, was permitted to intervene in the action. The decedent was killed on February 11, 1946, when his taxicab crashed into a Greyhound bus that had skidded out of control and was blocking the highway a short distance above a sharp turn around which the decedent, coming from the opposite direction, traveled to the point of impact.

The action has been twice tried. On the first trial, which was before the court without a jury, the defendants stipulated as to liability for the accident, leaving for determination only the issues of heirship and the amount of damages. By the judgment entered at the conclusion of that trial, the widow was awarded funeral expenses and William Gonzales recovered the sum of $1,800, but Kenneth David Gonzales was allowed nothing, the court finding that he was not the child of the decedent. Plaintiff Kenneth David Gonzales thereupon moved for a new trial, and it was granted upon the court's statement that "the evidence [was] insufficient to justify" its finding in negation of plaintiff's paternity claim since section 195 of the Civil Code provides that "the presumption of legitimacy of children born in wedlock can only be disputed by the husband or wife or descendant of one or both of them and the Pacific Greyhound Lines is not in that class."

The second trial, which was confined solely to the rights of plaintiff Kenneth David Gonzales, was had before a jury. The trial court, over plaintiff's objection, permitted defendants to introduce evidence in challenge of his legitimacy, and it refused plaintiff's offer of defendants' stipulation on the first trial in admission of their liability for the accident. The jury returned a verdict in favor of defendants. From the judgment accordingly entered, plaintiff appeals, contending that the said two major rulings of the trial court were prejudicially erroneous. His position is well taken on both points in the light of the record and the law applicable thereto.

[1] Plaintiff presented evidence which entitled him to claim the presumptions of legitimacy as controlling in his favor. Thus it was indisputably established that Jeraldine Gonzales and the decedent were married on December 11, 1942; that plain-

tiff was born on August 2, 1943; that the decedent was not impotent; and that the decedent and Jeraldine Gonzales had lived together as husband and wife from the date of their marriage up to several months after the birth of plaintiff. Accordingly, it becomes immaterial whether the presumption of plaintiff's legitimacy be considered conclusive, Code Civ.Proc., sec. 1962, subd. 5, or disputable, Code Civ.Proc., sec. 1963, subd. 31; see, also, Civ.Code, sec. 193, for defendants would not be in a position to argue the point.

Even where the presumption of legitimacy is a disputable one, challenge can be made "only by the husband or wife, or the descendant of one or both of them." Civ.Code, sec. 195. By reason of this statutory limitation, the following persons have been barred from questioning the legitimacy of a child born in wedlock: the state in a criminal prosecution for nonsupport of an alleged illegitimate child, In re Madalina, 174 Cal. 693, 695-696, 164 P. 348, 1 A.L.R. 1629; the beneficiaries named by the will of the deceased husband, bearing no relation to the testator but opposing the claim of his alleged daughter as a pretermitted heir, In re Estate of Lee, 200 Cal. 310, 314, 253 P. 145; collateral heirs of the decedent contesting distribution of the estate to his daughter as sole heir, In re Estate of McMurray, 114 Cal.App. 439, 442, 300 P. 72; the unmarried father seeking determination of the parentage of the child born to the mother while married. Serway v. Galentine, 75 Cal.App.2d 86, 89, 170 P.2d 32. Likewise here, defendants are not within the class enumerated in the statute and so are foreclosed from inquiry as to plaintiff's legitimacy. As was said In re Madalina, supra, 174 Cal. at page 696, 164 P. at page 350: "This is the declared policy of this state and is simply the adoption of a rule prevailing generally in all civilized communities."

The record reveals that the trial court, despite the provisions of section 195 of the Civil Code, deemed that the nature of defendants' controverting evidence, as embraced in an interlocutory decree of divorce between the decedent and Jeraldine Gonzales, made it proper for defendants to contest plaintiff's legitimacy. That litigation, as it herein appears, may be summarized as follows: In 1944 the parties in their respective divorce pleadings each alleged that plaintiff was the issue of their marriage. Apparently the action was uncontested and the divorce was awarded to the wife on the ground of extreme cruelty. At the hearing she testified that the decedent was not the father of plaintiff, and the trial court, upon so finding in pursuance of her testimony, included in the interlocutory decree a provision awarding plaintiff's custody to her and reciting that the decedent should not be required to contribute to plaintiff's support. No final decree was ever entered, the wife, Jeraldine Gonzales, explaining that several reconciliations undertaken with the decedent were followed by successive separations, and adding that up to the time of his death he contributed intermittently to plaintiff's support. She also stated on both the first and second trials of this action that her testimony in the divorce proceedings with respect to the paternity issue affecting the status of the child was false and was given because she feared that otherwise the trial court might award the custody of plaintiff to the decedent. At the time of the divorce proceedings, she was but seventeen years of age.

[2-5] It is true that this divorce litigation was relevant to the question of damages sustained herein by plaintiff, for at the time of the decedent's death the interlocutory decree stood as a final adjudication between the husband and wife on the issues there submitted, including custody of the plaintiff and the liability of the decedent to contribute to the wife for his care and support. Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; In re Estate of Hughes, 80 Cal.App.2d 550, 555, 182 P.2d 253. While plaintiff was not a party to the divorce proceedings and consequently the decree therein entered should not be deemed conclusive of his right to a recovery in this wrongful death action, see Davis' Administrator v. Cincinnati, New Orleans and Texas Pa-

cific Railway Company, 172 Ky. 55, 188 S. W. 1061, 1064, Ann.Cas.1918E, 414; Note Ann.Cas.1918E, p. 419, nevertheless it does signify a judicial determination relieving the decedent of any legal obligation to contribute to the wife for plaintiff's support and, as such, it is material on the question of the amount of damages, if any, sustained by plaintiff as the result of the decedent's death. Civ.Code, sec. 3281. However, as above noted, the trial court did not limit the admission of the divorce decree to the issue of damages, but rather admitted it for all purposes—including the issue of legitimacy—and such procedure clearly constituted serious error in the light of our statutory law.

[6] Furthermore, the instructions of the trial court served to accentuate its error in permitting defendants to contest plaintiff's legitimacy. Without detailing the instructions on the point, it is sufficient to state that they reflect the trial court's view that plaintiff's paternity claim was an open, controvertible issue for the jury's determination from the evidence adduced as above outlined. But in the absence of any prior determination of plaintiff's status in an adjudication which was final and binding upon him, defendants were precluded from challenging his legitimacy for, as to them, plaintiff was in legal effect conclusively presumed to be legitimate. Civ.Code, sec. 195. Accordingly, he was entitled to an instruction plainly stating that fact to the jury in support of his heirship claim in this action, and the trial court's failure to so charge constituted error of a most prejudicial nature.

Likewise available to plaintiff as ground for reversal of the judgment herein is the trial court's refusal to admit into evidence the stipulation as to liability made by defendants on the first trial. Pertinent to this point is the following excerpt from those proceedings as contained in the present record: "Mr. Noland [counsel for plaintiff]: I have been advised—I think I am correct that you stipulate to liability? Mr. Hoge [counsel for defendants]: Yes, as to the facts surrounding the happening of the accident."

In chambers and before the taking of any testimony on this second trial, plaintiff's counsel offered in evidence this admission of liability and claimed the benefit thereof in disposition of that issue. The record of the first trial as to this agreement between counsel dispensing with proof of the admitted fact shows that it was made without limitation. On the second trial defendants made no application for relief from the effect of their stipulation nor showed any cause for such consideration. Rather defendants' counsel simply asserted a change of position and objected to the competency of the stipulation as evidence, upon the theory that it had no binding force beyond the first trial. With this proposition the trial court agreed and so ruled in the defendants' favor.

[7, 8] It is the general rule that where a stipulation is distinctly and formally made for the express purpose of relieving the opposing party from proving some fact, and no provision is made by its terms indicating a limitation of scope or the duration of its effect, that admission can be introduced in evidence and is available upon a subsequent trial of the same action, unless the court permits its withdrawal upon proper application therefor. Wigmore on Evidence, 3rd Ed., Vol. IX, sec. 2593, p. 593; see anno. 100 A.L.R. 775; Nathan v. Dierssen, 146 Cal. 63, 65–66, 79 P. 739; Andrew v. Bankers' & Shippers' Ins. Co., 125 Cal.App. 24, 27–28, 13 P.2d 515; Crenshaw v. Smith, 74 Cal.App.2d 255, 267, 168 P.2d 752. For an effective discussion and review of the law on this subject as it prevails in this state, it will suffice to refer to the recent case of Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, where in footnote 1, page 73, 67 S.Ct. 156, page 159, 91 L.Ed. 80, the following observations are made: "In California a valid stipulation is binding upon the parties. McGuire v. Baird, 9 Cal. 2d 353, 70 P.2d 915; Webster v. Webster, 216 Cal. 485, 14 P.2d 522; see 23 Cal.Juris. 826. It is available at a second trial unless in terms otherwise limited, Nathan v. Dierssen, 146 Cal. 63, 79 P. 739; Crenshaw v. Smith, 74 Cal.App.2d 255, 168 P.2d 752;

see Le Barron v. City of Harvard, 129 Neb. 460, 262 N.W. 26, 100 A.L.R. [767], 775, and will be controlling at the second trial unless the trial court relieves a party from the stipulation. First National Bank v. Stansbury, 118 Cal.App. 80, 5 P.2d 13. Relief from a stipulation may be granted in the sound discretion of the trial court in cases where the facts stipulated have changed, there is fraud, mistake of fact, or other special circumstance rendering it unjust to enforce the stipulation. Sacre v. Chalupnik, 188 Cal. 386, 205 P. 449; Back v. Farnsworth, 25 Cal.App.2d 212, 77 P.2d 295; Sinnock v. Young, 61 Cal.App.2d 130, 142 P.2d 85; see 161 A.L.R. 1163. In the present case there is no intimation in the record or briefs of fraud, excusable neglect, or other ground for relief."

[9, 10] While as noted in the above quotation, relief from an unqualified stipulation of facts may be had in a proper case, defendants' objection here to the admission of their previous stipulation on the liability issue was not, in terms or effect, an application to be relieved therefrom through the exercise of judicial discretion by the trial court, but was an unconditional challenge to its competency and binding force in subsequent litigation. The trial court ruled in accordance with defendants' theory as to the legal effect of the stipulation and rejected it as competent evidence on the second trial. Since defendants' argument as made in no manner invoked the discretion and powers of the trial court on the subject of their right to withdraw from the stipulation admittedly made on the first trial, the decision on the point here cannot be correlated with those considerations as a factor of support. Nor does it matter whether or not defendants' counsel, in discussing with plaintiff's counsel the issues to be contested on the second trial, stated that "we [are] not going to admit liability," for the mere notice of a change of position would not affect the binding character of the stipulation by reason of its unlimited terms, in the absence of an order of the trial court procured in an affirmative application for such relief upon a showing of circumstances constituting cause therefor. Herbst v. Vacuum Oil Co., 68 Hun 222, 22 N.Y.S. 807, 808. As the record here stands, the conclusion is inescapable that the trial court, in denying the reception in evidence and the controlling effect of the stipulation on the issue of liability, committed error prejudicial to plaintiff.

The judgment is reversed.

GIBSON, C.J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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34 Cal.2d 239

McKINLEY et al. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Sac. 5941.

Supreme Court of California, in Bank.

Sept. 14, 1949.

Rehearing Denied Oct. 13, 1949.

Original proceeding by D. R. McKinley and Lillian E. McKinley, co-partners doing business under the name of Channel Bakers, also known as Channel Pie Shop, and others, as members of the Sacramento Wholesale Bakers Association, against California Employment Stabilization Commission and others for a writ of mandate directing the Insurance Appeals Board to vacate certain decisions granting benefits to claimants and to compel director of employment to strike out charges made to accounts of petitioners because of such payments.

Unemployment compensation had been granted to employees locked out of bakeries following a strike at the plant of one member of the association in support of the union's demand for a change in master contract with association.

The Supreme Court, Edmonds, J., granted a writ, compelling the removal of charges against employers' accounts on the ground that volitional cause of work stoppage rested with employees.

Gibson, C. J., Traynor, and Carter, JJ., dissented.

1. Master and servant 🔑78.3(41)

The Unemployment Compensation Act discloses legislative intent that persons who are involuntarily and innocently out of work as the result of a labor dispute should not suffer by loss of unemployment benefits. Gen.Laws, Act 8780d, § 56.

2. Master and servant 🔑78.3(41)

Under the "volitional test" as to right of an employee to unemployment compensation benefits during a labor dispute, right to benefits depends upon whether employee left his job of his own free will or was forced to do so because of acts of others. Gen.Laws, Act 8780d, § 56.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Volitional Test".

3. Master and servant 🔑78.3(41)

Where union and employers' association bargained collectively on an industry wide basis, all parties knew that a strike or lockout at one plant would result in a stoppage of all work, and employees authorized union to call a strike at one or more of the plants to enforce demands for a change in master contract, employees who were locked out of other plants after a strike was called at one plant were not entitled to unemployment benefits, since volitional cause of work stoppage rested with employees. Gen.Laws, Act 8780d, § 56.

4. Mandamus 🔑82

Where unemployment benefits were erroneously paid to claimants, employers were entitled to writ of mandate to require director of Department of Employment to remove from official records the charges against employers' accounts by reason of such payments. Gen.Laws, Act 8780d.

* * *

Gilford G. Rowland and Rowland & Craven, Sacramento, for petitioners.

Fred N. Howser, Attorney General, and Charles W. Johnson, Deputy Attorney General, for respondents.

Charles P. Scully, San Francisco, as amici curiae on behalf of respondents.

EDMONDS, Justice.

Seven employers, members of the Sacramento Wholesale Bakers Association, petition for a writ of mandate directing the Insurance Appeals Board to vacate and set aside certain of its decisions granting benefits to claimants, and to compel the Director of Employment to strike out all charges made to the accounts of the petitioners because of such payments. As a result of the rather unique administrative procedure which was followed, the petitioners now concede that the awards cannot be vacated; however, the charges against the employers' accounts may be stricken from the records if the determination of the board was erroneous. The case is presented upon an agreed statement of facts, and the only question for decision is whether the board correctly determined that the petitioners' employees are not excluded from benefits under section 56 of the Unemployment Insurance Act, as amended in 1945, Gen.Laws, Act 8780d.

The association, comprising all of the Sacramento "machine shop baking industry", was organized in 1935 for the purpose of representing its members in labor relations. Prior to the formation of the association, either individually or jointly the employers had entered into contracts with the Bakery and Confectionary Workers' International Union of America, Local 85. Since 1935, a master contract upon an industry-wide basis was utilized, and on behalf of the employers, executed by the executive secretary of the association. Prior to 1946, each employer indicated his concurrence by signing the master contract; since that year the employers have declined to do so, taking the position that each of them is bound by the action of the secretary of the association.

According to the agreed statement, "[t]he members of the Association understood among themselves that they would act as a unit in collective bargaining matters, and that a strike against any one or more members would be treated by them as a strike against all. This position had been known to the union by statements, letters and prior action, (p. 37, 625, p. 38

1.4; p. 39), but the union at no time expressed either agreement or disagreement with this position. The collective bargaining agreement in force during the time involved herein contained no provision on this point." The page references are to testimony in the transcript of proceedings before the referee. This testimony is referred to in the petitioners' reply brief as uncontroverted and is summarized as follows: "That in the past work stoppages have occurred in the baking industry in Sacramento, and that the Union took action against less than all of the members of the Bakers Association, and that when such action was taken, the others closed. * * *" This summarization is not contradicted by the union; clearly the parties agree that, when in the past the union invoked economic sanctions against less than all of the employers who were parties to the master contract, the others closed their places of business.

By the master contract made in January, 1946, uniform wages, hours and working conditions were established for the employees of all member employers. Early in 1947, less than 30 days prior to the expiration date of the contract and in accordance with its terms, the union advised the executive secretary of the association that it desired to amend the contract generally as to wages, hours and working conditions.

During the negotiations which followed, the members of the union employed in the petitioners' plants authorized the negotiating committee, in its discretion, to call a strike against any one or more of the employers. When negotiations broke down, the union declared a strike against the Butter Cream Baking Company, one of the members of the association. Pickets were stationed at the Butter Cream plant and remained until a month later, when an agreement was reached between the union and the association for a new master contract.

On the day that the picket line was established, a representative of the employers stated to a union representative at the scene that the strike against one employer would be treated as a strike against all. The union representative replied that he had expected such a result. Thereupon, and within the following few days, the other employers closed their plants. The employees in these bakeries continued to work until the plants were closed.

Throughout the entire period of the dispute and until its settlement, the union's sole demand was for changes in the contract with the association. At no time, either before or after the picket line was established, were demands made upon the individual employers. After the other bakeries ceased operations, the picket line included employees from bakeries other than the struck plant.

Section 56 of the Unemployment Insurance Act, as amended in 1945, provides: "An individual is not eligible for benefits for unemployment, and no such benefits shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed." Stats.1945, ch. 1178, p. 2225, Deering's Gen.Laws, 1945 Pocket Supp., Act 8780d, sec. 56.

The petitioners contend that the employees who have claimed and received benefits are within the exclusionary provisions of the act in that (1) the employers had "good cause" to close their plants under the rule laid down in Bunny's Waffle Shop v. California Employment Comm., 24 Cal.2d 735, 151 P.2d 224; (2) the employees made the strike at Butter Cream their own and voluntarily participated in it; and (3) section 56 must be construed liberally "to promote the purpose of the Act, i. e., to provide benefits only to those who are involuntarily unemployed through no fault of their own." The respondents reply that (1) according to the stipulated facts, the employees did not leave their work voluntarily; (2) the cause of the unemployment was the closing of the plants and not the trade dispute; and (3) the board's determination as to unemployment benefits is based upon certain language in the Waffle Shop case.

[1, 2] Provisions disqualifying from benefits an employee whose unemployment is the result of a labor dispute are to be found in the unemployment compensation statutes of all of the forty-eight states. In most jurisdictions, however, the legislature has made certain exceptions to the general disqualification provision. 49 Columb.L.Rev. 550 [1949]. Lack of such express statutory exception in the California act led this court in Bodinson Mfg. Co. v. California Employment Comm., 17 Cal. 2d 321, 328, 109 P.2d 935, 940, to state that disqualification "depends upon the fact of voluntary action" by the claimant. That decision recognized the obvious legislative intent that persons who are involuntarily and innocently out of work as the result of a labor dispute should not suffer by loss of unemployment benefits. Accordingly, the right to benefits under section 56 of the statute was said to depend upon whether the worker left his job of his own free will or was forced to do so because of the acts of others.

The disagreement between the parties to the present controversy arises from the difference in their respective views as to the cause of the claimants' unemployment. The employers contend that it was the union action of striking the Butter Cream plant which caused the shutdown; the respondents argue that the employees were willing to work in the petitioners' plants and did so until they were locked out.

In Bunny's Waffle Shop v. California Employment Comm., 24 Cal.2d 735, 151 P.2d 224, certain restaurant owners sought to compel their employees, through their union, to deal with a newly organized San Francisco Employers' Council in obtaining a collective bargaining agreement. The union refused to bargain except with the individual employers as had been the custom. To compel joint negotiations, the restaurant owners made a reduction of 25% in wages, and a six-day week with split shifts was established instead of the existing five-day week and straight shift. When the employees were paid at the lower rate, they left their jobs. Subsequently the restaurants were closed down. Later, the employers sued to obtain the relief demanded in the present case and the question presented for decision was whether the employees were disqualified from receiving benefits under the Unemployment Insurance Act because they left their work.

The commission contended that, in effect, the employers' action constituted a lockout. This position was upheld because the court determined, after reviewing the employers' acts, that they were disassociated from any bona fide proposal in connection with the dispute, hence, "when claimants left their work, they left because of this economic weapon and not because of the trade dispute then in existence." In reaching its conclusion, the court recognized that, in reality, the form of the cessation of employment is not controlling and the determinative factor is the volitional cause of the work stoppage. In other words, although the employees left work of their own choice, that choice was not freely made but was compelled by the economic weapon which the employers used. This is the only sound and fair way to apply the subjective volitional test stated in Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935.

[3] Applying this rule to the issue in the present case, the stipulated facts clearly show that the employees of the Sacramento bakeries left their work voluntarily and, therefore, should have been excluded from receiving unemployment benefits. Continuously since 1935, the union and the association, by collective bargaining, had entered into one master contract which included all of the employers and the employees of the baking industry of Sacramento. It seems clear that under such industry-wide, single contract negotiation, economic action by either side, whether strike or lockout, would be considered by each of the parties as action against the entire group struck or locked out. However, for the purpose of furthering the demand for certain amendments to that contract, the members of the union, by group action, voted to strike. The selection of a certain plant or plants for a shutdown by strike at a particular time was a mere matter of strategy in the conduct of the trade dispute which equally involved all

of the bakeries and their employees. This, in effect, applied the union's economic sanctions against each employer and brought about the unemployment of all of its members. Had the association acted first by closing down one of the members plants and the union followed with a strike against all of the remaining plants, it would be equally clear that the volitional act causing unemployment was the initial shutdown.

Either the union or an individual employer, at any time, could have broken off joint negotiations and bargained with its employees on an individual basis. But that course was not taken. At no time did the union purport to be directing any action solely against the Butter Cream plant; instead, the union continued throughout to deal directly with the association for the purpose of obtaining a new master contract. To say, therefore, that the act of striking the one plant did not shut down work in other plants of the association which were subject to the labor negotiations for the purpose of obtaining a master contract is wholly unrealistic. Industry-wide negotiations had been established by these employers and consistently carried on for over 10 years.

The volitional test established in Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935, was based upon the principle that innocent victims of a trade dispute should not suffer loss of their unemployment insurance rights. But the unemployment of the bakery workers was caused by their own action taken with full knowledge of its consequences. In the Waffle Shop case, the unemployment was due to a lockout; here the lockout of the bakers was due to a strike. The lockout of the restaurant workers was attributed to the concerted action of the employers; the strike of the bakers was by the vote of all the employees concerned and was directed against all of the employers who were parties to the master contract. The volitional test itself is based upon a just analysis of a substantial subjective element and it cannot properly be extended or perverted by insistence upon mere form. In this case the union members knew from letters and statements as well as from prior strike action that any strike during negotiations would result in stoppage of all work. When, in the face of that information, union members authorized a strike, they placed themselves outside the class of persons who are properly protected by the subjective volitional exception to section 56 which was stated and applied in the Bodinson case.

The respondents rely heavily upon the following language of the Waffle Shop opinion: "A strike against a single member of an employers' collective bargaining unit involves economic action against that employer only and subjects to disqualification under the Unemployment Insurance Act those employees only who leave their work because of the dispute. If the other employers thereupon choose to close their establishments and lock out their employees, such employees cannot be charged with leaving their work because of a trade dispute." 24 Cal.2d at page 741, 151 P.2d at page 227. But an important fact which must be considered in this connection is that the employer group involved in the Waffle Shop case was newly formed and had never been a bargaining agent for the restaurants; instead, the question of whether it should be the bargaining agent was one of the major issues in the dispute. The quoted language, therefore, is not applicable to a situation such as the present one where the evidence shows a long-standing practice of contracting between the union and a group of employers as a unit; if it may be said to have that effect it was dictum and, in either event, it is not here controlling.

[4] A peremptory writ of mandate will therefore issue, requiring the Director of the Department of Employment to remove from the official records the charges against the petitioners' accounts which are the subject of this proceeding.

SPENCE, J., concurs.

SCHAUER, Justice.

I concur both in the judgment and in the opinion of Justice Edmonds. Were it not for the majority holding in Bunny's Waffle Shop v. California Employment Commission (1944), 24 Cal.2d 735, 151 P.2d 224, a different result might consistently be reached. It may be arguable that a simple and literal interpretation and application of section 56 (Unemployment Insurance Act) might be preferable to the volitional test first evolved in Bodinson[1] and then expanded in Bunny's case (supra). But to me the important thing, judicially, is not so much *how* we interpret section 56 as that, *having* interpreted it, we shall apply that interpretation fairly and consistently. I am satisfied that unless Bunny's case is to be squarely overruled no result other than that reached by Justice Edmonds can fairly and consistently be reached.

In Bunny's case there was no literal shut down or lockout. A trade dispute had arisen; the employers, who theretofore had not, as among themselves, bargained collectively with the union (see page 736 of 24 Cal.2d, page 225 of 151 P.2d) demanded collective bargaining with their newly formed association (as stated at page 737, of 24 Cal., at page 225 of 151 P.2d they "wished to negotiate a single contract") and, as an alternative, announced that upon continued refusal to negotiate with their association wages would be reduced and certain working conditions changed. The employes refused to accede to either alternative and walked out.[2] But their walkout was held not to be voluntary and the concerted act of the employers was held (see page 739 of 24 Cal.2d page 226 of 151 P.2d), to be "tantamount to a lockout."

As shown more completely in the footnote quotation the commission held that "The economic weapon * * * was created by the employers * * * and it alone, rather than the trade dispute that occasioned it, was the cause of the leaving of work", and concerning that finding of the commission this court held that "[I]t rejects the trade dispute as the cause of such leaving and is sufficient to support the award of benefits."

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[1] Bodinson Mfg. Co. v. Cal. Emp. Com. (1941) 17 Cal.2d 321, 327, 109 P.2d 935.

[2] As stated at page 738 of 24 Cal.2d at page 225 of 151 P.2d, "[T]he employers submitted a proposed collective bargaining agreement to the Joint Board and offered to continue operations on the old terms pending negotiations. The unions rejected this proposal, reiterating their demand for individual agreements for more favorable conditions of work, and on that day directed employees of one of the restaurants to strike if the owner refused to sign such an agreement. The following day the restaurant owners' policy committee met and formulated a plan of action, and on July 3, 1941, the employers posted notices in their establishments that until the Joint Board and the unions agreed to negotiate collectively, wages would be reduced to 75 per cent of the previous rate, a six day week would replace the prevailing five day week, and split shifts instead of straight shifts would apply to all culinary workers * * * [The commission] held that the employers' imposition of a split shift, a six-day week, a twenty-five per cent cut in wages, and a uniform pay-day, for the sole purpose of compelling the employees [24 Cal.2d at p. 739, 151 P.2d at page 226] to bargain collectively with this group of employers was tantamount to a lockout, that the employees consequently left work as the result of the employers' acts and not voluntarily and that they were therefore not disqualified under section 56(a) of the act. * * * The commission's decision apparently is based upon the conclusion that the leaving of work was not voluntary, but [24 Cal.2d at p. 740, 151 P.2d at page 226] it also found that the leaving was attributable to the employers' changes in wages and conditions of work, to continue in effect until the unions would negotiate with them. Petitioners do not question this finding but contend that their acts were but an additional step in a trade dispute, and that when claimants left their work because of such acts, they left because of a trade dispute and are therefore not eligible for benefits. This reasoning fails to distinguish between leaving in the course of a trade dispute and leaving because of a trade dispute. The act does not disqualify an employee from receiving benefits in all cases where his unemployment results directly or indirectly from a labor dispute, but makes him ineligible only if he left his work because of the dispute. There must therefore be a direct causal connection between the trade dispute and the leaving of work. * * * [24 Cal.2d at p. 742, 151 P.2d at page 226]. The economic weapon * * * was created by the employers and directed against their employees, and it alone, rather than the trade dispute that occasioned it, was the cause of the leaving of work. * * * The finding of the commission as to the cause of claimant's leaving of work * * * was one that it was entitled to make under the facts. [Citation.] This finding rejects the trade dispute as the cause of such leaving and is sufficient to support the award of benefits."

Certainly in Bunny's case we should have been required to hold (on that phase of the case) that the employes had left their work voluntarily because of a trade dispute and, hence, were disqualified from benefits, unless we held, as the majority did, that it was proper to relate responsibility for the work stoppage to the party who created its actual and directly impelling cause. To that end the court looked behind the fact that literally there was no lockout or shut down and that the employes could have continued at work either at reduced pay and different hours or, by agreeing to collective bargaining, at the old rates and conditions. In literality, the walkout there was, of course, due to a trade dispute, a sparing contest in which employers and employes were exchanging blows. The employers led with the collective bargaining or wage reduction-hour increase blow and the employes retaliated with the walkout punch. The court held that it was proper to examine into the trade dispute and necessary "to distinguish between leaving in the course of a trade dispute and leaving because of a trade dispute. * * * There must * * * be a direct causal connection between the trade dispute and the leaving of work"; that there the leaving of work, while occurring *during* a trade dispute was *directly* caused by the act of the employers. In other words, the court related the leaving of work to the direct or proximately impelling cause, the concerted act of all empoyers directed against all empoyes; the court held accordingly that the employers were responsible and that the employes had not left voluntarily because of the trade dispute.

Here the similarity to Bunny's case is patent, but reversed as to parties. In this case, the employes struck the first, the impelling blow. The retaliation by the employers was exactly what the employes expected when they struck and was directly responsive to their action. In Bunny's case it was, of course, true, in literality, that the employes had a choice in the solution of which they exercised discretion. But it was not a free choice; they had to yield something in either alternative submitted by the employers. Hence, their walkout was not voluntary; the situation requiring the choice and necessitating some concession was created by the employers and their attempt was to force that choice on the employes. Here, it is rationally inescapable, we have exactly the same situation but in reverse.

The employes and the employers, in the case before us, were, and long had been, parties to one master contract which set forth the terms and conditions binding on all employes and all employers. Although only the employes of Butter Cream Baking Company literally walked out, that strike in principle and in its object was directed against all of the employers who were members of the association as much as against Butter Cream. The vote of the employes did not merely authorize a strike against Butter Cream; it authorized the strike against any or all of the employers as the union strategists might from time to time determine was expedient to the end of attaining the master contract modifications demanded by the union and which, if made, would be applicable to all employers; the union knew that a strike against one would be treated as a strike against all and they intended that the strike should be effective in obtaining concessions from all the employers, not just from Butter Cream.

Certainly here the employers (as did the *employes* in Bunny's case) had a choice which involved the exercise of discretion. They could accede to the demand of the union for the changes in the master contract or they could relinquish the joint participation in collective bargaining which the master contract obviously called for, and permit their plants to be struck one by one or in groups, until separate contracts were executed, or they could close all plants on a walkout from one. But this was not a free choice any more than the choice of the employes in Bunny's case was a free choice. In either alternative submitted by the union the employers were required to yield something. Clearly, if Bunny's case is to be followed, the employers, already having a master contract, did not have to accept either of the alternatives offered to them. They had a master contract; they had specifically notified the union that a strike against one would be treated as a strike against all; they did exactly that and that, exactly, is what the union expected when the strike was called.

It is asserted in support of respondents' position that "[A]lthough the union knew that the employers had an understanding among themselves that 'they would act as a unit in collective bargaining matters * * *,' the understanding was entirely unilateral upon the part of the employers, and the union never indicated that it would accept or be bound by it." It is as difficult for me to square that factual statement with any rational view of the facts depicted by the record as it is to reconcile the legal position of the dissenters with the holding in Bunny's case. The record shows unequivocally that the employers' association was organized in 1935 for the express purpose of representing its members and acting as a unit for them in collective bargaining with the employes, that continuously from that time on the association *has* represented its members in such collective bargaining with the union and that, quite to the contrary of being "entirely unilateral upon the part of the employers" and never recognized by the union, the fact is that from 1935 on *the union did accept* the employers' association as the bargaining unit and its contracts were made with that association. In fact the very master contract in question, to secure changes in which the strike was authorized and called, is a collective bargaining contract to which the union and the association were the contracting parties and in which contract the members of the association (likewise the members of the union) acted as a unit.

The position of the dissent of the Chief Justice appears to be grounded upon a few sentences selected from the record and construed as disassociated from their context. If these selected sentences could be said to create a material conflict in evidence then we would have a different situation. But no such case is here. Since we have stipulated facts before us I find no justification for ignoring some of those stipulated facts in order to ascribe a meaning to certain statements which meaning is untenable if the ignored facts are given effect. The statements in the record particularly relied on for the dissenting position are as follows: "The members of the Association (employers) understood among themseves that they would act as a unit in collective bargaining, and that a strike against any one or more members would be treated by them as a strike against all. This position had been known to the union by statements, letters and prior action * * * but the union at no time expressed either agreement or disagreement with this position * * * At a meeting at the premises of the struck bakery * * called within an hour after a picket line was established, a representative of the employers stated to a union representative that the strike against one employer would be treated as a strike against them all, to which the union representative replied that he expected such result."

Apparently on the strength of the last quoted language it is asserted that "the understanding [of the employers that 'they would act as a unit in collective bargaining matters, and that a strike against any one or more members would be treated by them as a strike against all'] was entirely unilateral upon the part of the employers." But it seems to me that a fair representation of the record requires that the foregoing sentences be read and understood in the light of the fact that the stipulation of facts also states that "the individual members of the union * * * authorized its negotiating committee to call a strike against *any one or more* of the employers in the committee's discretion * * * and this committee was authorized by the membership to conduct negotiations and *do whatever was necessary* to advance the progress of negotiations as that committee deemed best, and to call a strike, if that was necessary, *at any plant or plants* of the employers decided upon by the committee * * *" (Italics added.) Furthermore, it seems to me to be established beyond question on this record that the strike was directed against all the employers because admittedly there was but one contract by which all employes and all employers were bound; the demand of the union was for amendments to that one master contract affecting all employers; the strike vote authorized the union's committee to "do whatever was necessary to advance the progress of negotiations" for the amendments demanded and, to that end, to shut down "any plant or plants of the employers decided upon by the committee."

In my view the designation of the statement, "The members of the Association understood among themselves that they would act as a unit in collective bargaining" etc., as a "unilateral agreement" is, in the light of the other stipulated facts, unfair and inaccurate. Certainly the members of the association understood "among themselves" that "they would act as a unit in collective bargaining." But so did the union understand that fact. In truth the union's negotiations were conducted with the employers' association as a unit and it was concerning a contract which had been executed by the association as a bargaining unit and by the union as a bargaining unit that the negotiations were conducted; and, as stated in the stipulation, "The union's sole demand was for changes in the contract with the Association. At no time during negotiations were demands made upon the individual employers either before or after the picket line was established."

Lastly, it is noted that the dissent of the Chief Justice places reliance on a quotation from Bunny's case (p. 741 of 24 Cal. 2d, page 227 of 151 P.2d): "A strike against a single member of an employers' collective bargaining unit involves economic action against that employer only and subjects to disqualification under the Unemployment Insurance Act those employees only who leave their work because of the dispute. If the other employers thereupon choose to close their establishments and lock out their employees, such employees cannot be charged with leaving their work because of a trade dispute. The threat of possible economic action involved in a strike upon one of a group of employers * * * bears no analogy to the employers' act in the present case, for the latter culminated in actual economic action against the employees that caused them to leave their work."

The fallacy of such reliance is obvious. The statement quoted must be either a dictum which is grossly contrary to the actual holding of Bunny's case, or it is distinguishable and, in implication, supportive of Justice Edmonds' conclusions. Surely, it was not intended to suggest a "heads I win-tails you lose" application of the rule dependent on an interchange of the positions of the parties to the dispute. Examining the quotation for its true significance I think this appears: At the very outset its language is that "A strike against a single member of an employers' collective bargaining unit," etc. But here we do not have a *strike against a single member;* the strike was directed against *all* the members—"to advance the progress of negotiations" for amendments to the one master contract—although at the moment a walkout had been called in one plant only. That call was but a matter of strategy, deemed most expeditious to attain the end against all. Thus the major premise of the entire statement falls as to this case.

Secondly, the quotation reads, "The threat of possible economic action involved in a strike upon one of a group of employers * * * bears no analogy to the employers' act in the present [Bunny's] case, for the latter culminated in actual economic action against the employees that caused them to leave their work." Here it was the "actual economic action" of the *employes against the employers* which "caused them" (the employers) to shut down the plants.

Since we have in Bodinson, and as expanded in Bunny's case, declared the volitional direct cause test, and since the undisputed facts here do not disclose any material distinguishing feature, adherence to sound judicial process requires that we apply that test. If in Bunny's case the walkout was involuntary and directly caused by the concerted act of the employers it is at least equally clear that here the shut down by the employers was involuntary and the work stoppage was directly caused by the strike vote and action of the employes. Their strike vote and call were voluntary and directly resulted, as was expected, in the shut down. The *free* choice here was that of the employes, not of the employers. The writ must issue, as directed.

SHENK, J., concurs.

GIBSON, Chief Justice.

I dissent. The record in this case clearly shows that petitioners locked out their employees, and it is impossible for me to understand how it can be said that the employees left their work within the meaning of section 56 of the Unemployment Insurance Act. That section, as amended in 1945, provides: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: (a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed." Stats. 1945, ch. 1178, p. 2225, Deering's Gen.Laws, 1945 Pocket Supp., Act 8780d, § 56.

It is conceded that the right to benefits depends upon whether the worker left his job of his own free will or was *forced* to do so because of the acts of others and that under the Bodinson case section 56 disqualifies only those workers who *voluntarily* leave their work. Bodinson Mfg. Co. v. California Employment Comm., 17 Cal. 2d 321, 327, 109 P.2d 935. Thus, although the section clearly precludes the payment of benefits to employees who go out on strike, American-Hawaiian S.S. Co. v. California Employment Comm., 24 Cal.2d 716, 151 P.2d 213; W. R. Grace & Co. v. California Employment Comm., 24 Cal.2d 720, 151 P.2d 215; Bodinson Mfg. Co. v. California Employment Comm., supra, it has been treated as not generally disqualifying workers who are locked out by their employers. See Bunny's Waffle Shop v. California Employment Comm., 24 Cal.2d 735, 741, 151 P.2d 224; Bodinson Mfg. Co. v. California Employment Comm., supra, 17 Cal.2d at page 327, 109 P.2d at page 939. It would be a contradiction in terms to hold that a locked-out employee had *voluntarily* left his work.

Here it clearly appears from the agreed statement of facts that after the strike was called against one member of the employers' association, the bakery workers employed by petitioners remained at their jobs until petitioners closed down their plants and that petitioners' employees were willing to continue working throughout the course of the strike. Ordinarily it would be expected that this would end the matter, establishing that the employees had not voluntarily left but, rather, had been forced to leave their work.

The majority opinion, however, concludes that the employees "left their work voluntarily and, therefore, should have been excluded from receiving unemployment benefits." The theory seems to be that because the union and the employers' association were negotiating with regard to proposed changes in the master contract, and because the union had been informed of an understanding or agreement solely among the employers that a strike against one of them would be treated as a strike against all, the members of the union, by permitting a strike against one employer, thereby "placed themselves outside the class of persons who are properly protected by the subjective volitional exception to section 56 which was stated and applied in the Bodinson case." In my opinion this theory is unsound and does not warrant the conclusion that petitioners' employees voluntarily left their work.

Before considering the questions of law raised herein, it should be noted that certain statements in the majority opinion may create a misapprehension of the true nature of the facts presented by the record. It is stated as a fact or inferred that the union was aware that "under such industry-wide, single contract negotiation, economic action by either side, whether strike or lockout, would be considered by each of the parties as action against the entire group struck or locked out." There is nothing in the agreed statement of facts to the effect that the *union* might strike all remaining plants if the *association* first closed down one or more plants. Further, although the union knew that the employers had an understanding among themselves that "they would act as a unit in collective bargaining matters, and that a strike against any one or more members would be treated by them as a strike against all", the understanding was entirely unilateral upon the part of the employers, and the union never indicated that it would accept or be bound by it.

It is also stated as a fact in the majority opinion that "In this case the union members knew from letters and statements as well as from prior strike action that any strike during negotiations *would result in stoppage of all work.*" [Italics added.] The italicized portion goes beyond the agreed statement of facts submitted by the parties, which shows only that the union knew that a strike against one "would be treated by [the employers] as a strike against all." It does not follow that the union was aware that the understanding necessarily included an agreement to invoke a lockout or shutdown, since there is other conduct, short of a lockout, which might constitute treating the strike against one as a strike against all. For example, it might have been intended that the remaining employers would publish statements in the newspapers declaring that there was in effect a strike against all, or the employers might have contemplated financial aid to the one struck establishment or assistance in obtaining nonunion labor to reopen that plant or to meet any need for additional workers in their own plants. The understanding might also mean that the employers considered that a strike against all of them, although without a lockout or shutdown, would be a talking point or special matter for discussion during the collective bargaining negotiations.

Although it might be possible to infer that the notification to the union of the understanding among the employers included a threat to close the plants, it does not seem proper to draw such an inference under the circumstances of this case. Petitioners in this mandamus proceeding of course have the burden of proving all facts upon which they rely, and in their pleadings they claimed that the union was aware of such an understanding as is assumed by the majority opinion. The petition alleges that the members of the union knew that "any action" against one employer "would be considered and treated by the said Association as strike action against all, and that all of the establishments would be closed if a strike was called against one or more, but not all," and it is also alleged that the bakery employees acted with "full knowledge that the said action would bring about the closing of the plants of petitioners herein." These allegations, however were denied by the return to the writ. The dispute as to the facts was resolved, at the request of this court, by the agreed statement of facts filed herein, and in view of the pleadings it seems apparent that the language used in the agreed statement was a deliberate modification of or departure from the broader allegations of the petition.

Even if it be assumed that the union knew of an understanding among the employers that, upon a strike against one, the remaining employers would close their plants, this fact is not controlling. The understanding, as we have seen, was not in any way acceded to or binding upon the employees, but was entirely unilateral, among the employers only, and it seems erroneous to rely upon the fact that the union had been informed of the understanding and of the employers' intended course of action. It would broaden the disqualification provisions of the statute to permit employers to escape liability for unemployment due to what would otherwise be classed as a lockout merely by adopting the device of entering into such a unilateral agreement in anticipation of a strike against one employer and then notifying their employees of the agreement. If petitioners would have been chargeable with a lockout had the agreement to close down their plants not been made until after the strike was called against Butter Cream Baking Company, they should likewise be held responsible here. We need not determine whether the understanding would be of importance if it had been made part of the collective bargaining contract, because the union never agreed to be bound by it and, therefore, should not be charged with having improperly disregarded it. Clearly the employers should not be able to defeat any right of the union to act as it did merely by giving notice of the agreement made among themselves that they would not recognize a strike as being limited to one employer.

Although the employees authorized the negotiating committee of the union to call a strike against "any one or more of the employers in the committee's discretion," the agreed statement of facts clearly shows that the "union declared a strike against * * * one of the members of the Association." The fact that the authorization first given was broader than the strike eventally declared is, of course, immaterial, since it did not, of itself, constitute action directed against the employers.

The only real issue in this case, therefore, is whether, regardless of knowledge of the unilateral understanding, petitioners' employees were chargeable with having voluntarily left their work in petitioners' establishments by virtue of the fact that, during the course of negotiations for changes in the industry-wide contract, they, as union members, authorized a strike which was called against only one of several employers as a means of publicizing the dispute. The majority of the court, however, do not make it clear whether they would reach the same result if the factor of knowledge of the understanding were not regarded as a ground for their holding. In my opinion the activity in which petitioners' employees engaged did not constitute conduct which should be treated as such a direct cause of the shutdown that it was tantamount to a voluntary leaving of work. Although the strike at Butter Cream Baking Company may have induced petitioners to close their plants, there is no contention that operation of the plants actually became impossible because of the strike, and there is nothing to show that any property or business would have been injured by continuation of operations. The only reason given by petitioners for the shutdown is that it was put into effect as an economic weapon on the part of the employers to counteract the tendency that the strike against one bakery might have to break up the united stand adopted by the members of the association.

Even if we assume that petitioners are correct in attributing the strike against the Butter Cream Baking Company to a plan or scheme to force the employers to yield one at a time to the demands made in the labor dispute,[1] the strike did not compel petitioners to take such a drastic step as locking the doors, and for the purposes of section 56, it should not excuse petitioners' responsibility for their conduct. A lockout to protect the united stand of a group of employers is, in principle, no different from any other lockout deliberately used by an employer as a weapon to serve his purposes during the course of a labor dispute. This is not meant to suggest that the employers were not free to take such a step but merely that if they did so they, and not their employees, should be required to bear full responsibility for stopping of operations, insofar as the Unemployment Insurance Act is concerned, and there is no sound basis for holding that the employees in effect voluntarily left their work.

The majority opinion apparently concedes that the members of the union could call a strike against only one employer without being subject to a charge of having voluntarily left work in petitioners' establishments by merely going through the formality of withdrawing from negotiations with the association and, instead, bargaining with each employer separately. It is stated that "either the union or an individual employer, at any time, could have broken off joint negotiations and bargained with its employees on an individual basis. But that course was not taken." If this is all that is required of a union as a prerequisite to conducting a strike against only one employer without disqualification under section 56 of those of its members who work for the remaining employers, the rule adopted by the majority is simply one of form and not of substance, because a union need merely announce at the conference table that it is henceforth negotiating with each employer as an individual rather than as a member of the association. Further, there is nothing to indicate that the employers in the present case were in any manner injured or misled by the union's failure to take such a step, and to hold that compensation was improperly awarded here solely because the union did not follow the suggested procedure seems clearly unjustified.

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[1] The agreed statement of facts does not contain the reason why the union called the strike against only one employer, but at the hearing before the referee a representative of the union testified that it was because "we felt that we couldn't take all the bakeries on together."

Moreover, the conclusion reached by the majority is contrary to Bunny's Waffle Shop v. California Employment Comm., 24 Cal.2d 735, 151 P.2d 224. In that case restaurant employees, during the course of a labor dispute, refused to bargain collectively with an employers' association and insisted upon dealing individually with each employer. The employers made a 25 per cent cut in wages and a change in working shifts solely for the purpose of compelling the employees to bargain with the association, and the employees thereupon left their work. It was held that the cause of the employees' leaving work was not the trade dispute but the cut in wages and the change in shifts which were unrelated to, though motivated by, the demands made in the dispute. The court concluded, therefore, that the employees were not disqualified under section 56 since they had not left their work "because of a trade dispute." The employers in that case had argued that the wage cut and the change in shifts were merely steps in the course of a labor dispute and were similar to the act of a union in striking against an individual member of an employers' association. The court, however, using language directly in point here, distinguished the two types of acts, 24 Cal. 2d at page 741, 151 P.2d at page 227: "A strike against a single member of an employers' collective bargaining unit involves economic action against that employer only and subjects to disqualification under the Unemployment Insurance Act those employees only who leave their work because of the dispute. If the other employers thereupon choose to close their establishments and lock out their employees, such employees cannot be charged with leaving their work because of a trade dispute. The threat of possible economic action involved in a strike upon one of a group of employers * * * bears no analogy to the employers' act in the present case, for the latter culminated in actual economic action against the employees that caused them to leave their work." It is apparent that the statement is not dictum, as claimed by petitioners, since it was the answer given by the court to the point raised.

The argument that the result reached by the majority is required, or even suggested, by the Bunny's Waffle Shop case is without foundation, for at least two major reasons. The majority apparently assume that the Bunny's case held that the employees there involved did not *voluntarily* leave work and that the wage cut and the change in work shifts were tantamount to a lockout and in effect compelled the employees to leave work. They say, speaking of the Bunny's case, that "although the employees left work of their own choice, that choice was not freely made but was *compelled* by the economic weapon which the employers used." [Italics added.] Although not made entirely clear, the majority opinion then seems to reason that under this rule, applied by analogy to the present case, the strike against Butter Cream Baking Company *compelled* the remaining employers to close down in the same manner that the wage cut in the Bunny's case compelled the restaurant workers to leave. From this it is concluded that petitioners did not voluntarily lock out their employees but, rather, that the employees, in effect, voluntarily left their work.

First, the assumption that the Bunny's case treated the employees as not having voluntarily left work is erroneous. The opinion in that case makes it perfectly clear that, although the *commission* had relied upon the theory that the wage cut amounted to a lockout, compelling the employees to leave, the court adopted an entirely different ground for concluding that the disqualification of section 56 was not applicable. See 24 Cal.2d at pages 739–742, 151 P.2d at pages 226–227. The court held that section 56 did not apply because there was no "direct causal connection" between the leaving of work and the trade dispute, within the meaning of that portion of the statute disqualifying employees only when they leave "because of a trade dispute." As stated at page 741 of 24 Cal.2d at page 227 of 151 P.2d, the employees in the Bunny's case "left because of this economic weapon and not because of the trade dispute then in existence. The fact that the trade dispute was unquestionably the motivating cause of the employers' acts does not establish any direct causal relation between the dispute and the employees' leaving of work." Thus, although it is possible that the same result could have been reached in the Bunny's case upon the theory now attributed to it by the majority herein, the decision was specifically placed upon a different ground.

The opinion in the Bunny's case indicates that the court really treated the employees as having voluntarily left work. At pages 742–743 of 24 Cal.2d, at page 228 of 151 P.2d, the court found it necessary to determine whether, *"if they left their work voluntarily,* they are subject to the temporary disqualification imposed by section 58 (a) of the act upon one who 'left his most recent work voluntarily without good cause * * *'", and it was held that there was "good cause" within the meaning of section 58(a). [Italics added.] It is obvious that section 58(a) would not have required any discussion at all if, as the majority opinion now states, the ruling with respect to section 56 had been placed upon the theory that the leaving was not voluntary.

Second, even assuming that the Bunny's case held that a 25 per cent wage cut is tantamount to a lockout and therefore compels the employees to leave, and, further, that the case, by analogy, would support a rule that employees will be chargeable with having voluntarily left work if they engage in conduct which, similarly, *compels* their employers to lock them out, it still does not follow that a strike against one employer is sufficient to compel lockouts by the remaining employers involved in the trade dispute. Although it is understandable that a 25 per cent wage cut, or, for example, a 50 or 75 per cent cut, could reduce the income of a worker to such an extent that he would actually be forced to seek a different job in order to survive, the situation of a worker whose wages have been so reduced is not at all comparable to that of the petitioners here. These employers were in no way compelled or forced to lock their doors to protect their plants or businesses, and the purpose of the lockout was simply to give them an added advantage in bargaining with the union. The strike was directed only against the Butter Cream Baking Company, and petitioners were not subjected to strike, or threat to strike, or any other activity which would have forced them to close down. The most that can be claimed is that petitioners were subjected to indirect pressure resulting from a strike against a *different* employer at a *different* establishment which might place them at some disadvantage in negotiations. Such activity upon the part of the union cannot reasonably be treated as sufficient to justify the drastic step of a lockout any more than could the conduct of the union in the Bunny's case justify the action of the employers in imposing the 25 per cent wage cut, insofar as fixing responsibility for unemployment insurance is concerned.

Finally, the determination that the accounts of petitioners should not be chargeable with benefits paid to their employees amounts to disregarding the differences between the California statute and those adopted elsewhere. The California law is unique, since the labor dispute qualification found in section 56, based solely on a voluntary leaving of work, does not appear in the unemployment insurance acts of any other jurisdiction today.[2] Statutes in a large majority of the other states were modeled after the English unemployment insurance laws and the federal Social Security Board Draft Bill, and they provide that an employee is disqualified from receiving benefits if his unemployment is due to a stoppage of work existing because of a labor dispute and he either participates in or is interested in the dispute or belongs to a class of workers who are participating in the dispute.[3] Such statutes operate not only to disqualify employees who would be ineligible under the California law but, in addition, bar many individuals who do not voluntarily leave their work.[4]

It is clear that at the time the California Unemployment Insurance Act was adopted, the Legislature was familiar with both the type of labor dispute disqualification based upon the voluntary act of the individual worker and the type of provision now enacted in most other states. When the California unemployment insurance bill was first introduced in January, 1935, only the State of Wisconsin had passed an unemployment insurance act, and under that statute as it then existed an employee was ineligible for benefits "during any period for which he has left and is out of employment because of a trade dispute still in active progress in the establishment in which he was employed." Wis.Stat. [1931 Special Session] ch. 20, § 108.04(5) c.; subsequently amended by Wis.Stat. [1935] ch. 192, § 4, p. 292. The legislators who proposed the California bill knew of the provisions of the original Wisconsin statute and also of the English legislation which disqualified an employee "who has lost employment by reason of a stoppage of work which was due to a trade dispute." (1935 Assembly Journal, Vol. 1, p. 101; Unemployment Insurance Act of 1920, 10 & 11 Geo. V. ch. 30(8); see 14 & 15 Geo. V. ch. 30(4).) The language adopted by the Legislature in section 56 is almost identical with that of the former Wisconsin provision. We must assume, therefore, that the Legislature deliberately selected a disqualification provision based on voluntary action by the individual employee and rejected the broader type of disqualification found in the English legislation. The conclusion reached by the majority of this court, however, fails to give full recognition to the fact that our statute is not like those in most of the states, and it improperly increases the scope of the disqualification provision beyond its plain and reasonable meaning.

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[2] At least two states, Wisconsin and Pennsylvania, once had statutes similar to section 56, but they were subsequently revised to adopt provisions similar to those prevailing in a majority of the states. (See C.C.H., Unemployment Insurance Service: Pa., ¶4102; Wis., ¶4034A.) Eight jurisdictions have expressly mentioned lockouts in the disqualification provisions of their unemployment insurance acts. Of these, three provide for automatic disqualification of locked out employees (see C.C.H. Unemployment Insurance Service: Ariz., ¶4034; Dist. of Col., ¶4029A; N.Y., ¶4108), four provide that there is no disqualification (see C.C.H. Unemployment Insurance Service: Ky., ¶4036; Ohio, ¶4030; Minn., ¶4051; W.Va., ¶4099), and one provides that there is no disqualification if the lockout is unjustified. (See C.C.H. Unemployment Insurance Service: Miss., ¶4011.) Two other jurisdictions may provide for no disqualification in the event of a lockout. (See C.C.H. Unemployment Service: Colo., ¶4010; Utah, ¶4015.)

[3] About 26 states have provisions of this type. (See C.C.H. Unemployment Insurance Service: Ark., ¶4042; Ga., ¶4010; Idaho, ¶4066; Ill., ¶4031; Ind., ¶4071; Iowa, ¶4014; Kan., ¶4028; Maine, ¶4013; Md., ¶4016; Mass., ¶4056; Mich., ¶4041; Mo., ¶4048; Mont. ¶4009; Neb., ¶4052; N. H., ¶4028; N. J., ¶4012; N. M., ¶4009; N. C., ¶4072; N. D., ¶4102; Okla., ¶4009; Pa., ¶4102; S. D., ¶4061; Tex., ¶4018; Va., ¶4029; Wash., ¶4077; Wyo., ¶4027.)

Twelve states have statutes which contain somewhat different language but are generally the same in that disqualification is not dependent on whether the employee is voluntarily or involuntarily unemployed. (See C.C.H. Unemployment Insurance Service: Ala., ¶4034; Conn., ¶4028; Del., ¶4027; Fla., ¶4032; La., ¶4008; Nev., ¶4028; Ore., ¶4025; R. I., ¶4044; S. C., ¶4010; Tenn., ¶4034; Vt., ¶4071; Wis., ¶4034A.)

For an analysis and classification of the various provisions see Fierst and Spector, Unemployment Compensation in Labor Disputes [1940] 49 Yale L.J. 461; Lesser, Labor Disputes and Unemployment Compensation [1945] 60 Yale L. J. 167; Note [1949] 49 Col.L.Rev. 550.

[4] For example, participants in a labor dispute who were locked out by their employers have been held not entitled to benefits. In re North River Logging Co., 15 Wash.2d 204, 130 P.2d 64, 66; Adkins et al. v. Indiana Unemployment Security Division, 117 Ind.App. 132, 70 N.E.2d 31, 34–35; see Fash v. Gordon, 398 Ill. 210, 75 N.E.2d 294, 297. The courts have also ruled that employees who were laid off because of a strike, but who did not join in the strike were disqualified, regardless of their conduct or sympathies, if some of the workers of their class or grade went on strike. Auker v. Review Board, etc., 117 Ind. App. 486, 71 N.E.2d 629; Unemployment Compensation Commission v. Martin, 228 N.C. 277, 45 S.E.2d 385; Members of Iron Workers' Union v. Industrial Commission, 104 Utah 242, 139 P.2d 208; In re Deep River Timber Co.'s Employees, 8 Wash.2d 179, 111 P.2d 575.

The only case we have been able to find which dealt with a situation similar to that involved here held that the employees, comparable to petitioners' employees, were in fact locked out and were therefore entitled to unemployment insurance. Bucko v. J. F. Quest Foundry Co., Minn.1949, 38 N.W.2d 223, 231. The statute there considered is different from ours in that it disqualifies an employee who has left or lost his employment because of a strike or other labor dispute and then provides that nothing in the provision "shall be deemed to deny benefits to any employee who becomes unemployed because of a lockout." M.S.A. § 268.09, subd. 1(6). The court stated that under this statute the "fault which governs is the ultimate and final act causing the unemployment rather than any preliminary act which might furnish a motive for a lockout causing the unemployment." It also said that by so construing the statute it gives "meaning to the present statutory provision excepting from disqualification unemployment due to a lockout without doing violence to the legislative declaration of public policy limiting the right to benefits of unemployment due to no fault of the employe."

It is not the province of this court to consider either the merits of the trade dispute underlying the stoppage of work or the social desirability of paying benefits to petitioners' employees. See W. R. Grace & Co. v. California Employment Comm., 24 Cal.2d 720, 731, 151 P.2d 215; Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 325, 109 P.2d 935. There is nothing in section 56 or any other portion of the Unemployment Insurance Act which would justify a denial of benefits here, and the possibility that the allowance of benefits in a case such as this may furnish some members of a union with funds which could be used to help finance a labor dispute is plainly a matter which only the Legislature may consider.

The alternative writ of mandate should be discharged and the application for a peremptory writ denied.

TRAYNOR, J., concurs.

CARTER, Justice (dissenting).

As I understand the position taken by the majority in this case, it is to the effect that where an industry-wide collective bargaining agreement exists between employers and a labor union and there is an understanding between the employers that if a strike is called against one of their group the others will close their plants, the employees who are locked out as a result of such closing cannot obtain unemployment compensation benefits, and that if in such a situation one employer closes his plant, the union may declare a strike against all of the other employers, and all of the employees thrown out of employment as a result of such action are entitled to unemployment compensation benefits. I do not believe that it was the intention of the Legislature that the Unemployment Insurance Act should be so construed. Neither do I believe that anything said in Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935, or in Bunny's Waffle Shop v. California Employment Comm., 24 Cal.2d 735, 151 P.2d 224, requires such an interpretation of the Unemployment Insurance Act. It strikes me that the interpretation placed on this act by the majority in this case is just a step toward the ultimate holding that an over-all employers' association which unites industry of the community or state for the purpose of dealing with labor problems could make it impossible for any employee who belongs to a union to obtain unemployment insurance benefits by closing all industry in the event of a strike against any member of the group comprising the over-all employer organization. In other words, in order for an organized employer group to exert economic pressure to prevent a strike against one of their group, a complete shutdown or lockout could be inaugurated with the result that none of the employees locked out and thereby involuntarily unemployed could receive unemployment compensation benefits.

I cannot believe that it was the intention of the Legislature in enacting Section 56 of the Unemployment Insurance Act, to disqualify from unemployment insurance benefits any employees except those who actually leave their work because of a trade dispute between them and their employer. This is what the act provides, and to extend it further by judicial interpretation, is, to my mind, nothing more or less than judicial legislation. I would deny the writ prayed for in this case.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

ANSELL v. CITY OF SAN DIEGO.

Civ. 3969.

District Court of Appeal, Fourth District, California.

Sept. 22, 1949.

Hearing Granted Nov. 17, 1949.*

H. G. Ansell sued the city of San Diego for damages arising out of a collision between an automobile driven by plaintiff and a rubbish truck owned by defendant.

The Superior Court, San Diego County, Arthur L. Mundo, J., granted defendant's motion for judgment of dismissal on ground that claim as filed was insufficient at law and plaintiff appealed.

The District Court of Appeal, Griffin, Acting P. J., affirmed the judgment on the ground that the filing of plaintiff's claim with the auditor-comptroller was not a substantial compliance with statutory requirements for filing of claims against municipalities.

Automobiles 🔑230

Filing of claim for damages arising out of collision between automobile driven by plaintiff and truck owned by municipality with city auditor-comptroller did not substantially comply with statute requiring verified claim to be filed with clerk or secretary of legislative body of municipality, and judgment of dismissal of plaintiff's action was proper. Government Code, § 1981; St.1931, pp. 2475–2477.

J. A. Donnelley, Richard P. MacNulty, San Diego, for appellant.

McInnis & Hamilton, Jean F. DuPaul, City Attorney, San Diego, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff filed a complaint for damages against defendant City of San Diego because of a collision which occurred on March 27, 1945, between an automobile driven by plaintiff and a rubbish truck owned by defendant. After plaintiff's evidence was in, counsel for defendant moved for judgment of dismissal on the ground that the claim, as filed, was insufficient in law, and that plaintiff had not filed a claim with the City Clerk of defendant City, as provided by section 1981 of the Government Code. The trial court granted the motion and a judgment of dismissal was entered. This appeal is from that judgment. By stipulation, that portion of the reporter's transcript relating solely to the matter of the filing of plaintiff's claim with the defendant city was prepared. The claim received in evidence and upon which plaintiff's cause of action was predicated reads in part as follows:

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* Subsequent opinion 216 P.2d 455.

"To: The City of San Diego
Civic Center
San Diego, California
Claim of H. G. Ansell, 4409 Forty-fourth St., San Diego 5, Calif.
"Claim for loss of income," etc.........
"Total claim $8,152.00
Dated at San Diego, California, June 15, 1945.
(Signed) H. G. Ansell
H. G. ANSELL
(Claimant)
(Seal)
"Subscribed and sworn to before
me this 18th day of June, 1945.
John P. Morris
My commission expires Jan. 18, 1949."

Defendant's answer to the second amended complaint denies that plaintiff presented in writing or filed with the *clerk* of the City a *verified* claim for damages. It is defendant's position, and it is the sole issue involved, that the purported claim, as filed, completely fails to meet the statutory requirements in that it was not *verified* and further that it was not presented and filed with the *City Clerk.*

The evidence is without conflict that on June 15, 1945, plaintiff presented to and filed with the City Auditor-Comptroller the written claim above set out. The evidence shows that on that same day, on a mimeographed form used for such purpose, the City Auditor referred the claim to the City Attorney and sent him the original claim with the letter of transmittal. A copy of the letter of transmittal was forwarded by the Auditor to the City Clerk. In due course of time the City Attorney returned the claim to the City Auditor, together with a written opinion recommending its denial. Thereafter, the City Auditor wrote a letter addressed to the Mayor and City Council, enclosing a copy of the City Attorney's opinion recommending denial of the claim, which letter was, on March 27th, filed with the City Clerk. A copy of that letter was also sent to the City Attorney and City Manager. The City Clerk placed the City Auditor's letter in reference to the City Attorney's opinion recommending denial of the claim, on the docket for action by the City Council. The claim was denied by it on April 2, 1946.

Section 1981 of the Government Code provides that "* * * a *verified claim* * * * shall be presented in writing and filed with * * * the clerk or secretary of the legislative body of the * * * municipality, as the case may be. * * *" Plaintiff claims that although the claim was filed with the City Auditor-Comptroller, under the evidence produced there was a "substantial compliance" with that section, and that the notarization indicated was a sufficient verification.

It should be here noted that the *claim* filed with the City Auditor-Comptroller was never forwarded to the City Clerk, presented to, nor filed with him. Only letters in reference thereto reached his office. The act itself specifically requires that the *claim* be presented to the secretary of the legislative body. It needs no citation of authority to believe that the City Clerk is the secretary of that legislative body and not the Auditor-Comptroller. The act itself shows that no other officer is authorized to receive the claim for filing or for the purpose of presenting it to the legislative body. This is brought out in Johnson v. City of Glendale, 12 Cal.App.2d 389, 395, 55 P.2d 580, 582, where it is said:

> "The 1931 act requires presentation of a verified claim to the clerk of secretary of the legislative body of the municipality or other governing board within ninety days after the accident has occurred. It states no exceptions, and we are unable to believe that any were intended. If there were to be exceptions, they should have been stated in the act itself. It is not for the courts to create them."

In Wilkes v. City and County of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759, 761 (Hearing denied by the Supreme Court), plaintiff sought damages against the City for alleged negligence. She filed her verified claim, as here, with the comptroller of the City and County, and did not file it with the Clerk of the legislative body. In that case the City Charter required that all claims for damages be presented to the comptroller. The court there held that the filing of the claim with the comptroller was not complying with the public liability statutes of the State which control in these types of cases and that in order for plaintiff to prevail she must, as a prerequisite, have filed her claim with the Clerk of the legislative body. The Court then said:

"The matter of *where* the claim was filed may be intimately connected with the fiscal system of a municipality in preparing budgetary matters as part of its internal business; but one of the underlying purposes in designating a department wherein to file such a claim is that it may be paid, if found just, without litigation."

Johnson v. City of Glendale, supra, and Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, are cited as authority for the holding. In the latter case it was held that the filing of the claim with the Board of Public Works did not satisfy the statute and that the claim should have been presented to and filed with the Secretary of the City Council. The court there held that the provisions of the Liability Act, Stats.1931, pp. 2475–2477, are mandatory and the City cannot waive the requirement as a prerequisite to suit, and that the filing of an *unverified* claim is ineffectual. Recent decisions have relaxed the previous rules to some extent in reference to "substantial compliance", as where the sufficiency of the specification of time is concerned, involving a continuing water damage as in Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779. However, it has been uniformly held and is pointed out in that case that "substantial compliance" cannot be based upon the entire absence of one factor, that is, that no claim was filed, or not filed in time, or with the wrong official, or was not verified, citing cases. See, also, Eppstein v. City of Berkeley, 52 Cal.App.2d 395, 126 P.2d 365; Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362 and Ghiozzi v. City of South San Francisco, 72 Cal.App.2d 472, 164 P.2d 902. In the last-cited case it is said, quoting from Powers Farms, Inc., v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717, that "written notice to or actual knowledge on the part of public officers does not constitute a substantial compliance with or satisfaction of a statutory requirement for a verified claim, or give rise to an estoppel to assert the defense. The long-established rule in this state is that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction. Compliance with the statute is mandatory and the requirement may not be waived." [72 Cal.App.2d 472, 164 P.2d 905.]

Counsel for plaintiff cites many cases bearing on the question of "substantial compliance", and makes a good argument as to why equitable principles should apply, citing the dissenting opinion in Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13. However, we find no case which directly holds that filing the claim with the Auditor-Comptroller or any such officer other than the Secretary of the legislative body, is a substantial compliance with the provisions of section 1981 of the Government Code. The precedent established by the cases above mentioned precludes a reversal of the judgment.

Since the disposition of this question sustains the judgment, the second question as to whether the acknowledgment of the claim, as indicated, constitutes a verification, is academic. It therefore becomes unnecessary to decide it. Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 668, 161 P. 116; 2 Cal.Jur. p. 123, sec. 12.

Judgment affirmed.

MUSSELL, J., concurs.

93 Cal.App.2d 669

UNION NAT. BANK OF PASADENA v. HUNTER et al.

Civ. 16813.

District Court of Appeal, Second District, Division 3, California.

Sept. 20, 1949.

The Union National Bank of Pasadena, as trustee, brought an action against Jennie Fraser Hunter, individually and as administratrix of the estate of Rachel J. Fraser, and others to determine the proper disposition of income of an inter vivos trust created by Rachel J. Fraser.

The Superior Court, Los Angeles County, Paul Nourse, J., held that estate of deceased beneficiary was entitled to one-half income of trust for duration of trust, and Jennie Fraser Hunter, individually and as administratrix of Rachel J. Fraser, appealed.

District Court of Appeal, Shinn, P. J., held that gift of income to deceased beneficiary was personal to him and did not survive his death and reversed the judgment with directions.

1. Appeal and error ⚿842(1)

Where trial court's decision as to proper disposition of income payable under trust agreement was based solely on terms of written instrument, issue was one of law on which appellate court would make independent determination.

2. Trusts ⚿140(3)

Rule of interpretation favoring cross-remainders to survivor of two concurrent life beneficiaries by implication is only invoked in order to effectuate a manifested intention of the trustor to achieve that result.

3. Trusts ⚿140(3)

Where trust agreement conferred separate gift of one-half of income to trustor's daughter and one-half to trustor's grandson, during daughter's life, and grandson predeceased daughter, and trust agreement made no express provision for disposition of deceased grandson's income in such case, but provided for disposition of corpus if grandson was not living at daughter's death, and did not manifest intention to give daughter more than one-half of income, surviving daughter was not entitled to income of deceased beneficiary. Gen.Laws, Act 8696, § 4.

4. Annuities ⚿3

An annuity in terms payable for a fixed or ascertainable period will not pass to the annuitant's estate upon his death before the expiration of such period where the instrument in which annuity is created shows an intention that payments shall be personal to the beneficiary.

5. Trusts ⚿140(1)

Where trust agreement provided that trustee was to distribute income for use and benefit of beneficiaries "hereinafter named" and provided that all "income and/or principal" shall be payable only and personally to respective beneficiaries entitled thereto, gift to trustor's grandson of one-half of income was personal to him and did not survive his death.

6. Trusts ⚿140(1)

Where trust instrument provided that one-half of the net income accruing subsequent to trustor's death was payable to trustor's grandson and one-half of net income was payable to trustor's daughter, and trust instrument provided that upon death of trustor's daughter, trust estate was to terminate and entire remaining trust estate was to be paid to grandson, if he were living, but grandson died unmarried without issue before trustor's daughter, and trust made no provision for distribution of accrued income, court would not supply omission but income would be payable to trustor's estate for distribution.

7. Trusts ⚿140(1)

Under statute providing that income accrued but not actually paid prior to trustor's death was payable to person next entitled to income by terms of transaction by which principal was established, income accrued but not actually received by trustee prior to trustor's death was payable to only surviving trust beneficiary. Gen. Laws, Act 8696, § 4.

Roland Maxwell and Paul H. Marston, Pasadena, for appellant, Jennie Fraser Hunter.

Clarence M. Heublein, Los Angeles, for respondent, Matthew W. Hunter.

SHINN, Presiding Justice.

Jennie Fraser Hunter, individually and as administratrix of the estate of Rachel J. Fraser, appeals from a judgment directing the payment of certain income of an inter vivos trust created by Rachel J. Fraser.

Article VI of the trust instrument, which was executed on July 8, 1932, provided that the entire net income from the trust estate was to be paid to the trustor during her lifetime; upon her death, to her husband during his lifetime; and upon his death (or if he predeceased the trustor, then upon her death) to her daughter, Jennie Fraser Hunter, during her lifetime. Upon the death of Jennie Fraser Hunter, or if she predeceased the survivor of the trustor and her husband then upon the death of such survivor, the trust was to terminate and the entire principal and undistributed income was to become the property of William Fraser Hunter, the trustor's grandson. Subsequent to the execution of the trust, the trustor's husband died. Thereafter, on September 2, 1939, pursuant to a power reserved, the trustor amended Article VI to read:

"Article VI The entire net income received from the trust estate and available for distribution, shall be paid in quarterly or other convenient installments to the Trustor while she shall live.

"(a) Upon the death of the Trustor the Trustee shall pay the net income, as hereinabove provided from the remaining trust estate, as follows:

"1. One-half thereof to Mrs. Jennie Fraser Hunter, daughter of the Trustor, and

"2. One-half thereof to William Fraser Hunter, grandson of the Trustor.

"(b) Upon the demise of Mrs. Jennie Fraser Hunter, daughter of the Trustor, this trust shall terminate and the entire remaining trust estate, principal and undistributed income, shall then be distributed, paid to and become the property of her son, William Fraser Hunter, if he be then living.

"(c) In the event that William Fraser Hunter, grandson of the Trustor, is not living at the time of the death of Jennie Fraser Hunter, then upon the termination of the trust upon the death of Mrs. Jennie Fraser Hunter, the entire remaining trust estate, principal and undistributed income, shall then be distributed, paid to and become the property of the legal heirs of the Trustor, Rachel J. Fraser, under the laws of succession of the State of California, and the trust thereupon terminated."

William Fraser Hunter died unmarried, and without issue, on July 5, 1945, bequeathing all of his property to his father, Matthew W. Hunter, the divorced husband of appellant. The trustor died on July 14, 1946. Union National Bank of Pasadena, as trustee, thereafter brought this action to determine the proper disposition of the income which, under the amendment of 1939, would have been paid to William Fraser Hunter had he survived the trustor, and also of income accrued but undistributed prior to the death of the trustor. The court held that, by the amendment, "the trustor gave to William F. Hunter a gift of one-half (1/2) of the net income of the said trust for the duration of the said trust, which is for the life of Jennie Fraser Hunter." It also found that the trust instruments made no provision for distribution of income accrued but undistributed at the time of Rachel J. Fraser's death, and concluded that section 4 of the Principal and Income Act, Stats.1941, ch. 898, p. 2476; Deering's Gen.Laws, Act 8696, governed as to such distribution. By the judgment, one-half of the net income accruing subsequent to the trustor's death, together with one-half of the income accrued but not actually received by the trustee prior to the trustor's death, was ordered to be paid to respondent Matthew W. Hunter, as personal representative of the estate of William F. Hunter. All income actually received but not distributed by the trustee prior to trustor's death was ordered to be paid to appellant, as administratrix of the trustor's estate. Appellant contends that the estate of William F. Hunter is not entitled to any of the trust income, and that his share thereof should be paid to her, either in her individual capacity as surviving cobeneficiary, or in her capacity as administratrix, as intestate property of the trustor's estate.

[1] Nowhere in the trust instrument, as amended, is to be found any express provision for the disposition of one-half of the net income in the event William predeceased his mother, Jennie, upon whose death the trust was to terminate. Yet, that the trustor contemplated such a possibility is seen in paragraph (c) of the amendment, which provides that if William is not living at the time of Jennie's death, the corpus shall go to the trustor's heirs. Under the circumstances, there being no authorization for accumulations, three possible dispositions might be made of the half of the income otherwise payable to William: (1) It might be paid to Jennie, as the surviving cobeneficiary; (2) it might be paid to the estate of William; (3) it might be paid to the trustor's estate as property not disposed of by the trust instrument. The question for decision is which of these solutions should be followed. The answer depends, ultimately, upon the intention of the trustor as manifested by the language of the trust instrument. 1 Scott on Trusts, sec. 143, p. 718; Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 462, 165 P.2d 15, 163 A.L.R. 838; 25 Cal.Jur., sec. 145, pp. 286-287. Since the trial court's decision was based solely on the terms of the written instruments, the issue is one of law upon which this court is required to make its independent determination. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; First Trust & Savings Bank v. Costa, 83 Cal.App.2d 368, 372, 188 P.2d 778.

[2, 3] Appellant's contention that the income should be paid to her personally is based on the proposition that the survivor of two concurrent life beneficiaries possesses an implied cross-remainder in the estate of the deceased cobeneficiary, in the absence of a manifestation of a contrary intention. In support of her argument, appellant cites authorities adopting this view where a trustor has created two or more concurrent estates for life held as a tenancy in common with an express remainder to the survivor, or to a third person on the death of the survivor. Rest., Property, sec. 115, p. 359; 140 A.L.R. 841, and cases cited pp. 844-854. The cited authorities are not in point. Where the possession and use of the property, as distinct from the mere income thereof, is the subject of conveyance, some courts have implied a cross-remainder in order to carry out the intention of the trustor to transfer the entire undiminished corpus as a unit to the remaindermen upon the termination of the trust. See Dow v. Doyle, 103 Mass. 489; Glover v. Stillson, 56 Conn. 316, 15 A. 752; Jones v. Cable, 114 Pa. 586, 7 A. 791. Others have reached the same result where income is given to the beneficiaries as a class and not individually, see In re Boyer's Estate, 115 Pa.Super. 501, 175 A. 728; Clarke v. Rathbone, 221 Mass. 574, 109 N.E. 651, or where the language of the trust instrument justifies an inference that the income is to be shared equally among such of the named beneficiaries as are living, until the termination of the trust. See Loring v. Coolidge, 99 Mass. 191; New Jersey Title Guarantee & Trust Co. v. Elsworth, 108 N.J.Eq. 229, 154 A. 602; Kramer v. Sangamon Loan & Trust Co., 293 Ill. 553, 127 N.E. 877. The cases uniformly acknowledge that the rule of interpretation favoring cross-remainders by implication is only invoked in order to effectuate a manifested intention of the trustor to achieve that result. See also Rhode Island Hospital Trust Co. v. Proprietors, etc., 62 R. I. 83, 3 A.2d 236, 243; In re Grothe's Estate, 229 Pa. 186, 78 A. 88, 90; 33 Am.Jur., sec. 83, p. 540. Such intention may be reasonably inferred in particular factual situations such as those presented in appellant's cases. The present circumstances, however, are quite different, and provide no logical footing upon which to rest an implied cross-remainder in Jennie. On its face, the trust instrument conferred not a tenancy in common, but a separate gift of one-half of the income each to William and Jennie; the corpus vested in the remaindermen not on the death of the survivor, but on the death of Jennie, irrespective of when William should die; and the corpus clearly would pass to the remainder-

men as a whole regardless of the disposition of the income prior to the termination of the trust. At no place in the amendment has the trustor manifested an intention that Jennie should at any time receive more than one-half of the income. At least one purpose of the amendment, in fact, was to reduce her interest to one-half. We are persuaded that there would be no legal justification for awarding the income in question to appellant as cobeneficiary.

[4] The trial court's decision to award the income to the estate of William was premised on the theory, strenuously urged by respondent, that the amendment *expressly* conferred a vested gift of one-half of the income to William for the life of Jennie. It may be conceded that if the premise is sound, the award finds ample support in authority. Harrison v. Marden, 298 Mass. 148, 10 N.E.2d 109, 112 A.L.R. 577; Thompson v. Martin, 281 Mass. 41, 183 N.E. 51; Montanye v. Montanye, 29 App.Div. 377, 51 N.Y.S. 538; White v. Strowbridge, 133 Or. 638, 291 P. 798. It is well settled, however, and the foregoing cases contain nothing to the contrary, that "an annuity, in terms payable for a fixed or ascertainable period, will not pass to the annuitant's estate upon his death before the expiration of such period, where the instrument in which the annuity is created shows an intention that payments shall be personal to the beneficiary." Anno. 112 A.L.R. 581, 584, and cases there cited; see also First Nat. Bank of Chicago v. Cleveland Trust Co., 308 Ill. App. 639, 32 N.E.2d 964, 974; Union Trust Co. v. Fisher, 240 Mich. 68, 214 N.W. 941; 33 Am.Jur., sec. 3, p. 463.

[5] We are satisfied that the trust instrument sufficiently reveals the trustor's intention that the gift to William was to be a personal one limited to the duration of his life. The amendment merely gives one-half of the net trust income "to William Fraser Hunter, grandson of the Trustor," without more. Unlike the cases upon which respondent relies, there are no qualifying words providing that the gift shall be "for the life of" Jennie, although that would be the usual and customary way to express such an intention. Article I of the trust instrument requires the trustee to distribute the income "to or for the purposes hereinafter stated and for the use and benefit of the beneficiaries *hereinafter named.*" Article IX provides, in part, that "all income and/or principal shall be payable and deliverable *only and personally to the respective beneficiaries entitled thereto.*" Reading Article I and Article IX together, it appears from the portions thereof which we have italicized that the income was not to be paid to any one other than the named beneficiaries in person. It would seem self-evident, as was said in respect to a substantially identical trust provision in First Nat. Bank of Chicago v. Cleveland Trust Co., supra, 308 Ill.App. 639, 32 N.E. 2d 964, at page 975, quoting from Routt v. Newman, 253 Ill. 185, 97 N.E. 208, 209, that "'The continued existence of the recipient of the fund was necessary to a compliance with this requirement.'" The First National Bank and Routt cases both held that a provision for payment of trust income to the beneficiary in person showed an intention to limit the gift to the life of the beneficiary and thus precluded payment to his estate following his death prior to the termination of the trust. These cases alone sufficiently sustain the conclusion we have reached. But we need not rely solely upon them.

Article VIII of the trust provides additional evidence of the trustor's intent to make a personal gift. The relevant provisions of that article read, "If the income from this trust to which * * * any beneficiary of the trust may be entitled shall, in the discretion of the trustee * * * be insufficient * * * to provide any such beneficiary with reasonable care in case of illness or accident, then the Trustee may pay to, apply or expend for the use and benefit of such person so much of the principal, up to and including the whole thereof, as the Trustee may deem advisable, but not in the case of beneficiaries other than the Trustor * * * to exceed such part of the principal as is proportionate to the share of income such person is entitled to receive hereunder." Permission to invade the corpus for the welfare of the beneficiaries of the trust, by which we understand the trustor to mean the named beneficiaries, is in full accord with the concept of a personal gift, but not with respondent's theory that William's income interest was vested for the duration of Jennie's life. The latter theory, moreover, is clearly inconsistent with the expressed intention of the trustor that William is to take the corpus only in the event he survives his mother, and that if he does not survive her, it is to be ultimately distributed to the heirs of the trustor. Since the heirs of William, at least in the absence of any children who might also take under the trust as heirs of the trustor, were precluded from sharing in the corpus in the event which has occurred, it is highly improbable, and there is clearly no basis in the language of the trust for inferring, that the trustor intended such heirs to share in the income under such circumstances. It is more reasonable to infer that the trustor intended that the income would follow the corpus. We hold that the gift to William was personal to him, and did not survive his death.

[6] Upon thorough consideration, we are convinced that the trustor has failed to provide for the disposition of one-half of the trust income in the present situation. Viewing the trust instrument and its scheme of disposition as a whole and construing its words in context so as to carry out the trustor's intentions, we are unable to discern any expressed desire, nor any attempt at such expression, that the income should go either to William's surviving cobeneficiary or to his estate. In the language of In re Estate of Kruce, 10 Cal.App.2d 426, 429, 51 P.2d 1174, 1175, we may observe that "We are not asked to construe an imperfect or incomplete disposition, but to supply one which is not expressed at all, and which, we think, is not necessarily implied. If the testator omitted, as we are satisfied he did, to make a specific disposition of the remainder of the trust estate in the event that has occurred, that omission may not be supplied by the court. This is true whether the omission be the result of design or oversight." It follows that one-half of the trust income accruing subsequent to the death of Rachel J. Fraser to the termination of the trust should be paid to the personal representative of Rachel J. Fraser's estate for distribution as property undisposed of by the trust instrument. See In re French's Estate, 292 Pa. 37, 140 A. 549, 550; In re Grothe's Estate, supra; Glaser v. Chicago Title & Trust Co., 393 Ill. 447, 66 N.E.2d 410, 418–419; Routt v. Newman, 253 Ill. 185, 97 N.E. 208, 209; First Nat. Bank of Chicago v. Cleveland Trust Co., supra; In re Knox's Estate, 328 Pa. 188, 195 A. 34; Equitable Trust Co. v. Johnson, Del.Ch., 36 A.2d 257. Cf. In re Estate of Hamon, 136 Cal.App. 517, 29 P.2d 326.

[7] No objection is urged upon the appeal to the distribution by the judgment of all income accrued but undistributed at the time of the trustor's death, pursuant to the provisions of section 4 of the Principal and Income Act. Accordingly, we see no occasion for disturbing the award to the trustor's estate of income in the hands of the trustee at her death. With reference to income accrued but not actually received by the trustee prior to the trustor's death, however, section 4 provides it shall go to "the person next entitled to income by the terms of the transaction by which the principal was established." In view of the conclusions we have already reached, it is clear that the award of one-half of this income to the estate of William F. Hunter must fall. Although we have held the trustor's heirs entitled to income, their right flows not from the terms of the trust but from the laws of succession. It follows that Jennie Fraser Hunter, being the only person satisfying the statutory requisites, is entitled to all of the income accrued but not actually received by the trustee prior to the death of Rachel J. Fraser.

The judgment is reversed with directions to enter a decree in conformity with the views herein expressed.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 568

HANSEN v. HANSEN.

Civ. 14101.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1949.

Ann Hansen secured a divorce decree requiring Edward Hansen to pay her $25 a month for a period of 30 months for her support. More than six months after entry of decree defendant moved to modify decree to add a provision, which had been erroneously omitted from the decree, that monthly payments were to terminate on remarriage of plaintiff.

From an order of the Superior Court, San Francisco County, Sylvain J. Lazarus, J., granting the motion, the plaintiff appealed.

The District Court of Appeal, Peters, P. J., affirmed the order, holding that the error was merely a clerical error which could be corrected more than six months after entry of decree, and that the decree by implication contained a provision that payments were to terminate on remarriage of plaintiff.

1. Judgment ⚷304, 306

Though a court may not correct a judicial error, by a nunc pro tunc order more than six months after its entry, it may so correct a clerical error. Code Civ.Proc. § 473.

2. Judgment ⚷304, 306

Where an order or judgment inadvertently omits a provision expressly ordered inserted, failure to include it is a "clerical error" and not a "judicial error" even though it may be the error of the judge and not of the clerk, and it may be corrected more than six months after its entry. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Clerical Error" and "Judicial Error".

3. Divorce ⚷243

Where judge in divorce action expressly directed that provision giving divorced wife $25 a month for two and a half years should not apply if she should remarry, and reporter's transcript so showed, but decree prepared by attorney for wife, failed to so provide, there was a "clerical error" which could be corrected on motion of divorced husband more than six months after entry of decree. Code Civ.Proc. § 473.

4. Divorce ⚷247

On remarriage of divorced wife, divorced husband was not required in view of statute to continue monthly payments to wife under provision of decree providing for monthly payments over a period of 30 months for support of wife, and it was immaterial that decree erroneously omitted provision that monthly payments were to terminate on remarriage of wife. Civ. Code, § 139.

Phil F. Harvey, San Francisco, Julia M. Easley, San Francisco, for appellant.

Eugene Elerding, Berkeley, for respondent.

PETERS, Presiding Justice.

There is no merit to this appeal.

Appellant secured an interlocutory decree of divorce from her husband, the respondent. The interlocutory judgment, entered March 15, 1948, provided that the parents were to have joint custody of the children of the marriage, actual physical custody being given to appellant; that appellant was to receive all the furniture, fixtures, furnishings and personal property located in the former home of the parties; that respondent should pay to appellant the sum of $85 a month as support for the two children, and should also pay appellant the sum of $25 a month for a period of thirty months for her support and maintenance. On September 14, 1948, respondent filed a notice of motion, purporting to act under § 473 of the Code of Civil Procedure, to modify the interlocutory decree by adding thereto the condition that, if appellant remarried during the thirty-month period, the $25 monthly payments should cease. The affidavit in support of the notice of motion avers that such modification would be in precise accord with the actual ruling made by the trial judge at the time of trial. The motion was opposed by appellant, and was noticed for hearing on September 23, 1948, which was more than six months after the date of entry of the interlocutory decree. On October 1, 1948, a minute order was entered granting the motion to modify, followed on October 26, 1948, by a formal order modifying the interlocutory decree. This order recites that the interlocutory decree contains a "clerical mistake" in that it does not conform with the actual judgment of the court made in March, 1948; that at that time the court expressly directed that the $25 monthly payments should cease upon the remarriage of the wife, while the actual judgment was unconditional; that "to correct said clerical mistake aforesaid * * * and in the interest of justice, said Court on its own motion" modifies the decree to provide that if during the thirty-month period the appellant should remarry the $25 monthly payments should cease. The appeal is from this order.

The sole contention of appellant is that the error sought to be corrected was judicial and not clerical, and, therefore, could not be corrected more than six months after the entry of the interlocutory decree.

There are two complete answers to this contention. In the first place, the error was clearly a clerical one. The reporter's transcript of the divorce proceedings discloses that at the end of the trial the court orally designated what the decree should contain. As to the $25 monthly payments, the judge expressly directed that the decree should contain a provision giving appellant "$25 a month for the period of two and a half years, unless she gets married, of course, in the meantime. Then that allowance will terminate." The Court also directed the attorney for the wife to prepare the decree and to submit it to the attorney for the husband for approval. The attorney for the wife avers that he mailed a copy of the proposed decree to the husband's attorney on March 13, 1948, a Saturday. The decree was submitted to and signed by the judge on March 15, 1948. The husband's attorney denied ever receiving a copy of the proposed decree. At the hearing on the motion the trial judge stated that when he signed the decree he "assumed the decree contained that provision" making the $25 payments conditional. In response to the arguments of appellant's counsel the Court stated: "Counsel for the defendant need not reply to counsel's vehement argument and citation of authorities on this point. There is a higher law than the one that he recites, and that is the right that is given to every court at any time to correct its own records and make those records conform to what the Court intended. It certainly was not my intention that this woman was to receive support or alimony from her divorced husband after she was married to somebody else. I want that to appear distinctly in the record. * * * It wasn't the intention of the Court in any event, * * * for this woman to receive support from the man she wasn't married to, in the event of her marrying somebody else. * * * That is all there is to it, and the record will show that the Court itself is correcting its own records to conform with the views and intentions of the Court at the time the decree was made. No technicalities are going to prevent me from performing my duty in that regard, so the motion will be granted and it will apply to the interlocutory decree."

[1-3] The point need not be labored that the error here involved was clerical and not judicial. The trial court so found, and its determination is entitled to great consideration. While a court may not correct a judicial error by a nunc pro tunc order more than six months after its entry, it may so correct a clerical error. The law is now settled that, where an order or judgment inadvertently omits a provision expressly ordered inserted, the failure to include it is clerical and not judicial even though it may be the error of the judge and not of the clerk. Morgan v. State Bd. of Equalization, 89 Cal.App.2d 674, 201 P.2d 859; Benway v. Benway, 69 Cal.App.2d 574, 580, 159 P.2d 682; In re Estate of Remick, 75 Cal.App.2d 24, 27, 170 P.2d 96; Carter v. J. W. Silver Trucking Co., 4 Cal.2d 198, 204, 47 P.2d 733; In re Estate of Hultin, 29 Cal.2d 825, 829, 178 P.2d 756.

[4] In the second place, even if the error were judicial and not clerical, the original interlocutory judgment by implication and by operation of law necessarily contained the very clause to which objection is here made. There is no dispute but that the $25 monthly payments were for support and maintenance of the wife, and were not part of any division of property between the parties. Under such circumstances, § 139 of the Civil Code provides, in part, that: "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage." This provision, first added to our Civil Code in 1933 (Stats. of 1933, Chap. 412, p. 1039), merely enacted into statutory form a rule of public policy recognized long prior to 1933 by judicial decisions. Thus, in Cohen v. Cohen, 150 Cal. 99, 104, 88 P. 267, 270, 11 Ann. Cas. 520, the Court declared: "Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove." The rule is restated in Atlass v. Atlass, 112 Cal. App. 514, at page 516, 297 P. 53, where the Court also states that the rule is supported by the general weight of authority throughout the nation. In that case, after remarriage of the wife, the husband moved to strike the provision in reference to alimony. The trial court ordered that alimony should cease from the date of the order of modification. This was reversed, the appellate court holding that the duty to make alimony payments automatically ceased upon remarriage of the wife. For a general discussion of the rule since 1933 see McClure v. McClure, 4 Cal.2d 356, 362, 49 P.2d 584, 100 A.L.R. 1257; Rosson v. Crellin, 90 Cal.App.2d 753, 203 P.2d 841; Stucker v. Katz, 92 Cal.App.2d 843, 207 P.2d 879.

It thus seems clear that regardless of the omission in the interlocutory decree, that decree was limited in its legal effect by § 139, supra. To expressly include what was necessarily implied in the order was not error. At any rate, the trial judge acted well within his powers in correcting the judgment to make it conform to his expressed intent and to the statute.

The order appealed from is affirmed.

WARD and BRAY, JJ., concur.

93 Cal.App.2d 581

TEEPLE v. STANLEY et al.

Civ. 7650.

Sac. 6009.

District Court of Appeal, Third District, California.

Sept. 13, 1949.

Julian W. Teeple sued Henry H. Stanley and others for reformation of a deed to plaintiff's deceased wife so that it would convey realty to himself and wife as joint tenants.

The Superior Court, Sonoma County, Donald Geary, J., entered judgment for the defendants, and plaintiff appealed.

The District Court of Appeal, Schottky, J. pro tem, affirmed the judgment holding that since the husband was the administrator of his deceased wife's estate, only the Superior Court sitting in probate and not the equity side of the court had jurisdiction to determine the cause.

1. Courts 🔑200½

Title to realty cannot be tried in probate proceedings as between the estate or heirs or devisees, and a stranger to the estate.

2. Executors and administrators 🔑507(1)

Superior Court, in exercise of its probate jurisdiction, may try and determine as an incident to final account of an administrator or executor, title to property claimed by such administrator or executor in his own right.

3. Courts ⚩200½

Where husband, administrator of wife's estate, brought action individually to reform deed of realty to deceased wife so that it would convey realty to himself and wife as joint tenants while wife's estate was pending in probate, Superior Court sitting in probate and not the equity side of the court had jurisdiction of the cause.

◆

Bryce Swartfager, Santa Rosa, for appellant.

Harry T. Kyle, Clarendon W. Anderson, Paul Golis, Santa Rosa, for respondent Henry H. Stanley.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant, surviving husband of Tymie P. Teeple, deceased, filed this action for reformation of a deed which conveyed certain real property to Tymie P. Teeple as her separate property, and by said action sought to reform the deed so that it would convey the property to himself and Tymie P. Teeple as joint tenants. Defendant and respondent Henry H. Stanley is a son of said deceased, and he and appellant are her only heirs at law. Appellant alleged that the consideration for said deed was the joint tenancy funds of him and his wife, but that by the mutual mistake of appellant and defendants the Fosters, the grantors, and by the fraud of Tymie P. Teeple, the deed was erroneously made to Tymie P. Teeple as her separate property. The Fosters, grantors named in the deed, were served but made no appearance and their default was entered.

Defendant and respondent denied the material allegations of the complaint and also set up the defense that Tymie P. Teeple died on September 2, 1946, that the matter of her estate was pending in the probate court, and that the Superior Court was without jurisdiction to determine the action.

Upon the calling of the case for trial respondent demurred to the taking of evidence for the reason alleged in his answer, and upon the further ground that appellant had theretofore been appointed and had qualified as administrator of the estate of Tymie P. Teeple and therefore had not the legal capacity to maintain this action. The court reserved its rulings upon the objection, and evidence was received subject thereto.

At the conclusion of the evidence respondent renewed his demurrer to the evidence and also made a motion to dismiss the action. The court thereafter filed an order sustaining the demurrer to the evidence and granting the motion to dismiss. This appeal is from such order.

Appellant contends that the trial court erred in dismissing the action. He argues that "the issue in the instant case does not primarily involve title to real property as between the estate of decedent and the administrator; that primarily it involves the equitable remedy of reformation; and that, therefore, the equity side of the court is properly clothed with jurisdiction to determine the cause." Respondent in reply contends that in a case where the administrator claims property in his own individual right against the estate, the superior court sitting in probate has incidental power to determine the title as between the representative and the estate.

[1, 2] It is undoubtedly the rule in California that title to real property cannot be tried in probate proceedings as between the estate or heirs or devisees, and a stranger to the estate. In re Estate of Inghilleri, 27 Cal.App.2d 664, 81 P.2d 568; McCarthy v. McCarthy, 205 Cal. 184, 270 P. 211; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Wenks, 171 Cal. 607, 154 P. 24; In re Estate of Klumpke, 167 Cal. 415, 139 P. 1062. But it is equally well settled in California that the superior court in the exercise of its probate jurisdiction may try and determine, as an incident to the final account of an administrator or executor, title to property claimed by such administrator or executor in his own right.

[3] In the case of Bauer v. Bauer, supra, which was a case involving a deed to real property claimed to have been delivered by decedent to the grantee, the executor of decedent grantor's will, the

court said, 201 Cal. at pages 271-272, 256 P. at page 821:

"It is undoubtedly the rule that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327. This is necessarily so, for the reason that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings.

"It has, however, been held that when the title to property is claimed by a representative of an estate in his individual capacity the superior court, sitting in probate, is vested with the jurisdiction of determining the validity of such claim upon the settlement of the final accounts of such representative. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; In re Estate of Fulton, 188 Cal. 489, 205 P. 681; 2 Woerner's American Law of Administration, 3d ed., note, p. 1007; 3 Woerner's American Law of Administration, p. 1769.

"Appellants attempt to distinguish the cases cited by respondents upon the ground that the cases holding that the probate court has jurisdiction to determine the title to property claimed by the representative of an estate in his individual capacity were cases wherein the possession of the property was acquired by the representative by virtue of his official capacity. This may be conceded to be true of several of the cases cited by respondents. The case of Stevens v. Superior Court, supra, cannot, however, be so distinguished. The facts are practically identical. In that case the executor alleged that the testator had transferred certain money to him in his individual capacity prior to the testator's death and claimed the property as his individual property. Upon objections being filed to his final account upon the ground that said executor had failed, neglected and refused to account for the sum of money claimed by him, he sought a writ of prohibition to prevent the superior court, sitting in probate, from determining the validity of his title. The writ was denied upon the ground that the probate court did have the power to determine the title. The court said: 'It seems clear to us that the probate court must necessarily have the power to incidentally try and determine such an issue between the executor or administrator and the estate in the matter of the settlement of his exhibits and accounts. * * * We think there can be no doubt that the superior court, sitting in probate, has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto.'"

And in the later case of In re Estate of Roach, 208 Cal. 394, the court, at pages 396-397, 281 P. 607, at page 608, restated the facts of the Bauer case as pertinent, and quoted in part the portion of the opinion in that case above quoted. It then added: "The necessary effect of the above decision, in dismissing said proceeding in equity, is to vest in the probate court exclusive jurisdiction to hear and determine issues of this character. Had appellant followed the ruling of the lower court here, and instituted an equitable proceeding, it could, under the holding of the Bauer case, only have met with dismissal, and his efforts to so secure relief would have been unavailing." See, also, In re Vucinich's Estate and Guardianship, 3 Cal. 2d 235, 243, 44 P.2d 567.

In view of the foregoing we conclude that the trial court correctly held that the superior court was without jurisdiction to determine appellant's title to the property in a separate action. Therefore the order sustaining the demurrer to the evidence and granting respondent's motion to dismiss the action should be and the same is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 629

POWELL v. PACIFIC NAVAL AIR BASE CONTRACTORS et al.

Civ. 16853.

District Court of Appeal, Second District, Division 1, California.

Sept. 19, 1949.

Rehearing Denied Oct. 7, 1949.

Hearing Denied Nov. 17, 1949.

Willie James Powell sued the Pacific Naval Air Base Contractors, the Ventura County Railway Company and others, for injuries sustained while loading a railroad freight car.

The Superior Court, Los Angeles County, Wm. S. Baird, J., gave judgment to the defendant railway company notwithstanding the verdict and the plaintiff appealed.

The District Court of Appeal, Drapeau, J., held that the evidence was sufficient to support the jury's finding that the defendant was a delivering carrier and had been negligent in failing to furnish a railroad car in which it was safe for men to work and reversed the judgment and directed the Superior Court to enter judgment for the plaintiff for the amount of the verdict.

1. Railroads ⟹262, 275(4)

The delivering carrier owes to consignees and the shippers, and to their employees, the duty of inspection of cars furnished, to determine whether such cars are safe to load and unload, and the duty to give to consignees and shippers warning of defective condition in cars discoverable by such inspection.

2. Railroads ⟹262

An intermediate carrier owes no duty of inspection of railroad cars to either the consignee or the shipper, or to their employees.

3. Carriers ⟹4

A logging railroad, with all of its incidents, is not a common carrier as distinguished from a shipper or consignee.

4. Carriers ⟹4

An inter-plant railroad in a steel mill is not a common carrier as distinguished from a shipper or consignee.

5. Railroads ⟹272

In action by naval forwarding base employee against railroad for injuries sustained when struck by end gate of gondola freight car, while reloading freight car which had been unloaded on naval base's tracks, evidence sustained jury's finding that defendant railroad was delivering carrier and had duty to furnish railroad car in which it was safe for naval base employees to work.

6. Railroads ⟹282(5)

In action by naval forwarding base employee for injuries sustained when struck by end gate of gondola freight car while reloading freight car which had been unloaded on naval base's tracks, evidence sustained jury's finding that defendant railroad was negligent in failing to inspect railroad car before delivering car for men to work in.

7. Judgment ⟹199(3.7)

Where there is any fair inference to be drawn from substantial evidence to support the verdict of jury, the granting of a judgment notwithstanding the verdict is error.

◆

Sampson & Dryden, DeWitt Morgan Manning, Los Angeles, for appellant.

O'Melveny & Myers, Lauren M. Wright, Rodney K. Potter, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff was a slingman at the Pacific Naval Air Base at Port Hueneme, California. On April 14, 1945, working with a crane, he and another slingman were loading a type of freight car called a gondola. The gondola was 40 feet long, about 9 feet wide, and was equipped with steel endgates, hinged at the bottom. These endgates, as the name suggests, were at each end of the car. They were secured by locking bars and hooks fastened at the top to the bulkhead of the car. The locking bars and hooks were designed to keep the endgates from falling into the car when it was not loaded.

The crane would lift a heavy crate of masonite from the ground, swing it over and set it in place in the car. The plaintiff was working on the floor of the gondola. His duty was to guide the crates into places close to each other as they were lowered, and to take the crane slings off. The other slingman worked on top of the crates as they were dropped into the gondola. The crates were loaded from south to north.

As the crates were set in place, the plaintiff facing south, gradually backed northward. When he reached a point a few feet south of the north end of the car, with his back to the end-gate, without any warning it fell in upon him. It struck him in the back of the legs about the height of his knees and felled him to the floor of the gondola. It took the combined efforts of three men to lift the end-gate, to drag the plaintiff from where he lay under it.

After the accident it was found that one of the locking bars was rusty and broken, and apparently the end-gate had been held in place by rusty wire, about three times the size of baling wire. The boss loader at the base testified that he looked into the gondola before it was loaded and that the end-gate leaned inward about twelve inches.

The plaintiff was taken to a hospital. It was determined that he had sustained a compound fracture in the lower third of his right leg, with both bones badly crushed, and that the muscles of the leg were shattered probably beyond recovery. He spent weeks in that hospital, then he was discharged with his leg in a plaster cast. No union of the broken bone ensued, and he was thereafter hospitalized and operated upon twice, with no better success. His physician testified that in his opinion the plaintiff would never again be able to bear any weight upon his right leg. So here we have an unfortunate man, six feet three inches in height, who weighed 277 pounds, three weeks out of the service in the second world war, crippled for life.

Plaintiff complains, with one count for negligence, and two counts under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Defendants named were certain individual trainmen, all of the railroads which handled the gondola on its trip to the naval base, and the contractors at the base. The individuals, being nominal defendants, need no further consideration. The connection of the other defendants with the case will develop with a recital of the movements of the car prior to the accident.

The gondola, Pennsylvania No. 344785, was the property of the Pennsylvania Railroad Company. It came to California, loaded with portable building sections. It was delivered in Los Angeles to Southern Pacific Company by the Santa Fe, April 11, 1945. From Los Angeles it was hauled by Southern Pacific to Oxnard, California, and there delivered to Ventura County Railway Company, in the early morning of April 12, 1945.

Ventura County Railway Company owns 3½ miles of track from Oxnard to the naval base, and ½ mile of track inside the base. This short-line railroad hauled the car from Oxnard to the base on the same morning, and there delivered it to Contractors, Pacific Naval Air Base. It was unloaded and then reloaded on the same day by the contractors. The plaintiff was employed by the Contractors.

Shortly after the beginning of the second world war, the United States Navy established a forwarding base at Port Hueneme, California. The location was a desolate stretch of sand dunes and farm land near the old town of Hueneme, lying for several miles along the Pacific ocean. Before the end of the war it was transformed into a great storing and forwarding depot. Thousands of men and women were employed. Thousands of carloads of war material were loaded and unloaded every month, and at times several ships were unloaded and loaded every day.

Owing to the exigencies of war times, the Navy contracted with several American corporations to build the base and do the work. The Navy owned the yard and the facilities.

These corporations by agreement effected a combination like that of Six Companies in the building of Hoover Dam. The agreement was represented by a contract between the corporations as joint venturers, and they named themselves: "Contractors, Pacific Naval Air Bases." This concern will be referred to hereunder as "Contractors".

Pennsylvania Railroad Company went out of the case on an order quashing the summons, for the asserted reason that it could not under the provisions of the Federal Employers' Liability Act be made a defendant.

Judgment for nonsuit as to Southern Pacific and the Contractors was granted in a previous trial. The record does not show why nonsuit was granted in the first trial as to these two defendants. It may be assumed that perhaps it was for the reason that Contractors were consignees and shippers and not the delivering railroad carrier. In Contractors' answer it is alleged that the plaintiff was covered by and being taken care of by California workmen's compensation. And it may be assumed that perhaps Southern Pacific went out of the case because it was an intermediate, not a delivering carrier.

In any event, the only defendant left in the second trial was Ventura County Railway Company.

The issues were submitted to a jury, and verdict rendered for the plaintiff for $50,000.00.

Upon motion duly made, the trial court ordered judgment for the defendant notwithstanding the verdict.

Plaintiff appeals, and as grounds for reversal of the judgment urges that there was substantial evidence of negligence of Ventura County Railway Company; that from the testimony it may be fairly inferred that that company negligently furnished a defective car to plaintiff's employer, violating a duty owed by it to plaintiff.

It is respondent's position that there was no duty of care on the part of Ventura County Railway, because it was merely an intermediate carrier; and that, in any event, there is no evidence of negligence of said defendant.

[1, 2] Defendant's position that it was an intermediate carrier only must be based upon the assumption that Contractors operated a railroad as a common carrier. For the delivering carrier owes to consignees and to shippers, and to their employees, the duty of inspection of cars furnished, to determine whether such cars are safe to load and unload, and the duty to give to consignees and shippers warning of defective conditions in cars, discoverable by such inspection. On the other hand, an intermediate carrier owes no duty of inspection to either the consignee or the shipper, or to their employees. 44 Am.Jur. Sec. 434, p. 655 et seq.

In support of defendant's contention that the Contractors operated a railroad and were the delivering carrier, the following is quoted from defendant's brief (The facts stated are supported by the record.):

"The evidence is clear and uncontradicted that there were 35 miles of railroad tracks within the naval base, that the operations of engines and cars upon these tracks, with exception of a single line into the exchange tracks, was limited to Pacific Naval Air Base Contractors Railway Department, which, using engines and tracks owned by the Navy, was in complete charge of all railroad equipment on the base until its return to the interchange tracks.

"Complete trains of cars were left on this interchange track and from that point until the cars involved were ultimately reassembled on said track as other complete trains they were entirely under the control of the Pacific Naval Air Base Contractors. In the interim the trains were broken up by the Pacific Naval Air Base Contractors Railway Department, the individual cars moved to some locality on the many miles of track within the naval base and there unloaded by the Pool Department of Pacific Naval Air Base Contractors; thereupon they were either returned to the exchange track empty or if selected by the 'car department' of the Pacific Naval Air Base Contractors Railway Department for reloading were taken as necessary to some other locality where the Pool Department reloaded them before they were reassembled in new trains on the exchange track. The function of the Railway Department in this operation was described by Mr. Hathaway, who was in charge thereof as 'the Pacific Naval Air Base Railway.' The witness in charge of entire operations for

Pacific Naval Air Base Contractors, referred to this phase of operations as 'the railroad department' or 'the railroad section'. Mr. Hathaway further testified that the Pacific Naval Air Base Railway even operated engines outside of the navy base as far as the juncture of appellee's line with that of the Southern Pacific Company at Oxnard making use in so doing of appellee's track.

"It is apparent, moreover, that Pacific Naval Air Base Contractors Railway Department conducted itself as a railway in its relations with other railroads. As appears by the testimony of Mr. Hathaway it was a member of the American Association of Railroads. (Though appellant objected to the materiality of this testimony, it was never stricken from the records.) Moreover, Pacific Naval Air Base Railway exercised the privilege of confiscating cars for reloading purposes, of which privilege Mr. Duncan, witness for plaintiff, stated: 'It is generally accepted between all the railroads'.

"The Pacific Naval Air Base Railway was the only organization permitted to operate a railway upon the 35 odd miles of track within the confines of the naval base. In connection with this operation it established a car repair shop for the maintenance of railway cars handled by it."

But, giving to the evidence all the probative value as stated and argued in defendant's brief, there is another inference which can be drawn. That inference is that the Contractors were consignees and shippers and nothing more. As such consignee-shippers the Ventura County Railway Company was the delivering carrier, and owed to Contractors and to their employees the duty of furnishing a car in which it was safe for men to work.

The railroad on the naval base hauled no freight except the Navy's. It was not for public use. It was devoted to one purpose only, that of receiving war material, assembling, storing and reshipping the same. While the operation was Gargantuan in scope, in principle it was no more than that of a warehouseman who maintains his own private spur track and his own trackage on his own premises, and pulls freight cars there spotted by the railroad around with a tractor, or, lacking that motive power, moves them with a pinch bar.

[3, 4] A logging railroad, with all of its incidents, is not a common carrier as distinguished from a shipper or consignee. E. E. Taenzer & Co., v. Chicago, R. I. & T. R. Co., 6 Cir., 170 F. 240. The same rule applies to an inter-plant railroad in a steel mill. Cooperative Legislative Committee v. Public Utilities Comm., 1948, 149 Ohio St. 511, 80 N.E.2d 159.

[5, 6] With reference to defendant's contention that there was no substantial evidence of negligence on its part, the record shows that Ventura County Railway made no inspection of the car at all; they just took it over from Southern Pacific after an inspector for that company had looked over it in a perfunctory way. Something more than this is required of a delivering carrier which furnishes freight cars for men to work in. The evidence as to negligence was sufficient to require judgment in conformity with the verdict.

[7] It is well-settled law that if there is any fair inference to be drawn from substantial evidence to support the verdict of a jury, the granting of a judgment notwithstanding the verdict is error. Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184; In re Estate of Caspar, 172 Cal. 147, 155 P. 631.

The judgment is reversed, and the Superior Court directed to make and enter judgment for the plaintiff for $50,000.00.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

93 Cal.App.2d 704

PEOPLE v. BELTRAN.

Cr. 4329.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1949.

Joseph Anthony Beltran was convicted of armed robbery in the first degree and kidnapping for the purpose of robbery, and from a judgment of the Superior Court of Los Angeles County, Paul Nourse, **J.**, on the verdict, defendant appealed.

The District Court of Appeal, Wilson, **J.**, affirmed the judgment, holding that a verdict of conviction of kidnapping as charged in the information was not void because of the objections urged against it.

1. Criminal law ⚿1130(2, 5)

Appellant's brief, not stating points relied on separately, nor containing headings indicating alleged errors, was defective. Rules on Appeal, rule 15.

2. Criminal law ⚿881(1)

A jury's verdict, finding accused "guilty of kidnapping as charged in count III of the information," which charged "kidnapping for the purpose of committing robbery," was specific, and repetition in verdict of all words and phrases in information was unnecessary.

3. Criminal law ⚿881(1)

A jury's verdict, finding accused guilty of kidnapping as charged in count of information charging such crime in language of statute providing for punishment by death or life imprisonment, was not void as failing to indicate whether conviction was under such statute or under statute providing for imprisonment for not more than 25 years. Pen.Code, §§ 207–209.

4. Criminal law ⚿883

Since crime of kidnapping is not divided into degrees, jury's verdict of conviction of kidnapping for purpose of robbery, which is a separate offense, was not required to find degree of crime. Pen. Code, §§ 209, 211.

Gladys Towles Root, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, for respondent.

WILSON, Justice.

This appeal is without merit. Appellant and his two codefendants were charged in two counts of the information with armed robbery and in count 3 with kidnaping for the purpose of robbery. The information also alleged that defendants were armed at the time of their arrest and that appellant had suffered a prior conviction of felony and had served a term of imprisonment therefor in the state prison. He admitted the latter allegation.

Defendants were tried by a jury which found appellant guilty on all three counts, found that the robberies were of the first degree, that appellant was armed at the time of the commission of the offenses and at the time of his arrest. He has appealed from the judgment of conviction.

[1] Appellant does not question his conviction on the two counts of robbery. As nearly as can be ascertained from his brief * the contentions for reversal of his conviction on the charge of kidnaping are three in number.

[2] **1.** Appellant contends that the verdict finding him guilty of kidnaping is void in that it is in general language—"* * * guilty of Kidnaping as charged in Count III of the information" and does not find in the particular words of the information "kidnaping for the purpose of committing robbery." The verdict in the language quoted is definite and specific and the repetition in the verdict of all the words and phrases contained in the information is unnecessary. People v. Gilbert, 60 Cal. 108, 111; People v. Sachau, 78 Cal.App. 702, 709–711, 248 P. 960.

[3] 2. The second point is that the verdict does not indicate whether the jury

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* Appellant's brief does not conform to the Rules on Appeal, which have been in force since July, 1943, in that the points relied on do not appear separately, and it does not contain headings indicating the alleged errors. See Rule 15, 22 Cal. 2d 12.

convicted appellant of kidnaping under section 207 of the Penal Code which carries a penalty of imprisonment for not more than 25 years (sec. 208), or under section 209 which provides for punishment by death or imprisonment for life. Count 3 charged the crime in the language of section 209, hence the verdict of guilty as charged cannot refer to any other provision of the code than that section.

[4] 3. The third contention is that the verdict did not fix the degree of the crime of which appellant was found guilty. Kidnaping for the purpose of robbery, defined by section 209 of the Penal Code, is separate and distinct from robbery (Penal Code, sec. 211), which was the object of the kidnaping. Since the crime of kidnaping is not divided into degrees the jury was not required to find the degree. People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47, 64; People v. Clement, 97 Cal.App. 238, 241, 275 P. 511.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

* * *

93 Cal.App.2d 562

MARTIN et al. v. BUTTER et al.

Civ. 14029.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1949.

Rehearing Denied Oct. 13, 1949.

Hearing Denied Nov. 10, 1949.

Joseph E. Martin and Theresa E. Martin, sued L. R. Butter and Catherine Butter, and Bernice L. Collischonn, also known as Bernice Lee, to quiet title to certain realty.

The Superior Court, Alameda County, Leon E. Gray, J., held that the Butter-Lee purchase agreement was terminated long prior to the sale of the property to the Martins by Bernice Lee and that thereafter the Butters were merely tenants and had no other interest in the property and that the Martins were the owners of the property and their title should be quieted. The Butters appealed.

The District Court of Appeal, Peters, P. J., affirmed the judgment on the ground that the evidence supported the trial court's finding that the Butter-Lee purchase contract of 1926 had been abandoned.

1. Vendor and purchaser 🔑86

In action to determine title to real estate, evidence supported trial court's finding that contract to purchase realty executed in 1926, had been abandoned by mutual consent not later than 1937, and thereafter vendees occupied premises as tenants.

2. Vendor and purchaser 🔑86

A contract for the sale of real property can be mutually abandoned by the parties at any stage of their performance, and each of the parties released from any further obligation on account by parole, and the fact of its having been done established by evidence of the acts and declarations of the parties. Civ.Code, §§ 1698, 2309; Code Civ.Proc. § 1971.

3. Husband and wife 🔑25(6)

In action to determine title to real estate, evidence supported trial court's finding that husbands had implied authority to represent their wives in making oral agreement to abandon realty purchase agreement. Civ.Code, § 2309.

J. Elwood Andresen, Oakland, for appellants.

Breed, Robinson & Stewart, Oakland, for respondent Collischonn.

Raymond A. Ferrario, Robert S. Kernes, Oakland, for respondent Martin.

PETERS, Presiding Justice.

This action involves a dispute over the title to a parcel of real property in Alameda County. Prior to 1926 the property was admittedly owned by Charles F. Lee and his wife. On July 20, 1926, the Lees entered into a written contract to sell the property to L. R. Butter and his wife, the appellants, for a total sum of $5,500 payable at the rate of $50 a month, plus interest. The appellants agreed to pay the taxes and insurance.

The contract also provided that if the purchasers defaulted in any of their obligations and such default continued for 30 days, the Lees should be relieved of all liabilities under the contract, and that all sums paid under the contract should be retained by them as rent. The contract contained the customary "time is of the essence" clause. The appellants took possession of the property upon the execution of the contract and have remained in possession ever since. Mr. Lee died in 1939, and Mrs. Lee in 1941. Their interest in the property became vested in respondent Bernice Lee, now Bernice Collischonn. On October 2, 1946, Bernice sold the property to respondents Joseph and Theresa Martin and delivered the deed to them. In November, 1946, Mr. and Mrs. Butter, upon the request of the Martins, were served with an eviction notice by the O.P.A. informing them that they had to vacate by April, 1947. For a period of five months after receipt of this notice the appellants paid the Martins a monthly rental of $30, but thereafter refused to pay rent, claiming an interest in the property under their 1926 contract. The Martins then brought this action to quiet their title, joining the Butters and Bernice Collischonn. The trial court found that the Butter-Lee agreement was terminated long prior to the sale of the property to the Martins; that after such termination the Butters were merely tenants and had no other interest in the property; and that the Martins were the owners of the property and their title should be quieted. The Butters appeal.

The main contentions of appellants are that their contract was never terminated; that the Lees voluntarily agreed to a reduction in the monthly payments from $50 to $30; that these $30 payments were not rent but payments on the principal, and interest; that in any event, if there was an abandonment of the 1926 contract, such abandonment was oral and ineffective under the statute of frauds; that neither Mrs. Butter nor Mrs. Lee gave written authority to their respective husbands to modify or terminate the 1926 agreement, and that such written authority was necessary.

[1] None of these contentions is sound. The evidence amply supports the finding that the Butter-Lee contract of 1926 was abandoned by the parties by mutual consent, not later than 1937. The evidence shows that after the 1926 contract was entered into the Butters made their required $50 payments for a little over a year; that they paid the insurance on one occasion and a couple of installments of taxes; that thereafter they failed to pay any taxes or insurance and made a few irregular payments in various small amounts on the principal. Miss Arnest, the bookkeeper and rental agent for the Lees from 1926 down to the death of Mrs. Lee in 1941, testified that Mr. Lee got very disturbed over the appellants' various defaults; that finally in 1936 or 1937 Mr. Lee wrote to appellants and told them that they would have to comply with the terms of the contract or give up the property; that shortly after this letter was written she was present at a conversation between Mr. Lee and Mr. Butter at which Butter admitted his inability to comply with the terms of the contract; that in that conversation the parties agreed that the contract should be terminated, and, at the request of Butter, it was agreed that appellants could stay on as tenants at $30 per month rental. The acts of the parties thereafter amply corroborate this testimony. Subsequent to 1937, Butter demanded of Mr. Lee, and after his death of Mrs. Lee, that they repair the property. Butter warned the Lees that the Lees owned the property and would be responsible if anyone should be injured thereon. All taxes and insurance were paid by the Lees. Nearly every receipt after 1937 expressly stated that it was a "rent receipt," and in many cases this was written in ink on the receipt. Admittedly appellants at no time kept a record of the $30 monthly payments showing their application to interest and principal. Miss Lee registered the property with the O.P.A. Rent Division as "rental" property. Although Butter denied receiving a copy of such statement normally sent to a tenant, he admitted receiving some kind of unidentified form which he filled out and returned to the O.P.A. Butter also admitted that he knew

that Miss Lee attempted to get O.P.A. approval of a raise in rent, but was unsuccessful. After the Martins bought the property in October, 1946, and after the Butters had been served with the six-month eviction notice, the Butters made no claim to the property but paid the Martins $30 monthly rental for a period of five months. During that period the Martins replaced the sidewalk in front of the house, removed several trees, and performed other work around the premises, all without objection by the Butters. While appellants testified contrary to much of this testimony, this conflict was resolved against them by the trial court and is binding on appeal.

[2] It seems to be the theory of appellants that, under the provisions of § 1698 of the Civil Code and § 1971 of the Code of Civil Procedure, there cannot be an oral abandonment of any interest in real property acquired by an instrument in writing. That is not the law. The true rule, amply supported by many cases, is thus stated in 25 Cal.Jur. p. 736, § 206: "* * * a contract for the purchase and sale of real property is subject to abandonment at any stage of its performance, either by agreement of the parties or by conduct indicating an intent to abandon; and a mutual oral agreement to cancel a contract is sufficient consideration for its abandonment, if consideration is necessary. *A subsequent contract by which the purchaser becomes the tenant of the vendor operates as a mutual abandonment of the contract of purchase, although the latter instrument is not formally surrendered.* [Italics added.] Any words or acts by one party which indicate that he will not perform the contract, or permit the other party to do so, amounts to an abandonment. Thus a party may abandon a contract by refusing to proceed further with its fulfillment, and his breach of the contract, if material, justifies the other party in treating the contract as abandoned and in abandoning it himself. In such case, abandonment by one party is equivalent to a claim of rescission which may be acquiesced in by the other, thereby effecting a mutual rescission, no formal recission being necessary after one has acknowledged his inability to perform and has voluntarily abandoned the contract."

The rule is thus succinctly stated in Tompkins v. Davidow, 27 Cal.App. 327, 335, 149 P. 788, 791, quoting from the opinion of the trial court: "'There can be no question that a contract can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof; that it may be done by parol and the fact of its having been done established by evidence of the acts and declarations of the parties.'" See, also, Haberman v. Sawall, 72 Cal.App. 576, 237 P. 776; San Roque Properties, Inc., v. Pierce, 18 Cal.App.2d 379, 63 P.2d 1198; Snodgrass v. Parks, 79 Cal. 55, 21 P. 429; McWhinney v. Ewers, 112 Cal.App. 448, 297 P. 42. For an excellent recent review of the authorities on this precise question see Grant v. The Aerodraulics Co., 91 Cal. App.2d 68, 204 P.2d 683. This is also the law in other states. See quotation and many cases collected in 66 Corpus Juris p. 730, § 292.

Appellants also object to the finding that the contract was terminated "on or about February, 1937" and long prior to October 2, 1946, contending that there is no evidence that the contract was terminated in *February*, 1937. While that month appears to be the first in which a $30 "rental receipt" was issued, and thus the precise finding is supported, even if this were not true, the precise month of the abandonment is immaterial. The finding that the abandonment occurred in 1937 is amply supported, and that is all that is important.

[3] The last contention of appellants is that there is no evidence that either Mrs. Butter or Mrs. Lee gave their husbands written authority to modify or cancel the 1926 agreement, and, it is contended, such written authority was required under the terms of § 2309 of the Civil Code. That section provides that: "[1] An oral authorization is sufficient for any purpose, [2] except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writ-

ing." The second clause of the section requiring the authority to be in writing only applies where the contract to be authorized is required to be in writing. The cases heretofore cited demonstrate that the agreement to abandon is not required to be in writing, but may be oral. Therefore, the first clause of the section, not the second, is applicable. There is no doubt that the evidence demonstrates that the husbands had at least implied authority to represent their wives in making the abandonment agreement. That is all that is required.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

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93 Cal.App.2d 572

GOLDMAN et ux. v. HOUSE et al.

Civ. 14140.

District Court of Appeal, First District, Division 1, California.

Sept. 13, 1949.

Jacob Goldman and Mildred Goldman, his wife, sued John Lee House, Marie House, his wife, and another for injuries sustained in falling down a darkened stairway leading to an apartment rented from defendants.

The Superior Court, City and County of San Francisco, Samuel F. Finley, J., entered judgment for the plaintiffs, and the named defendants appealed.

The District Court of Appeal, Ward, J., reversed the judgment as to Marie House because she was not connected with the tort, and affirmed as to John Lee House, holding that the evidence sustained the finding of willful misconduct against defendants so that contributory negligence did not constitute a defense to the action.

1. Appeal and error 🔑994(3)

Credibility of witnesses is for trial court.

2. Landlord and tenant 🔑169(6)

Evidence sustained finding that landlords were guilty of willful misconduct in turning off electric lights leaving stairway in complete darkness, in attempting to evict tenants by harassment and annoyance, and tenant could recover for injuries sustained in falling down darkened stairway leading from rented apartment.

3. Negligence 🔑100

Where a person is charged with negligence, contributory negligence of injured party may be a good defense to negligence allegations but is not a defense to a willful misconduct charge.

4. Negligence 🔑11

"Willful misconduct" partakes more of the nature and character of intentional and malicious mischief than of negligence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Willful Misconduct".

5. Negligence 🔑1

"Negligence" is opposed to diligence and signifies absence of care.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Negligence".

6. Negligence 🔑11

That misconduct is "willful" may be implied if a reasonable inference may be drawn that conduct of party was such that he probably knew that injury would result, and it is immaterial that wrongdoer did not intend particular consequence that occurred.

7. Landlord and tenant 🔑130(1)

An agreement to let upon hire is an agreement that hirer may have quiet possession of the thing hired. Civ.Code § 1927.

8. Landlord and tenant 🔑180(1)

An attempt to evict by use of wrongful and malicious means with knowledge of probable injury is actionable.

9. Negligence 🔑100

Negligence is no defense to an intentional tort.

10. Negligence ⚷100

In action by tenant against landlords based on willful misconduct to recover for injuries sustained in falling down darkened stairway, contributory negligence was not a defense.

11. Stipulations ⚷18(1)

In action by tenant against landlord to recover for injuries sustained in falling down darkened stairway, landlords' contention that there was no duty to maintain lights on stairway would not be considered where parties agreed that if landlords turned off lights they were liable.

12. Landlord and tenant ⚷169(2)

In action by tenant against landlords for injuries sustained in falling down darkened stairway, wife of landlord could not be made a party to action where evidence indicated that she was not connected with act of turning off lights but was only one of owners of the flat.

◆

Charles H. Blagburn, San Francisco, James Sykes, San Francisco, for appellants.

Leon A. Blum, San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment against defendants John Lee House and Marie House, husband and wife, in a personal injury action based upon willful misconduct. The complaint alleges that plaintiffs were in possession, on a month to month tenancy, of a certain upper flat in San Francisco and had been tenants thereof for many years prior to an accident which occurred in February, 1947. Mildred Goldman, wife of coplaintiff Jacob Goldman, fell down a stairway and sustained certain injuries, and it is claimed that the injuries resulted from defendants' action in turning off the electric current which left the flat and stairway in "complete darkness."

The complaint alleges "That on or about July 12, 1946, the defendants purchased and acquired the premises within which the said upper flat is contained, and immediately thereafter the said defendants commenced to harass and annoy the plaintiffs for the purpose of coercing plaintiffs to vacate said upper flat and remove therefrom, and among other things the said defendants wilfully and maliciously shut off the water supply and the electric current from said upper flat for various periods of time, without notice to plaintiffs and without cause; * * *."

The issue of shutting off the water supply is pertinent only as tending to prove a plan of harassment and annoyance instituted by defendants against plaintiffs. The primary issue was settled by agreement of the respective litigants during the trial, namely, that the dispute was whether defendants willfully and maliciously shut off the electric current and for that reason Mildred Goldman fell down the darkened stairway and sustained injuries.

The evidence shows that the building consisted of a basement apartment, the first floor apartment in which the defendants, Mr. and Mrs. House, had lived since their purchase of the building in July of 1946, and two apartments above, in the top one of which the Goldmans had resided for several years. A separate enclosed stairway led to each of the upper apartments. The stairway to the Goldman flat had approximately 30 steps with two landings. There was a door with a clear glass pane at the first floor entrance of the stairway and a frosted glass window at the top landing. There was an overhead light fixture at the lower landing inside the door, which was operated by push button switches located at both the bottom and the top of the stairway. Gas light fixtures were located at various places in the flat, though there was conflicting testimony as to whether there were any on the stairway. On the evening of February 17, 1947, there were no electric lights in the flat. Mrs. Goldman had cooked supper on the gas stove and was burning candles for illumination, which she had been obliged to do for some months during various intervals. On returning home that evening Mr. Goldman found the keyhole in the entrance door at the bottom of the stairway stuffed with broom straw. He knocked on the door and "hollered" and Mrs. Goldman started down the unlighted stairs to let him in. She fell and injured her right arm and side. She testified that she wore low-heeled shoes and that before starting to descent she tried the light switch unsuccessfully, so held onto the stair rail. At the time of the trial Mrs. Goldman was 75 years of age and her husband "past 75."

Though the evidence is confusing and much of it contradictory, the trial court was justified in finding that the plaintiffs were month to month tenants, and that that ever since the defendants had purchased the building in July of 1946 they had endeavored by harassment and annoyance to evict the plaintiffs. Tendered rent was refused, water was shut off at various times, and the keyhole of the entrance door was stuffed with straw; also an eviction notice was sent to plaintiffs by the OPA which was later rescinded, and a suit was instituted by defendants for nonpayment of rent but subsequently dismissed. There was evidence that the electricity was off at various times, leaving the flat in complete darkness.

[1, 2] The damage in this case resulted from a condition of darkness. That allegation is the basis of the action. The fact that the complaint alleged, no demurrer thereto being interposed, and the court found that acts other than shutting off the electric current had occurred tending to harass and annoy plaintiffs was merely a recognition that other acts of harassment were performed which might be considered as probative of the ultimate fact found by the court that "while said upper flat was in complete darkness by reason of the fact that the elecric current thereto had been shut off by said defendants as aforesaid, Mildred Goldman, one of the plaintiffs, attempted to walk down the stairway of said upper flat and, because of the complete darkness, fell down the said stairway and sustained serious and painful injuries thereby; * * *." Other findings of fact contain evidence not inconsistent with the main fact in issue. The testimony of each plaintiff may have indicated senility, as defendants contend, but the credibility of each witness was a question for determination by the trial judge. The judgment was not based on the acts of shutting off the water or placing straw in the keyhole, and there is no indication that the court was confused in the admission of evidence or in the preparation of the findings. The ultimate facts found are sufficient to support the judgment. 24 Cal.Jur. p. 968 et seq., §§ 203, 204.

[3-10] On appeal defendants argue that Mrs. Goldman should have used a lighted candle. This contention savors of the claim that Mrs. Goldman was guilty of contributory negligence. Cases cited by defendants in support of plaintiffs' contributory negligence are not in point and need not be considered, since the present action is based on willful misconduct. Where a person is charged with negligence, the contributory negligence of the injured party may be a good defense to the negligence allegations but is not a defense to a willful misconduct charge. Willful misconduct partakes more of the nature and character of intentional and malicious mischief than of negligence. "Ordinarily, and likewise in the law, there is a decided and well-defined distinction between mere 'negligence' and 'willfulness.' Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong; and it follows that the moment a person wills to do an injury he ceases to be negligent. [Citing cases.]" Tognazzini v. Freeman, 18 Cal.App. 468, pages 473–474, 123 P. 540, page 543. That misconduct is willful may be implied if a reasonable inference may be drawn that the conduct of the party was such that he probably knew that injury would result. Hastings v. Serleto, 61 Cal. App.2d 672, 143 P.2d 956; 68 Corp.Jur. p. 282, n. 82. It is immaterial that the wrongdoer did not intend the particular consequence that occurred. The misconduct may still be the proximate cause of the injury. 52 Am.Jur. p. 382. An agreement to let upon hire is an agreement that the hirer may have quiet possession of the thing hired. Civ.Code, § 1927; McDowell v. Hyman, 117 Cal. 67, 48 P. 984. An attempt to evict by the use of wrongful and

malicious means with knowledge of probable injury is actionable. Negligence is no defense to an intentional tort. Prosser, Torts, 402; approved in Seeger v. Odell, 18 Cal.2d 409, page 414, 115 P.2d 977, 136 A.L.R. 1291.

[11] Defendants contend that there was no duty to maintain lights on the stairway. Health and Safety Code section 17820 contains certain provisions relative to the maintenance of artificial light to illumine a "public stairway." The stairway referred to in this case is not a public stairway. Though it does not appear that electricity was contracted for in the lease, it was agreed by the respective parties that "if those switches had been pulled the defendant is liable, if they prove that he did it."

[12] During the oral argument on appeal the court suggested that Mrs. House, as one of the owners who did not turn off the lights or participate in any of the other acts indicating a malicious and willful intent, may not be liable for the husband's acts. Plaintiffs failed to comment on this problem. Mrs. House could hardly be declared the principal in this proceeding and Mr. House merely her agent. There is not enough evidence of ratification or acceptance of benefits. In fact, there is no evidence that Mrs. House is connected with the acts of her husband except as one of the owners of the flat. In Citizens State Bank of Long Beach v. Hoffman, 44 Cal.App.2d 854, 113 P.2d 221, an action for malicious prosecution, a wife was joined with her husband as a defendant. The court stated, 44 Cal.App.2d at page 855, 113 P.2d at page 222: "Apparently the only connection she had with the litigation which brought about the present action lies in the fact that she is the wife of the other appellant and is one of the owners of the property for the rental of which the criticized action was commenced. Clearly no sufficient showing has been made to justify a judgment against her in the present action." 12 A.L.R., p. 1463, subds. III and IV.

There is evidence that the electric current was in operation subsequent to the action. Mr. Goldman testified that on one occasion he saw Mr. House cut the wires connected with the fuse and at another time pull the "switch." There is some confusion relative to the exact dates that Mr. House performed these particular acts but the question of the weight of the evidence is in the hands of the trial court. Certain inferences from other occurrences considered with the incidents of putting the flat in darkness were matters for the trial judge to determine.

The judgment insofar as it applies to Marie House is reversed. The judgment against John Lee House is affirmed; the costs of appeal to be borne by defendant John Lee House.

PETERS, P. J., and BRAY, J., concur.

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93 Cal.App.2d 577

In re ZARING'S ESTATE.

ZARING v. GLOVER.

Civ. 16848.

District Court of Appeal, Second District, Division 1, California.

Sept. 13, 1949.

Rehearing Denied Oct. 3, 1949.

Hearing Denied Nov. 10, 1949.

Proceeding in the matter of the estate of Kate A. Zaring, deceased incompetent, wherein John E. Glover, special administrator, objected to final account of Manson H. Zaring, guardian.

The Superior Court of Los Angeles County, Harold B. Jeffery, J., entered judgment adverse to contestant and he appealed.

The District Court of Appeal, Drapeau, J., affirmed judgment, holding that when realty owned by decedent and her son as joint tenants was condemned, and decedent's guardian retained one-half of the proceeds from condemnation, the joint tenancy was not terminated and surviving son as joint tenant was entitled to proceeds.

1. Executors and administrators 🔑55
Joint tenancy 🔑6

Survivorship is an incident of joint tenancy, and unless the estate in joint tenancy is terminated before death of a joint tenant, the executor of deceased has no interest in the property.

2. Joint tenancy 🔑5

The estate of joint tenancy may be ended by agreement.

3. Joint tenancy 🔑5

Destruction of one of the four unities incident to the estate terminates joint tenancy.

4. Joint tenancy 🔑5

The unity of possession in joint tenancy is not destroyed so as to terminate joint tenancy when a guardian takes charge of a ward's property.

5. Joint tenancy 🔑3

The proceeds of joint tenancy property, in the absence of contrary agreement, retained the character of the property from which they were acquired.

6. Joint tenancy 🔑5

Where realty held in joint tenancy by decedent and her son, was condemned, and decedent's guardian paid one-half of sum received to son, and charged himself as guardian with remaining one-half, after which decedent died, and there was no evidence of any agreement between decedent and her son to terminate joint tenancy, and decedent did nothing upon which a finding of termination could be predicated, proceeds from condemnation did not lose their joint tenancy characteristic of belonging to surviving joint tenant.

7. Joint tenancy 🔑8

Each joint tenant was entitled to share in rentals from the realty held in joint tenancy.

8. Appeal and error 🔑1010(1)

Finding of trial court supported by substantial evidence would not be disturbed.

9. Executors and administrators 🔑109(4)

Allowances for traveling expenses for executors and administrators are made only when such expenses are necessary to the actual conduct of estate.

10. Insane persons 🔑65

Allowance of $600 to guardian of incompetent for railway and bus fare and expenses was proper under the evidence as being necessary for the estate and for welfare of incompetent during her lifetime.

◆

Richard H. Cantillon, Los Angeles, for appellant.

Paul Taylor, Los Angeles, for respondent.

DRAPEAU, Justice.

Kate A. Zaring and her husband during their marriage owned a rooming house in Los Angeles. Title to the property was held in joint tenancy. Mr. Zaring was the first to die, and title vested in his widow as the surviving joint tenant.

Mrs. Zaring had two adult sons living, one in Los Angeles and the other in Texas. Mrs. Zaring conveyed title to the rooming house to herself and the Los Angeles son, as joint tenants. This son testified that he had an understanding with the Texas brother that the property would be used, all of it if necessary, to take care of the mother in her declining years, and that anything left over after her death would be divided equally between himself and his brother.

As the years went by after the death of her husband, Mrs. Zaring fell into the clutches of an artful and designing stranger, who mulcted her of considerable sums, but did not get away with the rooming house. In view of this circumstance, and because of her age and mental condition, she was adjudged incompetent and the Texas son was appointed her guardian.

Apparently Mrs. Zaring was dissatisfied with the guardianship, for litigation ensued. Proceedings were had in the name of a grandnephew: (a) to cancel the joint tenancy deed vesting title in the mother and son; (b) to restore her to competency, see 77 Cal.App.2d 294, 175 P.2d 276; and (c) to remove the Texas son as guardian.

Two of these proceedings (a and c) terminated adversely to the grandnephew, and the judgments are final. Nothing further was done with the petition to restore Mrs. Zaring to competency after decision by the District Court of Appeal, affirming an order granting a new trial on that issue.

While title to the rooming house was so held in joint tenancy by the mother and son, it was condemned for highway purposes. By the judgment in eminent domain $11,000 was awarded in payment for the property. (The guardian actually received a few dollars less than $11,000, because current Los Angeles taxes were deducted. It will, however, be referred to as $11,000.)

The guardian paid one half of this sum to the Los Angeles son, the other joint tenant, and charged himself as guardian with the remaining one half.

Then, Mrs. Zaring died at 87 years of age.

The principal question here involved is whether the one half of the $11,000 accounted for by the guardian goes to the estate of the decedent, or to the surviving joint tenant. This issue was framed by objections to the guardian's final account by the special administrator of the estate.

Appellant contends that the joint tenancy was terminated when the guardian retained half of the money paid by the state, and paid the other half to the Los Angeles son. Further, it is contended that the two sons are estopped to claim otherwise.

The trial court found and adjudged to the contrary. There being substantial evidence in the record to support this finding, the only consideration is whether, as a matter of law, the proceeds from condemnation of the property lost their joint tenancy characteristic of belonging to the surviving joint tenant.

[1-5] Survivorship is one of the incidents of joint tenancy, and unless the estate is terminated before the death of a joint tenant, the executor of the decedent has no interest in the property. Dando v. Dando, 37 Cal.App.2d 371, 99 P.2d 561. The estate of joint tenancy may be ended by agreement. Hiltbrand v. Hiltbrand, 13 Cal.App.2d 330, 56 P.2d 1292. Destruction of one of the four unities incident to the estate terminates joint tenancy. See Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73, for review of the nature of the estate in joint tenancy. The unity of possession in joint tenancy is not destroyed when a guardian takes charge of a ward's property. Doran v. Hibernia Savings & Loan Soc., 80 Cal.App.2d 790, 182 P.2d 630. And the proceeds of joint tenancy property, in the absence of contrary agreement, retain the character of the property from which they were acquired. Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10.

[6] There is no evidence of any agreement between Mrs. Zaring and her Los Angeles son to terminate the joint tenancy. Nothing was done by the decedent upon which a finding of termination could have been predicated. Therefore, there was no error in the ruling of the trial court in this respect.

Appellant also contends that the guardian should have accounted for the entire net rentals of the rooming house received by him before it was sold to the state. The guardian collected a total of rents of $2,019.85, charged himself as guardian with one half thereof, and paid the remaining one half to the other joint tenant. Also the guardian received a cashier's check, belonging to his ward, in the sum of $898.70, and charged himself with one half thereof.

[7, 8] The court found that both items were from rentals of the rooming house while title was in joint tenancy in decedent and the Los Angeles son. Each co-tenant had the right to share in the rentals. McWhorter v. McWhorter, 99 Cal. App. 293, 278 P. 454. The evidence supports this finding, and therefore, under the substantial evidence rule, it must stand.

[9, 10] Finally, appellant assigns error in allowing the guardian $600 for railway and bus fare and expenses going to and from Texas. The court found these expenses were reasonable and necessary to the welfare, health, and care of the mother and her estate. Allowances for traveling

expenses for executors and administrators are made only when such expenses are necessary to the actual conduct of the estate. In this guardianship matter there was evidence, and the court found that the traveling expenses were necessary for the estate and also for the welfare of the ward. Again the evidence supports the finding and it must stand.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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93 Cal.App.2d 585

MOKLOFSKY et ux. v. MOKLOFSKY.

No. 14051.

District Court of Appeal, First District, Division 1, California.

Sept. 15, 1949.

Hearing Denied Nov. 10, 1949.

Albert S. Moklofsky and wife sued Helen Moklofsky for specific performance of a contract of sale of realty and for a declaratory judgment. Defendant filed a cross complaint for rescission of the contract.

The Superior Court of San Mateo County, Edmund Scott, J., denied specific performance but entered a declaratory judgment in favor of plaintiffs and denied defendant any affirmative relief on her cross complaint, and defendant appeals.

The District Court of Appeal, Ward, J., held that declaratory relief was properly granted, though specific performance was denied, and affirmed the judgment.

1. Appeal and error 🔑1099(3)

Decision on former appeal was the law of the case on subject of specific performance, in absence of amendment of the pleadings or material change in the presentation of evidence.

2. Declaratory judgment 🔑2

One of the purposes of a declaratory judgment is to hold the parties steadfast to the definite provisions of a contract by a reasonable interpretation of its terms justifying a decree that will make definite the true intent of the parties to perform even upon the happening of a condition. Code Civ.Proc. § 1060.

3. Declaratory judgment 🔑145

That contract may be an oral contract to employ and to pay upon consummation of the work is not a controlling factor in refusing declaratory relief, if the decree may serve a practical legal purpose. Code Civ. Proc. § 1060.

4. Declaratory judgment 🔑148

A judgment was properly entered declaring the rights and obligations of the parties under a contract for sale of realty, though specific performance of the contract could not be decreed. Code Civ.Proc. § 1060.

5. Appeal and error 🔑1135

Where record on appeal on the judgment roll contained nothing to suggest that fraudulent misrepresentations induced vendor to enter into contract for sale of realty, judgment denying relief on her cross complaint for rescission of the contract would be affirmed.

6. Appeal and error 🔑900

An appellate court may not indulge in presumption, inference or surmise to reverse a judgment.

◆

Carl William Anderson, Cyrus J. McMillan, Burlingame, for appellant.

Joseph A. Brown, San Francisco, for respondents.

WARD, Justice.

This is a judgment roll appeal. Defendant and cross-complainant appeals from the "judgment in declaratory relief" in favor of plaintiffs and from the denial of any affirmative relief on defendant's cross-complaint, the allegations of which are in the nature of a complaint for rescission.

The complaint alleges a cause of action by plaintiffs for (1) specific performance and (2) declaratory relief. The case was previously tried and appealed and the cause remanded for a new trial. Moklofsky v. Moklofsky, 79 Cal.App.2d 259, 179 P.2d 628, 632, petition for hearing by Supreme Court denied. In the former appeal the same appellant as in the present appeal attacked the declaratory part of the judgment on the ground that a declaratory judgment (Code Civ.Proc. § 1060) may not be based on an oral contract or on disputed questions of fact. After reviewing several cases previously cited it was held that this point could not be sustained.

The main point relative to "cause of action" considered in the previous appeal covered plaintiffs' allegations and the prayer for specific performance. In this connection the court said: "Adverting to the principal questions: the respondents brought this suit seeking specific performance at a time when they had not 'fully and fairly performed'. Sec. 3392, Civ.Code. That is manifest from the language of the decree which makes the delivery of the deed conditional on the building of the stairway. The rights and duties of the parties must be measured and tested by the situation presented at the time of trial, and when this case was tried the respondents simply had not fully performed. See Wakeham v. Barker, 82 Cal. 46, 49, 22 P. 1131, supra. What the situation will be when the case is retried cannot be anticipated herein."

[1] On this appeal defendant admits that the present judgment denying specific performance may be supported on several grounds, namely, lack of mutuality of remedy, impossibility of the supervision of the contract, inadequacy of consideration, and adds "unfairness to the mother." Irrespective of defendant's admissions unless the pleadings as they appeared in the first trial had been amended, or a material change was made in the presentation of evidence, the decision on the first appeal is the law of the case on the subject of specific performance. No change was made in the pleadings and defendant in the present opening brief agrees that "the facts will be taken as stated in the prior opinion and findings of fact in this case."

[2–4] Notwithstanding the opinion in the previous appeal and the statements in the opening brief, defendant contends that "By its judgment in declaratory relief, while denying specific performance, the trial Court has placed the parties in an anomalous position" and that "The judgments are irreconcilable." To state that the parties have been placed in an anomalous position or that the judgments are irreconcilable is merely another manner of stating that the present trial judge deviated from the true legal path. The previous opinion is authority that the denial of specific performance and the granting of the prayer for declaratory relief, as applied to the facts as presented on the former appeal, is not inconsistent but is concordant with the law and the facts of the case. One of the purposes of a declaratory relief judgment is to hold the parties steadfast to the definite provisions of a contract by a reasonable interpretation of its terms justifying a decree that will make definite the true intent of the parties to perform even upon the happening of a condition. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747; Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 171 P.2d 500. The fact that the contract may be an oral contract to employ and to pay upon consummation of the work is not a factor that is controlling in refusing the remedy if the decree may serve a practical legal purpose. Columbia Pictures Corp. v. DeToth, supra. Declaratory relief is a proper remedy based upon the pleadings in this case. Moklofsky v. Moklofsky, supra.

[5, 6] Several further points on the present appeal must be mentioned. Defendant claims that she has been treated unfairly and that the court erred in denying any relief on her cross-complaint. In the former opinion, Moklofsky v. Moklofsky, supra, 79 Cal.App.2d at page 261, 179 P.2d at page 630, the court stated: "Respondents made a formal demand for a deed and offered to execute a promissory note (bearing 6% interest) for the balance of the purchase price secured by a deed of trust, all as provided in the agreement.

These were refused by appellant, who countered by serving a notice of rescission based on misrepresentations. The suit was then filed, and by her cross-complaint appellant sought to rescind." However, there is no fact cited in the opinion which suggests that fraudulent misrepresentations induced defendant to enter into the contract. The present appeal is on the judgment roll. No action has been taken by defendant to augment the present appeal by matters of record material to a determination of the points mentioned. An appellate court may not indulge in presumptions, inferences or surmises to reverse a judgment. Smith v. Wiget, 75 Cal.App.2d 591, 171 P.2d 563. Every intendment, supported by the record, is that the trial court reached the correct conclusion.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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93 Cal.App.2d 744

PEOPLE v. CORNETT.

Cr. 808.

District Court of Appeal, Fourth District, California.

Sept. 23, 1949.

Rebel B. Cornett was convicted in Superior Court of Tulare County, Frank Lamberson, J., of murder in the second degree, and he appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment, holding that the evidence sustained conviction, that rulings on evidence and instructions were not erroneous and that no miscarriage of justice occurred.

1. Homicide 🔑254

Evidence sustained conviction for murder in the second degree.

2. Criminal law 🔑1178

Where no claimed errors were specifically set forth and defendant's contentions on appeal from conviction were not supported by argument or citation of authority, presented points were not required to be considered.

3. Witnesses 🔑387

In prosecution for murder, district attorney was properly permitted to cross-examine a witness as to previous inconsistent statements made by her not in presence of defendant. Code Civ.Proc. § 2052.

4. Criminal law 🔑696(1)

In prosecution for murder, testimony of a witness as to what witness had told her mother was properly stricken.

5. Witnesses 🔑269(5)

In prosecution for murder, where witness admitted on direct examination that she had testified falsely at a former trial of defendant, district attorney was properly permitted to cross-examine witness as to such fact. Code Civ.Proc. § 2048.

6. Criminal law 🔑778(5)

In prosecution for murder instruction stating in part that where a person assails another violently with dangerous weapon, likely to kill, and which does kill person assailed, the natural presumption is that assailant intended death or great bodily injury, and "in absence of evidence to the contrary, this presumption must prevail", was correct as against contention that through use of quoted words, instruction had a tendency to mislead jury and give impression that burden of proof of self-defense would shift to defendant. Code Civ.Proc. § 1963, subd. 3.

7. Homicide 🔑300(3)

In prosecution for murder, use of words "urgent and necessary" in instruction that to justify assault with a deadly weapon in self-defense, it must appear to person using deadly weapon, as a reasonable person, that the danger, if any, was so urgent and pressing that assault with deadly weapon was necessary, was not objectionable as leading jurors to believe that to bring it within right of self-defense, the act of killing must have been absolutely necessary.

8. Homicide ⚷300(3)

In prosecution for murder, instruction that right of self-defense is not available to person who has sought a quarrel with design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault, for in such a case the original intent would control, was properly given.

9. Homicide ⚷300(3)

In prosecution for murder, instruction that whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is assaulted with a deadly weapon, the plea of self-defense is unavailing, was proper.

10. Criminal law ⚷782(9)

Instructions need only fully and fairly advise as to the quality and degree of proof necessary before defendant can be convicted.

11. Criminal law ⚷1186(4)

Conviction for murder in second degree would be affirmed where evidence of defendant's guilt was overwhelming and complained of errors were not prejudicial to defendant and did not result in a miscarriage of justice. Const. art. 6, § 4½.

◆

J. M. Lopes, Visalia, for appellant.

Fred N. Howser, Attorney General, Henry A. Dietz, Deputy Attorney General, for respondent.

MUSSELL, Justice.

Defendant was charged with the murder of Fred Weaver Cole, the stepfather of his divorced wife. A jury found him guilty of murder in the first degree without recommendation as to penalty and on appeal the judgment imposing the death penalty was reversed. People v. Cornett, 33 Cal.2d 33, 198 P.2d 877.

Defendant was again tried and a jury found him guilty of murder in the second degree, recommending leniency. A motion for a new trial was denied and defendant appeals from the judgment of conviction and from the order denying a new trial.

Facts

On the day of the homicide, September 28, 1947, defendant and his divorced wife, Pauline Cornett, were living with their seven children in a one room cabin at a labor camp at Woodlake. Defendant left the cabin at about eleven A.M. and returned in the afternoon as Mrs. Cornett was preparing supper. He said he had been looking for a job and she told him it looked like he had been drinking instead of looking for a job. Defendant then called Mrs. Cornett a "bitch" and stated that he was going to get her, "that dirty dog Fred Cole," her mother and the "whole bunch". When Mrs. Cornett saw that defendant was going towards his bed where he kept a Japanese Luger gun under the pillow she left the house and saw him get in his car and drive away. Mrs. Cornett and the seven children were then taken by a neighbor to the house of the decedent in Exeter some eleven miles distant. On their arrival at the house in Exeter, decedent and Mrs. Cornett held a conversation, following which, the children, except one daughter, were sent upstairs. The decedent procured two pistols which he put in his belt under his shirt. He then went to the front door and was sitting in a chair on the porch when, a few minutes later, the defendant drove up in his car. There was some conversation between the two men on the porch during which the defendant asked if Mrs. Cornett was there and on receiving a negative reply, he said: "Mom, come out. You know you are in trouble." Mrs. Cornett was then leaving through the rear door. She went to a neighbor's house and remained there until she heard a shot coming from the upstairs room of her stepfather's house. As Mrs. Cornett went out through the back door of her stepfather's house, the two men came into the house and proceeded toward the stairs. The defendant was a step or two in front of deceased and in this order they went up the stairs. As they reached the head of the stairs defendant said: "You better draw. This is your last chance." Defendant then asked where his wife was and decedent said he didn't know. Decedent made no move to draw his gun and had nothing in his hands when defendant walked over to a screen in the room, looked behind it, immediately whirled around and from the hip shot deceased who at that time was standing sidewise to him, about four feet away. The decedent caught himself on a chair. Defendant then said: "I am going to Visalia and give up." The decedent said, "I will go with you." Defendant replied, "No, you are not", and approaching him, fired a second shot into his stomach. Decedent fell to the floor. Defendant stepped over to decedent, pushed him over with his foot, took the guns which were inside decedent's shirt and left the house.

The police were called and found decedent lying on the floor. He was still alive and was removed to a hospital where he died within a few minutes from hemorrhage caused by the bullet wounds.

Defendant was apprehended late in the same afternoon near the cabin at Woodlake and at the time had a gun in his right hand which proved to be one of the guns taken from decedent. Defendant was searched by the officers and the Luger pistol was found inside his shirt. It had two shells in the clip, and had been fired.

Defendant was placed in the officer's car and while he was being taken to Visalia he asked the Chief of Police how Mr. Cole was and was told by the Chief that Mr. Cole was still alive when he left town but probably had now passed away. Defendant then said, "Good, I been wanting to do this for a long time." Defendant testified in his own behalf and admitted the shooting, contending, however, that he shot in self-defense and that he had not quarreled with his wife nor made any threats against her or the decedent.

[1] The evidence was amply sufficient to support the verdict of murder in the second degree, and the sufficiency of the evidence in that respect is not here questioned. Defendant contends that the court erred in its ruling on the admissibility of the evidence and that the error was prejudicial to defendant and resulted in a miscarriage of justice and that the court erred in its instructions to the jury.

[2-5] In support of his first contention defendant quotes certain excerpts from the record but he does not specifically set forth any claimed errors and does not support his contention by argument or citation of appropriate authority. Under such circumstances we are not called upon to consider the points so presented. People v. Black, 45 Cal.App.2d 87, 98, 113 P.2d 746. However, we have examined the excerpts set forth and find there was no error in permitting the District Attorney to cross-examine a witness as to previous statements made by her not in the presence of defendant. Code Civil Procedure, Sec. 2052. Nor was there error in striking from the record testimony of this same witness as to what she had told her mother. Where the witness admitted on direct examination that she had testified falsely at the former trial, there was no error in permitting cross-examination as to such fact. Code Civil Procedure, Sec. 2048.

Defendant next contends that the court erred in its instructions to the jury. The first instruction complained of is a part of a lengthy instruction defining murder and manslaughter. The portion to which objection is made reads as follows:

"In determining the intention of the defendant at the time of the transaction complained of, it is important to consider the means used to accomplish the killing. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity.

"A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own voluntary acts. Therefore when one person assails another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm, *and in* *the absence of evidence to the contrary this presumption must prevail.*

"The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, generally indicates a felonious intent."

Defendant contends that through the use of the italicized words, the instruction had a tendency to mislead the jury and give the impression that the burden of proof of self-defense would shift to the defendant.

[6] The portion of the instruction complained of deals only with the presumption to the effect that a person intends the ordinary, natural and probable consequences of his voluntary act and was a correct statement of the law. Code Civil Procedure, Sec. 1963, par. 3; People v. Besold, 154 Cal. 363, 368, 369, 97 P. 871.

Defendant complains of the following instruction: "The Court further instructs the jury that to 'justify the assault with a deadly weapon of another in self-defense, it must appear to the person using the deadly weapon, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the assault with the deadly weapon of the other was necessary. And it must appear that the person so assaulted was the assailant, or, if not the assailant, that the person using the deadly weapon had really and in good faith endeavored to decline further trouble before using the deadly weapon.'"

[7] The contention is that the use of the words "urgent and pressing" have the same meaning as "absolutely necessary" and the case of People v. Carmichael, 198 Cal. 534, 246 P. 62, is cited as authority. That case does not support defendant's contention. In the instruction in that case, the words "urgent and pressing" were used in the same connection as here and were not criticized in any way. The court recommended that the word "absolutely" be eliminated as it might have the effect of leading jurors to believe that to bring it within the right of self-defense, the act of killing must have been actually necessary.

In the former appeal in the instant case, People v. Cornett, supra, the use of the term "absolutely necessary" in the instruction was condemned but no criticism was made as to the use of the words "urgent and pressing". We do not think that the jury was misled by the instruction here given. The court gave full and adequate instructions to the jury on the law of self-defense and the word "absolutely" was not used.

[8] Without citing authority or indicating wherein it states the law incorrectly, or how it has a tendency to mislead the jury, defendant complains that the following instruction does not state the law and had a tendency to mislead the jury under the facts of this case. The instruction is that—"The right of self-defense is not available to a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault, for in such a case the original intent would control." The instruction was properly given. People v. Hinshaw, 194 Cal. 1, 26, 227 P. 156.

[9] Again without citing authority to sustain his contention defendant claims that another instruction likewise had a tendency to mislead the jury and did not correctly state the law. The instruction follows: "Whenever an assault is brought upon a person by his own procurement, or under an appearance of hostility which he himself creates, with a view of having his adversary act upon it, and he so acts and is assaulted with a deadly weapon, the plea of self-defense under the circumstances is unavailing." No error appears in the giving of this instruction under the circumstances presented by the record in this case. People v. Albori, 97 Cal.App. 537, 541, 275 P. 1017.

[10] We have read the many instructions given and when they are considered in their entirety it appears that the jury was fully and fairly advised as to the quality and degree of proof necessary before the defendant could be convicted.

That is all the law requires. People v. Rubio, 75 Cal.App.2d 697, 710, 171 P.2d 737.

[11] The evidence of defendant's guilt as disclosed by the record is overwhelming. It does not appear that the errors complained of were prejudicial to the rights of defendant or resulted in a miscarriage of justice. California Constitution, Art. VI, Sec. 4½; People v. Lopez, 32 Cal.2d 673, 675, 197 P.2d 757.

The judgment and order are affirmed.

GRIFFIN, Acting P. J., concurs.

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93 Cal.App.2d 653

GRIMES v. ALLEN et ux.

Civ. 7636.

Sac. 6093.

District Court of Appeal, Third District, California.

Sept. 19, 1949.

Hearing Denied Nov. 17, 1949.

Daniel W. Grimes sued L. B. Allen and wife to cancel a deed obtained by named defendant from plaintiff while plaintiff was a prisoner of named defendant as a city police chief.

From a judgment of the Superior Court of Placer County, Raymond McIntosh, J., for defendants, plaintiff appealed.

The District Court of Appeal, Schottky, J. pro tem., reversed the judgment, holding that the transaction was contrary to public policy and that plaintiff was entitled to rescind it and recover the property conveyed.

1. Vendor and purchaser 🔑30, 39

A police officer's entry into contract to purchase realty from prisoner while in officer's custody is against public policy, particularly when prisoner has no independent advice, and such transaction cannot be considered free and involutary and, if not wholly void, is voidable at prisoner's instance.

2. Contracts 🔑131

An officer's contract, interfering with unbiased discharge of his duty to public in exercise of his office, is against public policy and void.

3. Vendor and purchaser 🔑39, 105(4)

A transaction in which city police chief's jail prisoner agreed to sell and conveyed his home to chief was contrary to public policy, so as to entitle prisoner to rescind it, recover realty on tendering to grantee amount of purchase price paid, and recover rents, issues and profits of property during time of its possession by grantee.

◆

F. H. Bowers, R. A. Boon, Roseville, for appellent.

A. B. Broyer, Roseville and Robinson & Robinson, Auburn, for respondents.

SCHOTTKY, Justice pro tem.

Appellant, Daniel W. Grimes, a resident of Roseville, in Placer County, commenced an action against respondent L. B. Allen, chief of police of Roseville, and Katie Allen, his wife, to cancel a deed to plaintiff's home in Roseville, which deed, it was alleged, was obtained by Allen while Grimes was a prisoner of respondent Allen and confined in the city jail of Roseville. The complaint alleged that Grimes' signature to the deed was obtained through duress used by respondent L. B. Allen during Grimes' imprisonment by him; that the consideration for the deed was inadequate; that the transaction was against public policy and void.

Respondents' answer denied that there was any duress or that the consideration was inadequate and alleged that appellant executed the deed freely and voluntarily.

The court adopted findings of fact favorable to the respondent, specifically finding that the allegations of the complaint in regard to appellant's alleged unlawful arrest and confinement were not true and that the respondent L. B. Allen made no threats in order to procure the execution of the deed. In this latter regard, the court found that appellant signed the deed freely and voluntarily, and for adequate consideration. The court also found that appellant was lawfuly arrested upon a complaint of a citizen of the commission of a felony, upon which charge he was tried. Judgment was entered that appellant take nothing by his complaint and that respondents acquired title to the property, the judgment declaring that the transaction by which the deed was executed and delivered was free and voluntary and free from fraud, duress, or undue influence on the part of the respondents. This appeal is from the judgment so entered.

The principal ground upon which appellant seeks a reversal of the judgment is that the transaction as a whole is so repugnant to the regular administration of justice that it is against public policy and therefore void.

The record in this case reveals an unusual and somewhat amazing situation. The chief of police and another officer of the city of Roseville arrest appellant upon the oral complaint of a citizen accusing him of a felony, no formal complaint having been filed or any warrant issued, and take him to the city jail of Roseville. The following day, according to respondent chief of police, he and the imprisoned appellant enter into an oral agreement for the purchase by the chief of police of the home of appellant in Roseville. Appellant denies any such agreement. The chief of police procures the description of the property and has one of his subordinate officers go to a real estate office and have a deed drawn conveying the property of appellant to respondents. The respondent chief of police then arranges with a notary public to come to the jail, and then brings the appellant from his cell into the jail office; the deed is placed before the appellant, and the chief of police states to appellant in the presence of the notary and another police officer that he did not have to sign it if he didn't want to, this statement being repeated to appellant two times more before the deed was finally signed by appellant and delivered by the notary to respondent chief of police, who thereupon handed appellant a check for $1990.00, being the difference between the claimed purchase price of $3468.01 and the balance of the indebtedness owing to the Bank of America upon the property, and takes appellant back to his cell in the city jail. The chief of police then records the deed, takes appellant from the city jail to the property where appellant puts some of his personal belongings into a trunk, and then takes appellant to a bank where appellant deposits the check given him by the chief of police. Then respondent chief of police takes appellant from the city jail of Roseville to the county jail of Placer County at Auburn, a distance of 15 miles.

All of the foregoing happened within the short space of 48 hours, and during that time appellant talked with no one except the officers in the jail, and received no independent advice from anyone. He claims that he made a request for counsel but that it was denied him. Respondent chief of police denies that any such request was made. After appellant reached the county jail he was permitted to see counsel, and thereafter, through his counsel, he made a tender to respondent L. B. Allen of the amount paid by said respondent, and demanded the property back, which demand being refused the instant action was commenced.

Two realtors of Roseville testified that the real property conveyed was of the value of $5500, and an appraiser, who did not reside there, testified in behalf of respondents that the value thereof was only $3250. It seems odd that respondents should refuse to give the property back if, as their witness testified, it was worth less than they paid for it. While it has no particular bearing on the decision in this case, it appears from the record that no formal charge was filed against appellant until many days after the deed in question was signed, and that upon the trial the jury disagreed ten to two for acquittal and the charge was dismissed.

Counsel for respondents argue as though this were a transaction between persons dealing at arm's length and upon an equal basis. They assert that the transaction was free and voluntary, that the consideration was adequate, and that the findings of the trial court to this effect are supported by the evidence. They assert also that no question of public policy is involved.

[1] Were the transaction here involved the ordinary one where one citizen is seeking to cancel a deed made to another citizen upon the ground of duress or fraud, we would, of course, be compelled to hold that because there was a conflict in the evidence as to these matters we were bound by the findings of the trial court and compelled to affirm the judgment. However, this is not such a transaction, as the record clearly and without contradiction shows. We believe that it is against public policy for any chief of police, or police officer, who has a prisoner in his custody under lock and key, to enter into a deal with that prisoner to buy his home or other property, and carry out and complete the transaction while the prisoner is still in his custody, particularly when the prisoner has not had the benefit of independent advice. If public policy permits such a transaction to stand, dire consequences could result to citizens who might be cast into jail upon charges which might or might not be thereafter proved. The impropriety of entering into a business agreement with a prisoner in his custody should immediately suggest itself to a police officer, and he should refrain from entering into such agreement while the prisoner is in his custody. A transaction between a police officer and a prisoner cannot be considered free and voluntary under the circumstances that were present in the instant case; and such a transaction, if not wholly void as a matter of public policy, must be considered voidable at the instance of the prisoner. Public confidence in our law enforcement officers would be undermined if such transactions were permitted to stand, because the public would be no more likely to regard such a transaction as free and voluntary on the part of the prisoner than it would some of the confessions that emanate from behind the Iron Curtain. While it may be that respondent chief of police was impelled by proper motives and sincerely believed that he was entering into a fair transaction with the prisoner, we believe that when the purchase price was tendered back to him by appellant with a demand for the return of the property, he should have realized the impropriety of the transaction and have restored the property to appellant.

[2] We have not been cited to any case which deals with this precise situation, nor have we found any. We believe that the reason for this is that the usual result would be a voluntary reconveyance upon demand made by the prisoner. As stated in 21 Cal.Jur., at page 886:

> "The rule has long been recognized that any contract by an officer which interferes with the unbiased discharge of his duty to the public in the exercise of his office, is against public policy and void."

The principles of law which condemn the transaction here involved as being in violation of public policy are elementary, and citation of authority is unnecessary.

[3] We, therefore, hold that the transaction in the instant case was contrary to public policy, that appellant was entitled to, and did, rescind it, and was, and is, entitled to have his property restored to him upon tendering to respondents the amount of the purchase price of said property. Appellant is also entitled to the rents, issues and profits of said property during the time it has been held by respondents. Appellant is, of course, also entitled to the return of his personal property, but there is no dispute as to this as respondents state in their brief that appellant may receive delivery of it at his convenience.

The judgment is reversed with directions to the trial court to enter judgment in favor of appellant in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 588

VALENTIN v. VALENTIN.

Civ. 14002.

District Court of Appeal, First District, Division 2, California.

Sept. 15, 1949.

Nina Valentin sued Marcelino Valentin for divorce.

Defendant appealed from an order of Superior Court, San Francisco County, Milton D. Sapiro, J., denying her motion to set aside an order appraising an automobile constituting community property.

The District Court of Appeal, Nourse, P. J., affirmed the order holding inter alia, that appeal would be decided on merits; that the court in refusing to order sale of automobile properly gave preference to interlocutory divorce decree over findings of fact and conclusions of law which provided for sale, and that automobile was properly evaluated.

See also 207 P.2d 880.

1. Appeal and error 🔑82(1)

An order made after entry of interlocutory decree of divorce, appraising an automobile which was community property of the parties, was appealable as a "special order after final judgment."

> See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Order after Final Judgment".

2. Appeal and error 🔑113(2)

Generally, no appeal lies from an order refusing to vacate an appealable order when appeal would duplicate the review which would be had on appeal of the original order, but the appeal will lie where circumstances are such that an appeal from the first order would be vain for lack of a record showing rights of aggrieved party.

3. Divorce 🔑286

Where part of appellant's grounds for setting aside order, made after entry of interlocutory decree of divorce, appraising an automobile which was community property of the parties, could not be reviewed on the record pertaining to order, appeal from order denying motion to set aside the original order would be decided on merits.

4. Judgment 🔑256(1)

The judgment is the only real conclusion of law and displaces all former statements in the findings on the subject.

5. Divorce 🔑261

Where findings of fact and conclusions of law in divorce action provided for sale of automobile which was community property of the parties, and interlocutory decree of divorce omitted provision for sale, trial court properly gave preference to decree and refused to order sale.

6. Divorce 🔑254

Fact that appraiser appointed by court in divorce action to appraise automobile which was community property of the parties, considered need of reconditioning the automobile, did not establish that he did not appraise automobile according to market value, so as to justify setting aside order decreeing value to be as appraised.

7. Judgment 🔑294, 336

While a court can set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, it cannot, having once made its decision after regular submission, set aside or amended judicial error except under appropriate statutory procedure. Code Civ. Proc. §§ 473, 663.

8. Divorce 🔑254

In divorce action, use of an incorrect method of determining market value of an automobile constituting community property of parties would constitute judicial error which could not be made basis of motion to vacate order of appraisal.

9. Appeal and error 🔑232(2)

Propriety of exclusion of evidence would not be considered on appeal on a ground for admission not stated to trial court.

10. Divorce 🔑282

Grounds for vacating order of appraisal of automobile constituting a community property of parties, and made in divorce action, would not be considered on appeal where they were not stated to trial court as grounds.

◆

Lelia R. Leep, San Francisco, for appellant.

Ferriter, Purcell & Riordan, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal in a divorce action from an order denying a motion to set aside an order appraising an automobile, part of the community property of the parties and for reappraisement. In November, 1947, appellant, wife, was granted an interlocutory decree of divorce in which, as her one-half of the community property she was, among other things, awarded "one-half the market value of the 1941 Hudson automobile." In that respect the findings of fact and conclusions of law contain the following: "that said Hudson automobile hereinafter mentioned shall be sold at the fair market value thereof, and the said automobile shall be sold by the defendant, and the said net purchase price shall be divided equally by the parties plaintiff and defendant herein." April 8, 1948, the following order was filed:

"This cause, having come regularily on for hearing, and plaintiff above named being represented by her counsel, Lelia R. Leep, and defendant herein being represented by his counsel, William E. Ferriter, and the Court being advised by both parties that the only matter before the Court was the valuation of a certain automobile, which the Superior Court of the City and County of San Francisco, State of California, had heretofore ordered sold and the proceeds of said sale divided between the parties hereto or that the defendant in said action pay one-half of said appraised value of said automobile to the plaintiff herein, and the Court thereafter having appointed an appraiser of said automobile and the appraiser having reported that the automobile in question was of the value of $478.00, and the matter being submitted to said Court,

"It is hereby ordered, adjudged and decreed that the valuation of said automobile in dispute between said parties is of the total value of $478.00 and that the said plaintiff herein is entitled to one-half of said sum, or the sum of $239.00."

No appeal was taken from this order, but on April 19, 1948, appellant filed a notice of motion to set aside the appraisement and for reappraisement, "making said appraisement the market value of said car as is provided in and by the interlocutory degree of divorce heretofore made and entered herein." The notice states that the motion will be made on all the records "and upon oral sworn testimony to be taken at said time and place," but does not state any grounds for the vacation except as implied in the above. An affidavit of appellant in support of the motion states that the interlocutory decree provides that each party have one-half of the *market value* of the automobile; that the market value is the sum of $1000 for which it can be sold in the open market; that the appraiser, Mr. Harwood of Glen C. Stater Automobile Company, notified defendant and his counsel that $478 was the price for which said company would purchase the car for resale; that the dealer's purchase price is not the market value as the appraiser, defendant and counsel knew and that it was done with the intent and for the purpose of defrauding the plaintiff; with a prayer to the effect that the market value of said car be legally fixed after hearing the appraiser and other automobile dealers.

At the hearing the appraiser, called as a witness for appellant, testified among other things that he fairly and honestly made the appraisal of the car without knowing whose automobile it was, based on "market price less reconditioning." For the market price of the 1941 business coupe Hudson automobile he would have to check back on the blue book at the time that it was appraised, which he did not have. The appraisal had been oral. He had not said that the appraisal was based on the purchase price of his firm. Appellant then called an automobile dealer as a witness, but the court refused to hear him, stating that each party had suggested a firm for the appraisal and that the court took the one appellant suggested; that the court was satisfied that Mr. Harwood had proceeded in accordance with the requirements of the law and that the fact that some one else had a different idea of value was not sufficient to set it aside. What appellant's attorney wished to prove by the dealer is shown by her statements to the court that the witness had the blue book value of the car; that the market value was the blue book value and that the blue book value was $935. The court replied that the market value depends on the condition of the car and that the court had proceeded in accordance with the request of appellant's attorney. The motion was then denied.

On appeal of the denial appellant urges that the original order should have been vacated because, in excess of jurisdiction, it modified the findings of fact and conclusions of law and the interlocutory decree so as to dispense with the selling of the car, provided for in the findings and conclusions, and to substitute another value, to wit "market value less the costs of reconditioning" for the "market value" mentioned in the interlocutory decree, and that it was error to appraise the car on this wrong basis and to refuse to hear testimony of dealers as to the market value.

[1-3] Respondent suggests that there is considerable doubt whether the order appealed from is an appealable order but the parties did not brief this point. The original order of April 8, 1948, made after the entry of the interlocutory decree, was appealable as a special order after final judgment. Fulton v. Fulton, 220 Cal. 726, 729, 32 P.2d 634. Although as a rule no appeal lies from an order refusing to vacate an appealable order when such an appeal would duplicate the review which could be had on appeal of the original order, the appeal will lie where the circumstances are such that "an appeal from the first order would be vain for lack of a record showing the rights of the aggrieved party." 2 Cal.Jur. 167, sec. 31; In re Yoder, 199 Cal. 699, 703, 251 P. 205; Hilliker v. Board of Trustees, 91 Cal.App. 521, 526, 267 P. 367; Johnson v. Sun Realty Co., 138 Cal.App. 296, 298, 32 P.2d 393. It would seem that at least part of appellant's grounds for setting aside the order could not be reviewed on the record pertaining to the original order; we will therefore decide the appeal on the merits.

[4-6] However we do not find any merit in appellant's contentions with respect to modifications allegedly made by the court in excess of jurisdiction. By not ordering the sale of the car as had been done in the findings of fact and conclusions of law, the court correctly gave precedence to the interlocutory decree, which omitted such sale. "The judgment is the only real conclusion of law, and displaces all former statements in the findings on the subject." Mason v. Del Valle, 213 Cal. 30, 32, 1 P.2d 419; Liuzza v. Brinkerhoff, 29 Cal.App.2d 1, 5, 83 P.2d 976. The order of appraisal does not show any intent to deviate from the market value as mentioned in the interlocutory decree. The court evidently accepted the amount stated by the appraiser as a correct statement of the market value. The fact that the appraiser took in consideration the need of reconditioning of the car does not show that he did not appraise according to market value. In Continental Rubber Works v. Bernson, 91 Cal.App. 636, 638, 267 P. 553, 554, the court cites the definition of "market value" of Bouvier in his Law Dictionary as "a price established by public sales, or sales in the way of ordinary business, as merchandise" and the "price at which such articles are sold and purchased." Such price is evidently influenced by need of reconditioning of the car. The expression "market price less reconditioning" used by the appraiser obviously did not mean that the market price of the individual car was reduced by the cost of its reconditioning, but that the market value of the individual car was found by taking the market price of a car in the condition for which the blue book price was established and deducting the cost of bringing the individual car up to that condition. Even if this were not a correct method of arriving at the market

value of an individual car it would be a matter of judicial error not one of jurisdiction.

[7-9] Except in cases where the law expressly makes provision therefor, as in sections 473 and 663, Code Civ.Proc., not here involved, such judicial error can not be made the basis of a motion to vacate. "While a court has power to set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure." McMahan v. Baringer, 49 Cal.App.2d 431, 432, 122 P.2d 63, 64; Bastajian v. Brown, 19 Cal.2d 209, 214, 120 P.2d 9. This rule disposes of both alleged errors as to appraisal and as to the refusal to hear witnesses to prove and to remedy the error in appraisal. With respect to the last point the court stated another ground for its ruling excluding the testimony, to wit, that appellant in absence of fraud was bound by the appraisal made in accordance with her request. It is true that parties may agree to be concluded by an informal appraisal, 3 Cal.Jur. 68, sec. 28; California Annual Conf. of M. E. Church v. Seitz, 74 Cal. 287, 296, 15 P. 839, but the record does not contain any indication of such an agreement, express or implied, and without it the appraisal would at most be evidence subject to rebuttal. We, however, shall uphold the court's ruling on the ground that evidence of the true market value was immaterial so long as no ground for vacating the order of appraisal had been proved. Whether the alleged fraud was such that it could provide a ground for vacating the order we need not decide, as no evidence whatever of such fraud was adduced. If the evidence of the true market value were material for any other purpose than to prove that the evaluation in the order was erroneous, appellant would not be in a position to complain of the exclusion as no other purpose was stated to the trial court as a reason for admissibility. In re Estate of Parkinson, 190 Cal. 475, 477, 213 P. 259; Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 682, 5 P.2d 930.

[10] Appellant states incidentally that the court took the appraisement over the telephone without notice to the plaintiff appellant. Neither this nor any other informality, infringement of due process, or deprivation of rights was stated as ground for vacating the order; no attempt was made to create a record as to any such point and the record does not show it. No such matter is therefore before us.

Order affirmed.

GOODELL and DOOLING, JJ., concur.

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93 Cal.App.2d 608

WINTHER et al. v. MORRISON et al.

REWICK et al. v. STYLIANO et al.

DE WITT et al. v. STYLIANO et al.

CAVELL et al. v. STYLIANO et al.

Civ. 3948–3951.

District Court of Appeal, Fourth District, California.

Sept. 17, 1949.

Hearing Denied Nov. 14, 1949.

Actions by Alberta Winther and others against Wilton M. Morrison and others to determine interest in real estate and by Robert M. Rewick and others, by Robert M. DeWitt and others and by Ray C. Cavell and others against George Styliano and others for foreclosure of mortgages presented the question whether the tax claims of the United States were subordinate to the attachment and judgment lien of defendant Morrison.

The Superior Court, San Diego County, Arthur L. Mundo, J., held that the tax claims of the United States were subordinate to the attachment and judgment lien of defendant Morrison and the United States appealed.

The District Court of Appeal, Mussell, J., held that the United States could reach only such property rights as the Stylianos had when the tax liens arose and that such taxes were subject to the valid subsistent attachment lien of Morrison and the tax lien of the United States was not entitled to a priority over it, and affirmed the judgment.

1. Attachment ⚷177

Where an attachment was properly issued and properly levied upon property, attaching creditor perfected lien immediately which secured payment to him of any judgment recovered by him in the action in so far as property attached could be applied to judgment. Code Civ. Proc. § 542a.

2. Execution ⚷321

A sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if levy was such as to create a lien. Code Civ.Proc. § 542a.

3. Attachment ⚷177

Lien acquired by attachment is a vested interest affording specific security for debt put in suit and is a special interest which an attaching creditor has in property held in custody of sheriff sufficient to support an action for conversion. Code Civ.Proc. § 542a.

4. Internal revenue ⚷1711, 1719

Tax liens created by Internal Revenue Code are general and not priority liens. 26 U.S.C.A. §§ 3670–3672.

5. Internal revenue ⚷1717, 1721

Tax lien attaches to whatever interest taxpayer had in property at time tax lien arose and government can acquire only such title as the taxpayer then had. 26 U.S.C.A. §§ 3670–3672.

6. Attachment ⚷178

The rights acquired by attaching creditor by virtue of his attachment at a time when the property was free of tax liens would be determined by the law of the state where the property was located.

7. Internal revenue ⚷1717

Rights of internal revenue collector seeking to establish lien for unpaid taxes on property do not extend beyond those of the taxpayer. 26 U.S.C.A. §§ 3672, 3710a.

8. Internal revenue ⚷1719

Where owner's rights to property were subject to valid subsisting attachment lien, tax lien of United States placed on property thereafter was not entitled to priority. 26 U.S.C.A. §§ 3670–3672.

◆

Theron Lamar Caudle, Assistant Attorney General, Ellis N. Slack, A. F. Prescott, Hilbert P. Zarky, Helen Goodner, Special Assistants to Attorney General (James M. Carter, United States Attorney, E. H. Mitchell and James C. R. McCall, Jr., Assistant United States Attorneys, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, Los Angeles, of counsel), for appellant.

McInnis & Hamilton and Renwick Thompson, San Diego, for respondent.

MUSSELL, Justice.

These four cases have been consolidated for the purpose of appeal and are presented on an agreed statement of facts. The appeals are by the United States of America from judgments involving the relative priority of an attachment lien of defendant Morrison, and a subsequent lien of the United States for taxes.

George Styliano and his wife, Genell Styliano, owned four parcels of real property in San Diego County. Three of these were mortgaged, one to Robert M. Rewick et al., one to Robert M. DeWitt et al., and one to Ray C. Cavell et al. The fourth parcel had been sold and conveyed by the Stylianos to Alberta Winther and Margaret G. Young, and there was a balance owing to the Stylianos on the purchase price.

The Stylianos were indebted also to defendant Wilton M. Morrison on a promissory note. On October 17, 1946, Morrison brought an action against the Stylianos on this note and on the same day he procured the issuance of a writ of attachment in the action, pursuant to which, during the month of October, 1946, the interests of the Stylianos in the various parcels of real estate involved in the four actions were attached. Morrison recovered a judgment against the Stylianos in the sum of $78,938.55 on April 24, 1947, and recorded an abstract thereof in the office of the County Recorder of San Diego County on May 2, 1947.

After the levy of the Morrison attachment, but before the recovery of his judgment and the recording of the abstract, certificates of assessment of Federal taxes were received in the office of the Collector of Internal Revenue at Los Angeles, and notices of Federal tax liens against all property belonging to the Stylianos were filed in the office of the County Recorder of San Diego County. The notices were filed for record on December 3, 1946, December 5, 1946, December 10, 1946, and January 22, 1948.

In the Winther case the action was to determine the interests of the purchasers in the property, and the balance thereon had been deposited in court. The trial court ordered that the $1500.00 so deposited be paid to Morrison in satisfaction pro tanto of the judgment lien, and held that the United States had a lien on the balance which was inferior to that of Morrison. The Rewick, DeWitt and Cavell cases were actions for foreclosure of mortgages and the plaintiffs therein recovered judgments in which the court ordered the mortgaged property sold and the proceeds applied as follows: First, to the payment of the respective mortgage judgments and costs; second, to the satisfaction of the Morrison judgment lien pro tanto; third, any balance to be paid to the United States on its federal tax lien. In each of the cases Morrison asserted his lien by virtue of the attachment and judgment and no question is raised as to the regularity of the attachment proceedings or judgment, or the correctness of the judgments of the trial court respecting the claims of the plaintiffs in any of the four actions.

The sole question involved on this appeal is whether the court erred in holding that the tax claims of the United States were subordinate to the attachment and judgment lien of defendant Morrison.

[1-3] Section 542a of the Code of Civil Procedure provides in part that "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated." It is further provided that "the attachment * * * shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action." Since it is conceded that the attachment herein was properly issued and properly levied upon the property, it is evident that Morrison perfected a lien thereon which secured and insured the payment to him of any judgment that was recovered by him in the action, insofar as the property attached could be applied to the judgment. Halstead v. Halstead, 72 Cal.App.2d 832, 836, 165 P.2d 513. The lien attached immediately upon the levy of the attachment. Code Civil Procedure, 542a, supra; Ritter v. Scannell, 11 Cal. 238, 240, 70 Am.Dec. 775. "It is, in effect, an incipient execution—an execution, so to speak, in advance of trial and judgment." 3 Cal.Jur. p. 402; Porter v. Pico, 55 Cal. 165, 174. A sheriff's deed executed in pursuance of an execution sale under a judgment rendered in an attachment suit relates back to and takes effect from the levy of the attachment, if the levy was such as to create a lien. Martinovich v. Marsicano, 150 Cal. 597, 600, 89 P. 333, 119 Am.St.Rep. 254. As was said in Balzano v. Traeger, 93 Cal.App. 640, 643, 270 P. 249, 250: "When the attachment is upon real property and the judgment lien is established, the attachment lien merges in the lien of the judgment, and thereafter the only effect of the lien of such attachment is to preserve the priority thereby acquired. This priority is continued and enforced under the judgment." The lien acquired by an attachment is a vested interest affording specific security for satisfaction of the debt put in suit and is a special interest which an attaching creditor has in property held in custody of the sheriff sufficient to support an action for conversion.

McCaffey Canning Co., Inc., v. Bank of America, 109 Cal.App. 415, 423, 424, 294 P. 45.

The lien of the United States in the instant action was placed upon the property of the Stylianos after the attachment lien was perfected under the laws of California. It is the position of the United States that at the time its lien attached, Morrison had only a potential right of a contingent lien and that such a lien is inchoate and is not sufficiently specific or perfected to prevent a subsequent federal tax lien from attaching to the property with priority. In support of its position the United States relies on sections 3670, 3671, and 3672 of the Internal Revenue Code, 26 U.S.C.A. §§ 3670–3672. Section 3670 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 3671 is as follows: "Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

Section 3672 provides, with respect to the liens referred to in sections 3670 and 3671, that: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—(1) In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *."

Under the provisions of Section 3671, supra, the tax lien in this case arose on December 3rd, 5th and 10th, 1946, and on January 22, 1948, the dates on which notices of tax liens were filed for record in San Diego County. It is argued by the United States that when its lien arose Morrison was not a mortgagee, a pledgee, a purchaser or a judgment creditor, and that his attachment lien is subordinate to the tax lien. In support of its argument appellant relies principally upon the case of MacKenzie v. United States, 9 Cir., 109 F.2d 540, in which case it appears that the assessment list was received by the collector in June, 1931, the attachment was issued and levied upon the property on September 4, 1931, and on May 28, 1932, judgment was recovered in the attachment suit. It was held in that case that the lien of the Government for taxes was prior to that of the judgment creditor. Since the tax lien arose prior to the issuance of the attachment it was not necessary to the decision to pass upon the priorities of tax and attachment liens where the tax lien, as here, arose after the levy of the attachment. The factual situation here involved was not before the court.

[4] The liens created by Sections 3670 and 3671 of the Internal Revenue Code are general and not priority liens. Board of Supervisors of Louisiana State University v. Hart, 210 La. 78, 26 So.2d 361, 363, 174 A.L.R. 1366. There is no provision in either section indicating that the liens for taxes have a priority over attachment liens placed on the property prior to the time when the tax liens arise. The tax lien is upon "all property and rights to property, whether real or personal, belonging to such person."

[5, 6] Whatever interest the Stylianos had in the real property involved, at the time of the tax lien, was subject to the attachment, and any mortgage or conveyance by them would be subject to the rights of an attaching creditor. It follows that the tax lien attached to whatever ownership the Stylianos had in the property at the time the lien arose and that the Government could acquire only such title as the Stylianos then had. As was said in New York Cas. Co. v. Zwerner, D.C., 58 F. Supp. 473, 477: "The rights of the Collector of Internal Revenue can rise no higher than those of the taxpayer whose right to property is sought to be levied upon; * * *."

It should also be noted that while Section 3672 of the Internal Revenue Code provides that the tax lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice has been filed by the collector, it does not provide that the mortgagee shall be one who has recorded his mortgage; it does not expressly state that after notice is filed the lien in favor of the Government shall be subject to all existing mortgages, or that the lien shall be superior to them. The priority of liens as between mortgagees, pledgees, purchasers and judgment creditors is not therein provided for. As we read the section its purpose is to afford notice to those named, of the existence of tax claims, before dealing with the property. Exchange Nat. Bank of Tulsa v. Davy et al., D.C., 13 F.Supp. 226, 228.

In Board of Supervisors of Louisiana State University v. Hart, 210 La. 78, 26 So.2d 361, 174 A.L.R. 1366, the precise question here involved was passed upon. In that case the attachment was levied and the attachment lien arose on July 25, 1939. Thereafter the assessment list was received by the collector on February 15, 1940, and notice was filed on February 16, 1940. Thereafter judgment was rendered in the attachment case.

The court held that the nature of the rights flowing from an attachment in that State (Louisiana) must be determined by the law of that State; that the lien of the attachment when recognized by judgment relates back to the date of the seizure and is superior to or primes any intervening mortgages, liens, encumbrances or purchasers; that while a lien and privilege resulting from an attachment in its strictest sense is not a judgment, it is specific and attaches to the priority from the moment of the seizure and is superior to a lien, mortgage or privilege thereafter arising and the situation is not altered if the judgment recognizing the attachment is rendered subsequent to the intervening lien, mortgage or privilege; that the tax lien of the United States attached to the property of Smith (against whom the assessment was levied) in the condition in which the property was at the time the lien arose; that at the time Smith's property was attached by the Louisiana State University it was in the custody of the court and that the tax lien was subject to the attachment lien. The court considered the MacKenzie case, supra, but did not consider it to be controlling as the tax lien in that case arose prior to the issuance of the attachment.

In United States v. Yates, Tex.Civ.App., 204 S.W.2d 399, the attachment was levied on May 15, 1944. Thereafter on May 26, 1944, the assessment list was received and notice of the lien was filed. Thereafter judgment was obtained. The court followed Board of Supervisors of Louisiana State University v. Hart, supra, and held that the lien of the attachment was prior to the lien of the United States for taxes.

In United States v. 52.11 Acres of Land etc., D.C.Mo., 73 F.Supp. 820, it was held that money paid into registry of court by the United States in satisfaction of landowners' respective judgments for taking of land by the United States, and representing indebtedness of landowners to third persons under the landowners' contracts with the United States, was subject to lien in favor of third person's creditor superior to Internal Revenue Collector's lien for federal taxes assessed against third person, where a creditor obtained liens by virtue of garnishment proceedings in 1942 and 1945 and notice of tax liens were filed thereafter.

[7, 8] The rights acquired by Morrison by virtue of his attachment at a time when the property was free of tax liens must be determined by the law of California. Gray v. Little, 97 Cal.App. 442, 450, 275 P. 870. The determination of what constituted the property of the Stylianos on the date of establishment of the tax lien is primarily a matter of State law and the Collector of Internal Revenue can reach only such property rights as the Stylianos had when the lien arose. United States v. Winnett, 9 Cir., 165 F.2d 149, 151. Whatever rights the Stylianos had in the real property involved were subject to the valid subsisting attachment lien of Morrison and the tax lien of the United States was not entitled to priority over it.

Judgments affirmed.

GRIFFIN, Acting P. J., concurs.

93 Cal.App.2d 646

RICE v. RICE.

Civ. 16852.

District Court of Appeal, Second District, Division 3, California.

Sept. 19, 1949.

An action by Kathleen Rice against James C. Rice for divorce presented the question whether certain real property was separate or community property.

The Superior Court, Los Angeles, Stanley Mosk, J., granted plaintiff's motion to vacate the interlocutory decree of divorce and to file an amended complaint on the ground that defendant was guilty of fraud in permitting the court to apportion community property without disclosing to the court that the defendant had deeded said property to a third person.

The District Court of Appeal, Wood, J., held that the defendant's failure to disclose to the court that he had conveyed the property to another constituted a fraud upon the court, and affirmed the order.

1. Divorce ⚷165(3)

Where court awarded wife interlocutory decree of divorce and one-half of the community property, consisting of one-half the value of a house and lot, but husband had not disclosed to court that he had conveyed realty to another, even though he stated to court that he had possession, and was questioned at length regarding property, husband committed fraud upon court and decree would be set aside. Code Civ.Proc. § 473.

2. Judgment ⚷375

The court has inherent power to set aside a judgment obtained through fraud perpetrated upon it.

3. Judgment ⚷375

Judgment may be set aside for either extrinsic or intrinsic fraud. Code Civ. Proc. § 473.

William R. Law, Los Angeles, for appellant.

F. Walter French and Frank J. Indovina, Santa Monica, for respondent.

WOOD, Justice.

Appeal by defendant from an order granting a motion of plaintiff (1) to vacate an interlocutory decree of divorce, and (2) to file an amended complaint.

The complaint for divorce alleged that the community property of the parties included a certain house and two lots. That allegation was denied in the answer, and the cross-complaint alleged that there was no community property.

A principal question at the trial was whether said real property was separate or community property. The plaintiff and defendant testified at some length regarding the purchase of the lots and the source of the funds which were used to purchase the lots and to build the house. The testimony of defendant indicates that he was contending at the trial that the property was his separate property. The testimony of the plaintiff was to the effect that it was community property.

On March 3, 1948, an interlocutory decree of divorce was granted to plaintiff. It was decreed therein that one-half of said real property is community property. One-half of that community property (that is, one-half of one-half of the house and lots) was awarded to plaintiff, and the other half of that community property was awarded to defendant. It was also decreed that the house and lots should be appraised and that defendant might acquire the one-fourth interest of plaintiff by paying to plaintiff one-fourth of the appraised value, or that plaintiff might acquire the property by paying to defendant three-fourths of the appraised value; that in the event neither party desired to purchase the property, then the property should be sold and one-fourth of the proceeds should be paid to plaintiff and three-fourths thereof should be paid to defendant; that said order should be carried into effect within 60 days from the entry of the decree. The furniture located in said house was adjudged to be community property, and it was awarded to defendant.

On October 10, 1946, (about one year before this action was commenced on September 10, 1947) defendant allegedly conveyed said property to one Nelda Davis; and on said date Nelda Davis executed a note for $5,000 payable to defendant and also executed a trust deed in favor of defendant covering said property, as security for the payment of the note.

On June 21, 1948, plaintiff made the motion above mentioned (to vacate the decree, and to file the amended complaint) upon the ground that defendant was guilty of fraud in permitting the court to award said real property to the parties as community property, apportioning one-fourth thereof to plaintiff and three-fourths to defendant, without disclosing to the court that defendant had deeded said property to a third person on October 10, 1946. The motion was also made upon all the grounds set forth in section 473 of the Code of Civil Procedure.

At the trial it was shown that plaintiff and defendant were married in 1918 in New Zealand and came to the United States about 1922; they acquired said real property about 1923; title thereto was originally in the name of plaintiff, but later it was transferred to the names of plaintiff and defendant; the purchase price of the property was paid from funds earned by defendant, part of which was his separate property—having been earned before the marriage; and plaintiff and defendant resided in said house until they separated in 1926, and since that time defendant has continued to live there. Plaintiff testified, at the trial, that the first time she learned that the title to the property was not in her name was when her counsel so informed her during this litigation; in 1925 she signed a document at defendant's request but she did not know the nature of the document; about 1945, when defendant was in a hospital, he stated to plaintiff, in a conversation relative to borrowing money, that they still owned the house; plaintiff "signed something" at a bank; and defendant never told her that she had no interest in the house. Defendant testified that plaintiff "deeded" the property to him; he and plaintiff "parted company financially" in 1925, and they made an agreement at said time that plaintiff should have certain money and diamonds and that she should give defendant a quitclaim deed to the house. In rebuttal the plaintiff denied that they had made such an agreement. About November, 1925, while plaintiff was preparing to go to Australia, defendant made and signed a written statement for her use in connection with her return to the United States, in which he said that the property here involved was purchased by plaintiff and that it would be the permanent home of the parties. In 1942, while he was in the hospital, he wrote to plaintiff and said that "They know we own real estate on the hill."

In plaintiff's affidavit, in support of said motion, she referred to the testimony given at the trial, hereinabove mentioned, and in addition thereto stated that shortly after February 10, 1948, she was advised that a title report showed record title to said property to be in one Nelda Davis; that at the trial on February 19, 1948, defendant referred to said property as the "home on the hill" and at no time disclosed that Nelda Davis had any interest in said property; that in his testimony, he did not mention the Davis deed nor the trust deed made by Nelda Davis securing the $5,000 note; and that at the conclusion of the trial, when the judge announced that he was awarding one-fourth of the property to plaintiff as community property, neither the defendant nor his attorney protested or asked leave to prove that said property belonged to Davis.

In defendant's affidavit, in opposition to the motion, he stated that no fraud was practiced upon the court or upon the plaintiff; that several weeks prior to the trial the attorney for plaintiff informed the attorney for defendant that plaintiff knew that said property had been transferred by defendant to some other person, and that when the divorce action was over if plaintiff did not get what she thought she was entitled to she intended to file suit to set aside the transfer; and that the deed to Nelda Davis was recorded on October 14, 1946.

[1-3] Appellant (defendant) contends that there was no fraud. He argues that

the testimony shows that the title to the property was not in defendant's name. The testimony so referred to by defendant was his answer to a question by plaintiff's attorney. The question and answer were as follows: "Q. Does title stand in your name? A. No, sir; I have had other property." Apparently defendant contends that the court should have understood from said answer that the title to the property stood in the name of a third person. That answer indicates that the title was not in defendant's name, but it does not necessarily indicate that the title stood in the name of a third person. Such answer was not inconsistent with title being in the name of defendant and plaintiff or in the name of plaintiff. The part of the answer following the words "No, sir" was not responsive to the question and was meaningless and evasive. As above shown, that question was not asked by defendant's attorney. It was asked by the attorney for plaintiff immediately after the attorney for defendant had announced that "The defendant will rest." Thereafter the attorney for defendant did not ask any questions. It appears from statements of the trial judge, near the beginning and at the close of the trial, that the judge was under the impression that the title to the property was in the name of one or both of the parties. Near the beginning of the trial, while plaintiff was a witness, the following occurred:

"Q. [by attorney for plaintiff] When did you first learn your property was not in your name any longer? A. When you told it to me.

"Q. Was that at the time this action was filed?

"Mr. Law [attorney for defendant]: I object to your going into that. No issue here on setting aside a deed.

"Mr. Indovina [attorney for plaintiff]: It will be linked up.

"The Court: There is an allegation that the community property consists of a house. The fact that there is a question now as to whose name it is being held in doesn't necessarily affect that allegation.

"Mr. Law: Maybe it doesn't affect the allegation. If he is seeking to set aside a document that was transferred to him, I would like to have it pleaded.

"The Court: Paragraph IV of the Complaint alleges this property is community property. *Whether the property is held in the wife's name or the husband's name, or both names jointly doesn't affect the status of the property.*" (Italics added.) After the testimony had been completed and just before the judgment was announced, the judge stated that there is "a conflict on the question of the purchase of this home and the deeding of the home by the wife to the husband. * * * I am going to determine that one-half was purchased out of the earnings of the husband in the State of California, after his arrival, and the other half were accumulated savings, which would not be community property. That the deeding thereafter was merely for the purpose of security in connection with her voyage overseas." It therefore appears that when plaintiff's attorney asked plaintiff, during the trial, when she first learned that the property was no longer in her name, the defendant objected to "going into that" and stated there was no issue on setting aside a deed. It also appears that, at the close of the case, when the judge was apportioning the property and was discussing the question of the ownership and character of the property, the defendant remained silent regarding the facts that he had executed a deed purporting to convey the property to Nelda Davis and that Davis had executed the $5,000 note and the trust deed to secure the payment of the note. The defendant did not at any time during the trial disclose to the court that the property had been conveyed to a third person. The conduct of the defendant during the trial was such, with reference to the question of title to the property, that the judge was justified in believing that the title was in such condition that he could make an effective order apportioning the property. Defendant testified at the trial that he was still living in the house, and that most of the furniture which he and plaintiff had in the house was still there and that he would not take $1,000 for it. Defendant was questioned at length, in his own behalf, regarding the source of the funds used in purchasing the lots and building the house. Good faith on the part of the defendant required that he inform the court that he had conveyed the property to Davis. Under the circumstances here, the conduct of defendant constituted a fraud upon the court. The court has inherent power to set aside a judgment obtained through fraud perpetrated upon it. McGuinness v. Superior Court, 196 Cal. 222, 231, 237 P. 42, 40 A.L.R. 1110. Such a judgment may be attacked by motion. Cowan v. Cowan, 72 Cal.App.2d 868, 871, 166 P.2d 21. As above stated, the motion herein was made under the provisions of section 473 of the Code of Civil Procedure. Fraud is recognized as a ground for relief under said section. Difani v. Riverside County Oil Co., 201 Cal. 210, 216, 256 P. 210; see also In re Yoder, 199 Cal. 699, 701 251 P. 205. Where the motion to set aside the judgment on the ground of fraud is made under said section "it is immaterial whether the fraud be extrinsic or intrinsic." Security-First Nat. Bank v. Hauer, 47 Cal.App.2d 302, 307, 117 P.2d 952, 955; Tomb v. Tomb, 120 Cal.App. 438, 441, 7 P.2d 1104. The motion was made within the period of time prescribed by said section, the judgment having been entered on March 3, 1948, and the notice of motion having been filed on June 21, 1948.

Appellant argues further that it was as much the duty of respondent to speak up and inform the court of the transfer of the property to Davis as it was the duty of appellant to do so. It is true that plaintiff stated in her affidavit, in support of the motion, that about nine days before the trial she was advised that the record title to said property was held by Nelda Davis. It does not appear, however, that plaintiff joined the defendant in the alleged transfer of the property to Davis; and it appears that plaintiff did not know that she (plaintiff) had conveyed the property to defendant, if in fact she had so conveyed it. Although plaintiff had been advised that the record title was held by Davis, it does not appear that plaintiff had any reason to believe that the alleged transfer to Davis was valid. At the hearing of the motion, the attorney for plaintiff stated that about a week before the trial he called defendant's attorney by telephone and referred to the transfer as a "phony transfer" and asked him if he was going to urge in court that it was a bona fide transfer, and told him that if defendant urged in court that it was a bona fide transfer that plaintiff would have to file an action, and that he (plaintiff's attorney) would wait to see what the defendant would do in court. He stated further that defendant's attorney replied that he did not know what defendant would do—that defendant was unpredictable. It was not denied that that conversation was had. In view of that conversation, and in view of the facts that defendant was still in possession of the property, that he did not mention the Davis deed at the trial, that he was examined at length by his counsel as to the source of the funds used in acquiring the property, and that when plaintiff referred to a transfer of the property the defendant objected to "going into that," plaintiff would have been justified in assuming that defendant did not regard the Davis deed as a bona fide conveyance of the property and that defendant was not relying upon that deed as a defense to plaintiff's claim to a part of said property. The issue at the trial with reference to the property was whether it was community property or the separate property of the defendant. Defendant did not contend at the trial that the condition of the title was such that the court could not make an effective order apportioning the property, but on the contrary he led the court and plaintiff to believe that the title was in such condition that the court could make such an order. If defendant regarded the Davis deed as genuine and effectual, it was his duty to inform the court regarding it.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

93 Cal.App.2d 624

In re MERRICK'S ESTATE.

MERRICK et al. v. MERRICK et al.

Civ. 14056.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1949.

Proceeding by James A. Merrick and others against John P. Merrick and another to contest probate of the will of Mary Elizabeth Merrick, deceased.

The Superior Court of Alameda County, Leon E. Gray, J., found for proponents and entered judgment and order admitting the will to probate and contestants appealed.

The District Court of Appeal, Runnells, J., pro tem., found that the evidence sustained the finding that will was not procured through undue influence and affirmed the judgment and order.

1. Wills ⟹163(2)

Testatrix' son and principal beneficiary under will, who sustained a confidential relation to testatrix at time will was executed and actively participated in its preparation, had the burden of showing that will was not procured by undue influence.

2. Wills ⟹163(2)

The presumption that will was procured by undue influence arising from confidential relation of principal beneficiary to testatrix may be overcome by other circumstances which show affirmatively that testator's volition accompanied testamentary act.

3. Wills ⟹163(1)

The indicia of undue influence may be explained and rebutted by testimony of persons present when instrument was executed by proof that testator gave instructions for preparation of instrument and by evidence that he subsequently affirmed or expressed approval of its provisions.

4. Wills ⟹324(1), 386

In will contest all questions of credibility of witnesses and weight to be given their testimony are exclusively for jury and trial judge.

5. Wills ⟹386

A verdict or finding in will contest will not be disturbed on appeal if there is a real and substantial conflict of evidence on the issue of fact involved.

6. Wills ⟹166(2)

Evidence sustained finding that will favoring son who had lived with and cared for testatrix for many years was not procured by undue influence.

◆

Clarence E. Rust, Oakland, for appellants.

Samuel L. Gold, Augustin Donovan, Oakland, for respondents.

RUNNELLS, Justice pro tem.

Four of the heirs of Mary Elizabeth Merrick, deceased, contested her will before probate and now appeal from a judgment and order admitting the will to probate. The said heirs are children of the deceased, and will be referred to as the contestants. The respondents are also children and heirs of the deceased and will be referred to as the proponents. On June 12, 1947, proponent John P. Merrick filed in the court below his petition for probate of the will of deceased in which it was alleged, among other things, that Mary Elizabeth Merrick died on May 5, 1947, in Alameda County leaving an estate of an estimated value of more than $10,000; that the heirs consisted of the contestants and proponents and in addition thereto two grandchildren. A copy of the will was attached to the petition. In the will there was devised to said John P. Merrick the family home and the residue went in one-sevenths to each of the six children and one-seventh divided equally between the two grandchildren.

Contest to the will before probate was filed on July 8, 1947, by three sons and a daughter of decedent, wherein it was alleged that at the time of the execution of the will decedent was wanting in testamentary capacity by reason of unsoundness of mind and that said will was obtained from the decedent through undue influence.

The contest was tried by the court without a jury and the court found in favor of the proponents on all issues presented and made its judgment and order admitting the will to probate.

The only specification of error which the appellants have raised on appeal is: "There is no evidence to support the finding that the Will was executed free from the undue influence of proponent or to overcome the presumption of undue influence or to establish that said Will was the free and voluntary act of testatrix."

The evidence discloses that the testatrix suffered a paralytic stroke in 1944; also a broken hip in 1944 and about six months later the other hip was broken; pins were placed in both hips; that a second stroke was suffered on April 23 1947; that John P. Merrick had spent practically all his life at his mother's home; that during the last years of her life he slept on a couch in her room, cared for her and administered to her comfort and needs and performed the most menial tasks; that she had indicated on more than one occasion that she wanted him to have the home; that he paid the housekeeper and operating expenses of the home; that the testatrix paid medical and hospital bills out of her own funds; and that upon ascertaining that his mother had suffered a stroke on April 23, 1947, he immediately notified the other children.

The testimony of contestants of the occurrences from April 23 to the date of death of testatrix varied only in minor details; substantially their testimony so far as is here pertinent was to the effect that their mother was in a state of coma; was unconscious; was unable to move; was unable to speak; was unable to eat and was in such a state as to be unable to recognize any of them; that they had no knowledge of the execution of the will until after their mother's death, although they, or at least some of them, were in a down-stairs room in the home at the time of the execution of the will. The testimony of the proponents was to the effect that the testatrix told them on the afternoon of April 24, 1947, that she desired to make her will; that she wanted Jack (John P. Merrick) to have the home and the remainder to go to her children in one-sevenths and one-seventh in equal shares to her two grandchildren, children of a deceased daughter; that she wanted Mrs. Christiansen and Mr. Roach as witnesses; that while their mother was directing how she desired to leave her property, Belle Merrick Stuart made notes thereof; that the will was put in typewritten form and was shortly thereafter signed by mark by their mother in the presence of Mrs. Christiansen and Mr. Roach.

The testimony of the subscribing witnesses, Mrs. Christiansen and Mr. Roach, was to the effect that John P. Merrick read the will to his mother; that she stated it was what she wanted; that she thereupon signed by mark and asked them to witness the will which they did. Both subscribing witnesses testified that the testatrix was able to talk and appeared to understand what she was doing.

Mrs. Frates arrived at the home the morning of April 25, 1947, and remained until May 4th and was in attendance as nurse for deceased from nine to five each day. She testified that until the last two or three days of her stay the deceased was able to and did talk to her and to members of the family, was able to eat and to recognize those about her.

Gus Campbell, who had known deceased since September, 1945, and who had seen her about once a week since that date testified he had seen decedent in her bedroom on April 25, 26, and 27; that deceased had talked to him and that she was not in a coma or unconscious condition.

[1] It is the contestants' view in the light of the testimony taken at the trial that, inasmuch as John P. Merrick was the principal beneficiary under the will and that he not only sustained a confidential relation to the testatrix at the time of the execution of the will but actively participated in its preparation, he carried the burden to show the will was not procured or induced by undue influence. With this contention we are in agreement. In re Estate of Graves', 202 Cal. 258, 262, 259 P. 935; In re Estate of Baird, 176 Cal. 381, 384, 168 P. 561; In re Estate of Higgins', 156 Cal.

257, 261, 104 P. 6; In Re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101.

[2, 3] The presumption of undue influence may be overcome by other circumstances which show affirmatively that the decedent's volition accompanied the testamentary act. The indicia of undue influence may be explained and rebutted by the testimony of persons who were present at the time the instrument was executed by proof that the decedent gave instructions for the preparation of the script, and by evidence showing that he subsequently affirmed or expressed approval of its provisions. 26 Cal.Jur. 649 and cases cited.

The evidence shows that the presumption of undue influence was squarely met and overthrown. The testatrix, according to the testimony of John P. Merrick, stated that she wanted to make a will and, "I want you (Jack) to have everything." Jack protested and said he did not want everything, "I don't want any trouble." Then she said, "You have always been good to me, and they all know I want you to have this house. This has always been your home, and I want it as your home." Belle Merrick Stuart testified in effect in confirmation of the same thing. Mrs. Christiansen also testified that during a conversation with testatrix in the early part of April, 1947, the testatrix stated: "* * * when she went she wanted the house left to Jack."

Thus the record shows that the testatrix had, prior to the execution of the will, evidenced a desire to favor John P. Merrick (Jack) in appreciation of his filial affection. The record is completely silent of any domination over the testatrix by John P. Merrick or in fact any person concerning the disposition of her property. In view of his long attendance upon his mother, her will was a completely natural one.

[4, 5] Evidence was produced to the satisfaction of the probate court that there was no pressure brought to bear directly upon the testatrix in making disposition of her property in the manner so desired by her. Indeed, the testimony was to the contrary in that it definitely showed that the disposition of her property was the natural result of her uncontrolled act and will. In Re Estate of Snowball, 157 Cal. 301, 305, 107 P. 598, 600, it was held: "All questions of the credibility of witnesses and of the weight to be given to their testimony were exclusively for the jury and the trial judge. The rule is the same in will contests as in other proceedings, and a verdict or finding in such a case will not be disturbed 'where there is a real and substantial conflict of evidence on the issue of fact involved.' In re Estate of Doolittle, 153 Cal. [29], 30, 94 P. 240." In Re Estate of Janvier, 7 Cal.App.2d 624, 625, 46 P.2d 792, which involved a contest to the probate of two codicils to the will of the decedent upon the ground of alleged undue influence and in which appellants relied upon the presumption of undue influence under circumstances similar to the instant case, the court disposes of the matter in these words: "It is the first contention of the plaintiffs that the presumption of undue influence was not overcome by the evidence of the defendants. It is sufficient for us to say that there was substantial evidence to overcome the presumption, and the jury resolved the question in favor of the defendants by a special verdict which this court would not be justified in upsetting on appeal."

The testimony of the subscribing witnesses and the nurse, coupled with that of the proponents, apparently had great weight with the trial court for that court found as a fact "That it is not true that on the 24th day of April, 1947, John P. Merrick then and there persuaded or induced the said deceased to make her mark, and thereby attempt to influence the execution of the said Will offered for probate in these proceedings." And "* * * it is not true that the making of said Will was procured through undue influence practiced by John P. Merrick."

[6] Under the circumstances, it is concluded that the issue of undue influence was correctly determined by the lower court.

For the reasons given, the judgment and order are affirmed.

GOODELL, Acting P. J., and DOOLING, J., concur.

93 Cal.App.2d 616

In re SCHOMAKER'S ESTATE.

SCHOMAKER v. EDY.

Civ. 14042.

District Court of Appeal, First District, Division 2, California.

Sept. 19, 1949.

Hearing Denied Nov. 17, 1949.

Proceeding in the matter of the estate of Leo Schomaker, wherein Garnett Christine Schomaker filed a petition for letters of administration, contested by Margaret Edy.

The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered an order appointing contestant administratrix of the estate, and petitioner appealed.

The District Court of Appeal, Runnells, J. pro tem., affirmed the order, holding that since the petitioner appeared in Nevada in divorce action brought against her by the decedent, the divorce decree became final and would be given full faith and credit in California.

1. Divorce ⚷327

Where a defendant in a divorce action has participated in divorce action and has had full opportunity to litigate issue of jurisdiction, divorce decree is binding even though a relitigation of question of jurisdictional residence requirements in another state might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree, which as a matter of policy could not be procured in the state of actual domicile.

2. Divorce ⚷327

Where finding of requisite jurisdictional facts was made in husband's divorce action in Nevada in which wife appeared and participated, divorce decree became final and would be given full faith and credit in courts of California so that former wife was properly denied letters of administration on deceased husband's estate.

Walter H. Duane, San Francisco, for appellant.

William A. O'Brien, San Francisco, for respondent.

RUNNELLS, Justice, pro tem.

This is an appeal from an order appointing respondent, Margaret Edy, the administratrix of the estate of Leo Schomaker, deceased.

On September 18, 1947, Garnett Schomaker, appellant herein, filed in the Superior Court of the City and County of San Francisco her petition for letters of administration of the estate of Leo Schomaker, deceased; it was alleged in the petition that Leo Schomaker died intestate at Lovelock, Nevada, on September 13, 1947; that at the time of his death he was a resident of and left estate in the City and County of San Francisco; that petitioner was his surviving widow and that the other heirs of deceased were a son and two brothers.

On September 30, 1947, Margaret Edy filed in said court her petition for letters of administration in which she alleged the death of Leo Schomaker; that at the time of his death he was a resident of the State of Nevada; that he left estate in the City and County of San Francisco; that he died intestate; that on September 30, 1947, petitioner was appointed the guardian of Donald L. Schomaker, a minor, son of said decedent; and that the heirs or next of kin of decedent were said minor son, two brothers and Mrs. Garnett Schomaker, divorced wife of decedent.

The hearing of the two petitions was held on October 14, 1947, at which time said Margaret Edy filed a contest to the petition of Garnett Schomaker for letters of administration and objections to the granting of her said petition; in said contest Margaret Edy alleged that she was the mother and natural guardian of Donald L. Schomaker, the only child of decedent Leo Schomaker; that on September 18, 1947, the said court appointed contestant the special administratrix of the estate of said decedent and that she thereafter qualified as such special administratrix; that on September 30, 1947, said court appointed contestant the guardian of the person and estate of Donald L. Schomaker, said minor, and that she thereafter qualified as such guardian; that said contestant and petitioner denied all of the allegations contained in the petition for letters of administration of said Garnett Schomaker, save and except that contestant admitted that the minor, Donald L. Schomaker, was the heir of said decedent and that said decedent died in Nevada on the 13th day of September, 1947; contestant specifically denied that decedent was a resident of San Francisco on the date of his death and specifically denied that Garnett Schomaker was the surviving widow of said decedent. As further grounds of contest the contestant averred that the marriage of said decedent to said Garnett Schomaker was terminated by a valid decree of divorce duly given and entered by the district court of the Fifth Judicial District of the State of Nevada in and for the county of Elko on the 12th day of September, 1947; that on September 8, 1947, appellant and respondent entered into a property settlement agreement wherein in consideration of the sum of $2500 appellant waived all her community interest in the community property of the marriage and relinquished all her rights as heir of decedent and the right to act as administratrix of his estate; that on said last mentioned date appellant in consideration of the sum of $2500 executed a waiver relinquishing all claims to community property, alimony and support and agreed to be estopped forever from asserting the right to act as administratrix of the estate of decedent.

A certified copy of the judgment and decree of the Nevada court, property settlement agreement and waiver and release were admitted in evidence.

Counsel for appellant argues: (1) there was no evidence introduced at the trial to support the finding that the Nevada court had jurisdiction of the person and subject matter of the divorce but to the contrary, so he contends, it was clearly established that the deceased did not live in Nevada more than 15 days at the time he received the divorce, and cites, among other authorities, Andrews v. Andrews, 188 U.S. 14, 23 S.Ct. 237, 47 L.Ed. 366; Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, 157 A.L.R. 1366, and In re Estate of Bruneman, 32 Cal.App.2d 606, 90 P.2d 323, and (2) that the property settlement agreement was based on fraud. (Citing cases.) On the other hand, respondent asserts that Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385, is decisive of the issue involved here.

The principal issue here presented is: Do the requirements of full faith and credit bar the appellant from collaterally attacking the Nevada divorce decree? If this issue is answered in the affirmative no other issues are involved.

The deceased and appellant were married at Wild Horse, Nevada, on August 14, 1945; deceased operated a tavern known as "The Blue Lamp" on Geary Street in San Francisco, which business was sold in June, 1947, and thereupon deceased notified appellant that he intended going to Nevada and entering into business there; appellant testified that deceased went to Nevada in July, 1947, remained there four days and returned to San Francisco and lived with her until August 25, 1947, when he again went to Nevada. In other words, appellant's contention is that deceased was actually in Nevada less than twenty days when the decree of divorce was made and entered. Several witnesses testified they had seen deceased in California on various occasions during August, 1947.

A. E. Graziani, an attorney residing in San Francisco, was employed on September 3, 1947, by deceased and his attorney to contact appellant; the contact was made on the afternoon of that day at which time, according to the testimony of Mr. Graziani, he informed appellant that he was an attorney at law in the City and County of San Francisco; that he was engaged by Mr. Schomaker and his attorney to prepare a property settlement agreement and power of attorney which were to be presented to her for her signature. Continuing Mr. Graziani testified: "I had certain documents which I had been told that she was willing to sign—in fact, she was agreeable—had agreed—to sign them, and they were ready for her signature.

She wanted to know how much she was being offered, and I told her $2200 in cash. She wanted to know why it was not $2500, and I informed her that she had already received $300. She told me that she felt that $2500 would be sufficient, but she didn't want to credit the $300 that she had already received, but wanted $2500 in full, if I could possibly get her $2500. I told her I would do what I could, and I eventually succeeded in getting her $2500 in cash. * * * She told me that they had had a good deal of marital trouble, that Mr. Schomaker had sold his tavern, that she knew he had gotten mostly cash for it, that he had gone to Nevada, and she couldn't very well pursue him up there, and if she didn't take this $2500 she felt that she would receive nothing from him; that he had been a bartender before he sold this tavern, and that he probably would wind up by being a bartender again when he had spent all of his money and gambled it away." Again concerning another interview with appellant on September 8, 1947, Mr. Graziani testified: "I had prepared this property settlement agreement and a power of attorney, and a release —complete release of all rights—and I showed Mrs. Schomaker the papers, I read them to her, I explained them to her, and she expressed a willingness to sign them. She still reiterated that she wanted $2500 in cash—she didn't want to credit the $300 to the total to be paid. However, she was willing to settle for the $300 that she had plus $2200 more, if I couldn't get the extra $300 for her. I told her that I would do my best to get her the extra $300—I told her that I felt that the $300 would not be a stumbling block—that Mr. Schomaker would be willing to give her the extra $300. She then wanted to sign the papers, and I asked her if she understood them fully, and she said she did. She told me at that time that Mr. Schomaker had been a bartender most of his life, he had been fortunate enough to get this bar, had sold it for a high price, had gotten the cash, was in Nevada, and if she didn't take the $2500 she probably would not get a thing from him. She expressed no desire at that time to go to Nevada to fight the divorce. I told her if she wanted to go, she could go, but she did not desire to go—she was willing to take the $2500. I told her it would be best to sign before a Notary, * * *."

On September 11, 1947, Mr. Graziani called Mrs. Schomaker and told her that she could have the $2500 any time she wanted it and stated to her that Mr. Schomaker was to pay his fee and that he was sending the papers on to Nevada by air mail. Then continuing the witness testified: "I gave her a copy and I read them to her while she followed the copy with her eyes. As we went along, she asked me various questions which I endeavored to explain to her about the property settlement agreement. I believe she fully understood the agreements and all of the papers which she signed." Thereupon the following testimony was given by Mr. Graziani:

"Q. Any other questions that you can recall in the course of this interview? A. She asked about the power of attorney, which was in blank—there was no name for the attorney—and the waiver—it is a form that is used very commonly by attorneys in Nevada—that is usually filed—prepared and executed in blank, and filed—and I told her that it would be necessary for her to submit herself to the jurisdiction of the Court, going there directly herself, or by appointing an attorney in Nevada who would accept the summons in her place and stead, and who would also waive notice of time and place of trial, findings of fact and conclusions of law. She said she didn't understand those things, but I explained them to her to the best of my ability.

"Q. You did explain them? A. Yes.

"Q. Did she at that time express any concern as to whether or not she would get a valid divorce? A. She wanted to be sure that she got a valid divorce.

"Mr. Duane: I will ask that that go out—

"Mr. O'Brien: Q. What did she say in that regard? A. She said to me, 'If

I sign these papers and they enter a divorce, will the divorce be good?' And I said yes.

"Q. In the discussion of the sale of the decedent's business—namely, the Blue Lamp—did she discuss with you how much money he had obtained for that? A. Yes.

"Q. Tell us that whole discussion? A. She knew as much about it as I did—

"Mr. Duane: I will ask that that go out. A.—She told me that he received $25,000 for the Blue Lamp, $15,000 in cash, a promissory note with chattel mortgage for $10,000, and she told me also that he received an additional $10,000 under the counter—'under the counter' was the expression she used—making a total of $35,000 for the sale of the Blue Lamp.

"Mr. O'Brien: Q. When did she tell you that? A. She told me that at the conversation that we had on September 8th in my office.

"Q. So you did, then, in fact, fully explain all of the various documents which you have referred to and which you asked her to execute at that time? A. Yes.

"Q. And she did, as far as you were able to observe, fully understand them? A. Yes.

"Q. And the only objection that she indicated was that she wanted the additional $300? A. Yes, she wanted the additional $300.

"Q. Which you subsequently secured for her? A. Yes."

After appellant was told by Mr. Graziani that he had the $2500 for her she instructed him to forward the papers to Nevada and advised him to hold the money for a few days and she would let him know what she wanted done with it. The money remains in the possession of Mr. Graziani.

Appellant notified Mr. Graziani that she knew Mr. William McDonnell, assistant public defender. Upon receiving this information Mr. Graziani said to appellant: "You understand that I am representing Mr. Schomaker; wouldn't you like to go to Mr. McDonnell and have him represent you on this thing so that he can explain these papers to you?" And again, "Now, if you would like to go over to Mr. McDonnell's office with all these papers, you can get independent advice from him—he has represented you before, and you know him, and she said, 'No, I don't need a lawyer—you can explain the papers to me.'"

Her counsel, thus obtained and who derived his authority through the medium of a power of attorney which she executed with full knowledge of its import, filed an answer and represented her in open court throughout the proceedings. The testimony adduced at the trial in Elko, Nevada, disclosed that the deceased's residence in Elko County had been continuous and uninterrupted for a period of six weeks immediately prior to the date of the trial.

In its findings of fact, the probate court found that all of the allegations of the petition for letters of administration of Margaret Edy were true, and in order to make this finding, credence must have been given to Graziani's testimony. It would appear, too, that appellant knew the purport of the instruments which she signed and had complete knowledge that an attorney in Elko would represent her in the divorce proceedings.

It is believed a solution to the problem may be found, as respondent contends, in an application of the law as held in Heuer v. Heuer, 33 Cal.2d 268, 201 P.2d 385. The distinguishing features between the Heuer case and the instant case are that in the former after the divorce action was commenced in Nevada by the husband, the wife, a resident of California, went to Nevada, and after being served there with summons and complaint, engaged an attorney who filed an answer and cross-complaint for separate maintenance and thus tendered the issue of jurisdictional requirements.

In the Heuer case, supra, it is said, 33 Cal.2d 270, 201 P.2d page 386:

"The findings of jurisdictional defects were based on alleged sham and fraudulent intent in the domiciliary claims of the husband. The plaintiff now concedes that two recent decisions of the Supreme Court of the United States, Sherrer v. Sherrer, 334 U.S. 343, 68 S.Ct. 1087 [1097, 92 L.Ed. 1429, 1 A.L.R.2d 1355], and Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094 [92 L.Ed. 1451, 1 A.L.R.2d 1376], decided June 7, 1948, are controlling adversely to her contentions regarding the validity of the Nevada decree. Facts in those cases were somewhat similar to those involved here.

"In Sherrer v. Sherrer the wife went from Massachusetts to Florida and sued for divorce. The husband appeared in the action personally and by counsel. The wife was granted a divorce. She received custody of the minor children pursuant to the parties' stipulation read into the record. The husband returned to Massachusetts and sought a judicial declaration that the divorce and subsequent remarriage of the wife were invalid. A decree in his favor was affirmed by the Supreme Judicial Court of Massachusetts.

"In Coe v. Coe the wife obtained an award of support in a Massachusetts court. The husband journeyed to Nevada and there instituted divorce proceedings. The wife went to Nevada to contest the husband's action and to obtain a divorce for herself. She filed an answer denying other allegations but admitting the allegation as to the husband's residence. Both parties were present personally and by counsel at the trial. The wife was granted a divorce. She returned to Massachusetts and brought contempt proceedings against the husband for failure to comply with the prior support order. A contempt order based on a holding of the invalidity of the Nevada decree was affirmed on appeal.

[1, 2] "The Supreme Court reversed in each case. The reversals resolved the main issue in the present case on a declaration that 'the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.' Sherrer v. Sherrer, supra, 68 S.Ct. at page 1091. The test therefore is not whether the issue of jurisdiction was actively litigated in the court rendering the divorce decree. It is sufficient if the defendant has participated in the proceedings and had full opportunity to litigate the issue. If so, the decree is binding even though a relitigation of the question of jurisdictional residence requirements in another state might result in a finding that the domiciliary claim was fraudulently asserted for the purpose of obtaining a decree which as a matter of policy could not be procured in the state of actual domicile. Therefore where, as here, the finding of the requisite jurisdictional facts was made in divorce proceedings in another state in which the defendant appeared and participated, and the decree has become final, it must be given full faith and credit in the courts of this state.

"The trial court's conclusion that the Nevada decree is invalid is therefore erroneous."

The order is affirmed.

GOODELL, Acting P. J., and DOOLING, J., concur.

93 Cal.App.2d 635

PETROL CORPORATION v. CHARTRAND.

Civ. 16809.

District Court of Appeal, Second District,
Division 3, California.
Sept. 19, 1949.

The Petrol Corporation sued John W. Chartrand, doing business as Chartrand's Traffic Service, to require defendant to account for bonuses exacted from users for diverting to their use tank cars which plaintiff had leased and placed under direction of defendant.

The Superior Court of Los Angeles County, Alfred L. Bartlett, J., entered judgment in favor of defendant and plaintiff appealed.

The District Court of Appeal, Wood, J., reviewed the law of agency and held that amended complaint stated a cause of action for secret profit derived by defendant as agent from subject of agency and reversed the judgment and dismissed the appeal from the order sustaining defendant's objection to introduction of evidence.

1. Appeal and error 🔑714(5)

Statements in briefs of purported facts could not be considered in determining whether complaint stated a cause of action.

2. Principal and agent 🔑78(3)

Allegation in complaint that defendant, having undertaken to direct the movement of tank cars leased by plaintiff, had exacted from users for diverting cars to their use charges above "mileage credits" earned by cars and had not accounted to plaintiff therefor was sufficient to allege wrongdoing by defendant.

3. Pleading 🔑428(6)

Under defendant's objection to introduction of any evidence on ground that amended complaint failed to state a cause of action, well pleaded allegations of amended complaint must be regarded as true.

4. Contracts 🔑337(2)

Allegation that defendant, having undertaken to direct movement of tank cars leased by plaintiff, had charged users a bonus for diverting cars to their use showed wrongdoing by defendant in violation of agreement to obtain for plaintiff as much mileage credits as practicable, since charging a bonus for the privilege of using cars would tend to limit their use and prevent plaintiff from receiving mileage credits.

5. Principal and agent 🔑78(3)

Allegation that under contract by which defendant had undertaken to direct the movement of tank cars leased by plaintiff, defendant was the agent of plaintiff was not conclusive that defendant was such agent, but such allegation must be considered in connection with the provisions and subject matter of contract and circumstances under which it was made.

6. Principal and agent 🔑3(2)

Provision in contract of employment for its termination by either party is an important factor indicating the existence of relationship of principal and agent as distinguished from that of employer and independent contractor.

7. Principal and agent 🔑20(2)

Evidence as to circumstances under which contract was made is admissible to show that contract created relationship of principal and agent as distinguished from that of employer and independent contractor.

8. Principal and agent 🔑69(2)

An agent is not permitted to make any secret profit out of the subject of his agency.

9. Principal and agent 🔑78(3)

Complaint alleging that defendant, having undertaken as agent during acute shortage of tank cars to so manage movement of cars leased by plaintiff that cars not needed for plaintiff's use would earn as much mileage credits as practicable, had exacted bonus from users for diverting cars to their use stated a cause of action for secret profits allegedly derived by defendant from subject of agency.

10. Principal and agent 🔑78(1)

Principal's right to recover secret profit derived by agent out of subject of agency is based upon the duties incident to agency relationship and fact that all profits realized from relationship belong to principal and does not depend upon any deceit by agent.

◆

Orris R. Hedges and Monta W. Shirley, Los Angeles, for appellant.

Edward Flam and Derthick, Cusack & Ganahl, Los Angeles, for respondent.

WOOD, Justice.

Defendant objected to the introduction of any evidence upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action. The objection was sustained, and judgment was entered in favor of defendant. Plaintiff appeals.

The amended complaint alleged that on January 15, 1945, plaintiff and defendant entered into a written contract which was as follows:

Chartrand's Traffic Service
2310 Sixth Avenue
Los Angeles 16

"John W. Chartrand Tank-Car Rentals
"Traffic Counsel and Management

"January 15, 1945

"The Petrol Corporation,
"4020 Bandini Blvd.
"Los Angeles 23, Calif.

"Gentlemen:

"This is to confirm our conversation today with Mr. Gollands in which you engaged our services to keep busy your leased tank cars for ten percent (10%) of mileage credits earned by your cars under our direction. We shall undertake to manage and direct your cars so that:

"(a) You shall have available suitable and sufficient cars as promptly as practicable after reasonable notice to protect your asphalt loadings.

"(b) Your cars when not required for your own use shall be operated to obtain for you as much mileage credits as practicable.

"We further shall undertake to:

"(a) Maintain satisfactory cooperation and relations with O.D.T.

"(b) Cover your empty movements with Bs/L and Release Notices.

"(c) Make declarations in good season to owners of cars entitled to 1-½¢ per mile.

"(d) Report to owners promptly all movements of your cars, and

"(e) Audit mileage credits and follow-up where necessary to see that you receive all credits earned.

"To avoid unnecessary accounting we will render monthly invoice based on mileage credits as allowed by car owners. Thus, for January service we shall render invoice Feb. 28th, payable by March 10th

"Your acceptance by endorsement and return of duplicate hereof shall constitute agreement effective Jan. 15, 1945 and continuing in force for ninety days thereafter unless sooner terminated upon thirty days written notice by either party.

"Accepted:
"The Petrol Corporation
"By Harold R. Pauley

"Yours very truly,
"J. W. Chartrand"

It was further alleged therein that plaintiff performed all obligations required of plaintiff on account of the contract; pursuant thereto plaintiff delivered to defendant, and defendant took possession of, the tank cars mentioned in said contract; the possession of said cars was delivered to defendant "only and pursuant" to said contract; that under and pursuant to the terms of said contract said defendant became and was the agent of plaintiff, and acted for and in behalf of plaintiff herein in the operation and management of plaintiff's said tank cars.

It was further alleged therein as follows: "That at all times herein mentioned, there was a serious shortage of tank cars throughout the United States; * * * that defendant herein, intending to cheat and defraud the plaintiff herein, and intending to make a secret profit, made charges to persons to whom said defendant rented the said cars, at prices over and above the mileage charges authorized by plaintiff and agreed to by defendant herein, exacted by defendant from the users of plaintiff's said tank cars, as a bonus for diverting the cars to their use; that said defendant did not report such charges or bonuses to plaintiff herein, and did not account to, nor forward to plaintiff, such sums so collected; that * * * said defendant, in this fashion, collected sums in excess of Ten Thousand Dollars ($10,000.00) over and above the mileage credits earned by plaintiff's tank cars under direction of defendant herein, all of which defendant retained and still retains; all of which was without the knowledge or consent of plaintiff herein and against the will of plaintiff herein."

It was also alleged therein that although demand has been made upon defendant for an accounting of said sums the defendant has refused and neglected to account to plaintiff and that there is due, owing and unpaid from defendant sums amounting to approximately $10,000, the exact amount of which cannot be ascertained without an accounting.

For a second cause of action it was alleged in the amended complaint that within four years last past, in Los Angeles, California, the defendant became indebted to plaintiff in the sum of $10,000 for and on account of money had and received by the defendant for the use and benefit of plaintiff; that although demand has been made upon the defendant for the payment of such sum, no part thereof has been paid, and the whole thereof is due and unpaid from defendant to plaintiff.

In said complaint plaintiff prayed that defendant be required to account for all money received by defendant for the use or rental of plaintiff's said cars; that the amount due plaintiff be determined by said accounting; and that plaintiff have judgment for such amount found to be due, and for costs and further relief.

[1-4] Respondent contends that the allegation of the amended complaint that defendant made charges at prices over and above the mileage charges does not allege any wrongdoing on respondent's part. He argues, in support of that contention, that since appellant has explained in his brief the meaning of the expression "mileage credits," and since such credits were the only earnings in which appellant had an interest under the contract, and since the contract made no provision relative to charges to the users of the cars, the charges which respondent made to those who used the cars were not "over and above" the mileage credits. He asserts that those charges were made either for the use of the cars or for traffic services rendered by respondent and were not over and above any agreed charge. The question here is whether the complaint stated a cause of action, and of course statements in the briefs of purported facts regarding the meaning of "mileage credits" or regarding the purposes for which respondent made charges to the users of the cars are immaterial. It is alleged in the amended complaint in substance that defendant, intending to cheat and defraud plaintiff and to make a secret profit, made charges "at prices over and above the mileage charges authorized by plaintiff and agreed to by defendant," and at prices exacted by defendant from the users of the cars "as a bonus for diverting the cars to their use." Upon a trial it might be shown that, according to custom or usage in the kind of business involved here, or according to an agreement of the parties hereto, those words "mileage credits," as used in the written agreement herein, had such a well understood meaning that it could be definitely ascertained whether respondent made charges "over and above" those credits. Under respondent's objection to the introduction of any evidence, the allegations of the amended complaint which are well pleaded are to be regarded as true. The allegation that respondent charged the users of the cars a bonus for diverting the cars to their use is to be regarded as true. Also, according to the amended complaint, the respondent agreed to obtain for appellant as "much mileage credits" as practicable. The charging of a bonus for the privilege of using appellant's cars would tend to limit the use of the cars and consequently would tend to prevent appellant

from receiving mileage credit, and it therefore would be wrongdoing on the part of appellant.

[5-9] Even though wrongdoing on the part of respondent was alleged, a question arises as to whether a cause of action for the recovery of secret profits was stated. Respondent asserts that such a cause of action was not stated for the reason the amended complaint did not show that the relationship of principal and agent existed between the parties. He argues that the contract set forth therein shows that respondent was an independent contractor. It was alleged that under the terms of the contract the respondent was the agent of appellant. That allegation, however, standing alone, is not conclusive that respondent was such agent. It is necessary to consider that allegation in connection with the provisions and the subject matter of the contract and the circumstances under which the contract was made. It cannot be said, as a matter of law, from a consideration of the provisions of the contract, that the relationship of principal and agent did not exist between the parties. The contract herein provided that it might be terminated by either party. Such a provision in a contract is an important factor indicating the existence of the relationship of principal and agent. Anderson v. Badger, 84 Cal.App.2d 736, 741, 191 P.2d 768. Also, according to the provisions of the contract, the full control of all the cars was not given to respondent. Appellant had the right, after reasonable notice to respondent, to use its own cars. Appellant engaged respondent's services "to keep busy" the cars of appellant, which were not required for appellant's use, so that those cars would earn for appellant as much mileage credit, at 1½ cents per mile, as practicable; and for such services respondent was to receive 10 per cent of the mileage credits. There was no provision in the contract that respondent should receive any additional compensation for its services, and there was no provision therein that he was permitted to make any charge as a bonus or otherwise for diverting the cars to the use of any one, or that he was permitted to make a charge for the use of the cars. There was a serious shortage of tank cars throughout the United States, as shown by the amended complaint. It is to be assumed therefore that the services of respondent were not engaged for the mere purpose of finding persons who needed the use of tank cars. Presumably, from the provisions of the amended complaint, the principal service which appellant desired to obtain from respondent was that respondent should keep the accounts in connection with the operation of the cars, and that he should direct the operation of the cars in such a manner that appellant would have a sufficient number of cars available for its own use, and that the cars not in use by appellant would earn as much mileage credit as practicable. Upon a trial appellant would be entitled to show the circumstances under which the contract was made. From a consideration of the provisions of the contract in connection with such circumstances, it might be determined that the respondent was the agent of appellant. An agent "is not permitted to make any secret profit out of the subject of his agency." Savage v. Mayer, 33 Cal.2d 548, 203 P.2d 9, 10. It cannot be determined as a matter of law from the amended complaint that respondent was an independent contractor.

[10] As above stated, the amended complaint alleged that the respondent, intending to cheat and defraud the appellant and to make a secret profit, made charges over and above the mileage charges authorized and agreed upon. It appears that the trial judge was of the opinion that a cause of action was not stated for the reason, among others, that the allegation regarding fraud pertained to something that occurred after the contract was made, and that it was not alleged that there was fraud on the part of respondent at the time of entering into the contract. In Savage v. Mayer, supra, it was said, 33 Cal.2d at page 551, 203 P.2d at page 11: "[T]he principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal."

The judgment is reversed. The purported appeal from the order sustaining the objection to the introduction of any evidence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

BAFFA v. JOHNSON et al.

Civ. 16797.

District Court of Appeal, Second District, Division 3, California.

Sept. 16, 1949.

Hearing Granted Nov. 14, 1949.*

William Baffa sued Johnnie A. Johnson and another to recover deposit made under written contract for sale of cocktail lounge, fixtures, furniture and good will.

The Superior Court of Los Angeles County, Otto J. Emme, J., found that defendants performed all that was required of them under contract and that plaintiff had refused to open an escrow and deposit additional amount pursuant to contract and entered judgment for defendants and plaintiff appeals.

The District Court of Appeal, Vallee, J., held that the evidence sustained the finding of the Superior Court and affirmed the judgment.

1. Sales 🔑391(9)

Vendor and purchaser 🔑335

Where contract to purchase real or personal property has not been mutually abandoned or rescinded and purchaser defaults, vendor, who is without fault, may retain amount paid on purchase price, though contract makes no provision for such retention.

2. Sales 🔑397

Evidence sustained finding that vendors had performed all that was required of them under written contract for sale of cocktail lounge, fixtures, furniture and good will and that purchaser had refused to open escrow and deposit additional portion of purchase price pursuant to contract so that purchaser, being in default, could not recover portion of purchase price originally deposited under contract.

◆

Frederick Brunner and Raymond A. Nelson, Los Angeles, for appellant.

Sturzenacker & Isenberg, Hollywood, for respondents.

VALLEE, Justice.

This is an action for money had and received to recover a $5,000 deposit paid under the following written contract entered into between plaintiff and defendants on July 15, 1946:

"Received from *William Baffa* Address ——— the sum of $5000.00 being a part payment on *the Cocktail Lounge, furniture and fixtures, liquor license and good will and also furniture in apartment, as per inventory. Property is located at 114 W. Whittier, Pico, Calif.* (Subject to restrictions and reservations of record) At price of *$93,000.00* payable *$40,000.* cash (including the within payment) balance payable as follows: *A first Trust Deed on Property in the sum of $53,000., payable at $1000. per month or more at the rate of 5%—all assessments, and all encumbrances. It is understood that this offer is net to Mr. and Mrs. Johnson, the seller, and does not pay a real estate broker's commission. W. B.* ~~*This is to be a 45 day escrow.*~~ *J.A.J. Upon opening of escrow, buyer will deposit an additional $15,000. When this offer is signed by buyer and sell* [*sic*], *it shall become good and binding.* Balance of first payment, to-wit ——— dollars to be deposited in escrow within —— days from above date and failing to make such payments, above amount paid is retained by and forfeited to ——— as liquidated damages. Purchaser agrees to purchase said property at above price and terms. ~~Agent reserves the right to refund payment if unsatisfactory to owner.~~

Dated this *15th* day of *July*, 1946, at *Los Angeles*, California.

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* Subsequent opinion 216 P.2d 13.

——— Purchaser Agent *Carl Larsen Co.*
/s/ William Baffa Purchaser Per ———
I accept above sale and agree to pay *No Commission* ~~Commission of~~
Dated /s/ J. A. Johnson (Accepted)
Owner———
/s/ Gladys H. Johnson
Owner———"

(The italicized portions were added by the parties to a widely used printed form.)

On the reverse side of the above contract appears the following, which is in the handwriting of the broker acting for plaintiff, and is signed by the parties: "~~Property~~ Fixtures and Equipment to be Secured by Chattel mortgage. Stock to be Payd [sic] for in cash over and above selling Price. Escrow may be opened any time on or before 45 days from this date. /s/ William Baffa /s/ J. A. Johnson /s/ Gladys H. Johnson."

The court found that defendants performed all that was required of them under the contract and that plaintiff failed and refused to open an escrow and abandoned the contract.

Plaintiff contends there was a mutual abandonment of the contract, which is tantamount to contending that the evidence does not support the findings.

[1] It is firmly settled that in the absence of a mutual abandonment or rescission, a defaulting vendee under a contract to purchase real or personal property cannot recover from a vendor who is without fault any of the money paid to the vendor in accordance with the terms of the agreement. The vendor's right to retain the amounts paid on the purchase price exists independently of any express provisions in the contract for forfeiture of rights and for the retention of the purchase money as liquidated damages, such provisions being but declarations of what would have been the legal rights of the vendor without such provisions. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 10–12, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 339, 197 P. 94; Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367.

There is no evidence in the record indicating a mutual abandonment of the contract. On the contrary there is evidence, and plaintiff so concedes in his brief, that plaintiff had given an indication that he was abandoning the contract. Defendant Johnnie Johnson (referred to as "defendant") testified he was at all times "ready to go to escrow with Mr. Baffa." He explained the reason for striking out the sentence "This is to be a 45-day escrow" on the face of the agreement and substituting the writing on the back of the agreement was because plaintiff needed extra time within which to obtain money tied up in another escrow to pay for the stock. The agreement was signed on a Monday and plaintiff stated he would go into escrow on the following Wednesday at 1:00 o'clock. On Wednesday morning defendant was called into the office of the real estate agent representing plaintiff, who stated plaintiff was having marital difficulties and wanted "a little more time, but if Mr. Baffa isn't willing to go through with it, why don't you give the $5,000 back and call it quits?" Defendant said, "No * * * we have a deal." The real estate agent then replied, "Well * * * Mr. Baffa will never go into escrow." Thereafter defendant had a telephone conversation with plaintiff in which he was told that plaintiff was not going into escrow and wanted the return of his $5,000.

[2] There is no provision in the agreement that the $5,000 deposit was to be, as plaintiff contends, a conditional down payment provided defendants furnished him with bills and invoices showing the property had cost defendants $84,000 plus the cost of an air conditioner, and defendants denied there was ever any agreement that they should furnish plaintiff with "anything like that." On September 12, 1946, defendants' attorney sent the following letter to plaintiffs: "You are hereby notified that the time given you under your contract of sale with Johnnie A. Johnson and Gladys H. Johnson, through Carl Larsen and Co. has passed. The original contract provided that on or before 45 days from the 15th of July you would open an escrow and deposit an additional $15,000. This you have

failed to do and Mr. and Mrs. Johnson are retaining the $5,000.00 deposit as liquidated damages, as provided in the contract. Unless you do, within five days from the date of this notice, September 17, 1946, before the hour of five o'clock P.M. that day, and open an escrow in accordance with the terms of the contract, and deposit the funds, we will treat the contract as cancelled and your deposit forfeited. Mr. and Mrs. Johnson expect to offer the property for sale and if the property is sold for less than the balance due from you, suit will be instituted against you to recover the balance." No answer was ever made to this letter and on October 11, 1946, plaintiff commenced the instant action. The evidence supports the findings.

The other contentions made by plaintiff are without merit and require no comment.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

34 Cal.2d 340

PEOPLE v. HENDERSON.

Cr. 4991.

Supreme Court of California, in Bank.

Sept. 29, 1949.

Clyde Lester Henderson was convicted of attempted robbery while armed with a deadly weapon, assault with intent to commit murder and assault with a deadly weapon in the Superior Court, Los Angeles County, Ranse R. Sischo, J., and he appealed.

The Supreme Court, Shenk, J., affirmed the judgment holding that testimony of other witnesses sufficiently corroborated the testimony of an accomplice to sustain the conviction.

Carter, J., dissented.

Prior opinion, 204 P.2d 626.

1. Criminal law 🔑511(2)

Although corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that accomplice is telling the truth. Pen.Code, § 1111.

2. Criminal law 🔑511(1)

Evidence of inculpatory participation need not be direct nor extend to every fact and detail in order to constitute sufficient corroborating evidence. Pen.Code, § 1111.

3. Criminal law 🔑511(2)

Circumstantial evidence is sufficient corroborating evidence even though slight, if it tends to connect defendant with commission of the crime. Pen.Code, § 1111.

4. Criminal law 🔑511(4)

Possession of a weapon similar to one used in commission of a robbery is substantial evidence connecting defendant with crime so as to sufficiently corroborate testimony of accomplice without introduction of gun into evidence. Code Civ. Proc. § 1954; Pen.Code, § 1111.

5. Criminal law 🔑510½

In determining whether there are corroborating circumstances, relationship of individuals and all of their acts and conduct may be considered. Pen.Code, § 1111.

6. Criminal law 🔑511(1)

Testimony of other witnesses sufficiently corroborated testimony of accomplice to sustain conviction of attempted armed robbery and assault with intent to murder two persons injured when shot gun was unintentionally discharged. Pen. Code, § 1111.

7. Criminal law 🔑1159(2, 4)

Questions of weight of evidence and credibility of witnesses are for trial court and where circumstances reasonably justify finding of guilt, an opposing view that they also may be reconciled with innocence will not warrant interference with judgment on appeal.

8. Assault and battery 🔑71

Where defendant's shotgun was unintentionally discharged during attempted robbery, injuring his associate, fact that associate was engaged jointly with defendant in attempted robbery, did not make him a principal in the assault with a deadly weapon thus committed upon associate so to preclude conviction of defendant for such offense.

Saul J. Bernard, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Dan Kaufman, Deputy Attorney General, for respondent.

SHENK, Justice.

This is an appeal from a judgment of the court without a jury finding the defendant guilty on charges growing out of an attempted robbery, and from the order denying a motion for a new trial.

About 1:30 a. m. on December 29, 1947, two men wearing overcoats and hats, and having flesh-colored stocking hoods over their heads, entered a cafe in Altadena and ordered the persons present to face the bar and put up their hands. One carried a sawed-off .410 single barrel shot gun, the other a pistol. As the proprietor, employees and patrons were obeying the order, the shot gun was discharged by one of the men whereupon they fled without taking anything. The organist, a customer and William Lewis Roberts, the other of the offenders, were wounded by shot from the gun.

William Lewis Roberts and the defendant were jointly charged with complicity in the matter. The charges were dismissed as against Roberts. An amended information, containing four counts, accused the defendant of attempted robbery, two assaults with a deadly weapon with intent to murder the two persons in the cafe, and assault with a deadly weapon upon Roberts; and alleged the prior conviction in October 1947 in California of receiving stolen property, a felony.

The defendant entered a plea of not guilty to each of the four counts and admitted the prior conviction. He waived a trial by jury. On the trial Roberts testified for the prosecution. The court found the defendant guilty on all four counts and denied his motion for a new trial.

It is not questioned that the evidence is sufficient to support the judgment if the testimony of the accomplice Roberts is sufficiently corroborated.

Section 1111 of the Penal Code requires corroboration of an accomplice's testimony by such other evidence as shall tend to connect the defendant with the commission of the offense, and provides that corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

[1-3] Although the corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connect the defendant with the commission of the crime in such a way as reasonably to satisfy the fact finding body that the accomplice is telling the truth. People v. Trujillo, 32 Cal.2d 105, 110–111, 194 P.2d 681. The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime. People v. Negra, 208 Cal. 64, 69–70, 280 P. 354; People v. Yeager, 194 Cal. 452, 473, 229 P. 40.

[4] Possession of a gun similar to that used in the commission of the crime has been deemed competent corroborative evidence (People v. Trujillo, supra, 32 Cal.2d 105, 194 P.2d 681; People v. Radovich, 122 Cal.App. 176, 181, 9 P.2d 542, and it is not necessary that the gun be introduced into evidence. Code Civ.Proc. sec. 1954; People v. Anderson, 87 Cal.App.2d 857, 861, 197 P.2d 839.

[5] The relationship of the men and all of their acts and conduct may be considered in determining whether there are corroborating circumstances. People v. Ross, 46 Cal.App.2d 385, 116 P.2d 81; People v. Willmurth, 77 Cal.App.2d 605, 611, 176 P.2d 102.

The testimony of Roberts disclosed the following: He and the defendants are cousins and had been companions of long standing. Before the present charge of attempted robbery both had run afoul of the criminal laws of this state. Roberts was on parole following convictions of rape and burglary. The defendant was under charge of automobile theft for which he was subsequently convicted. (At the trial, as related, he admitted a prior conviction of receiving stolen property, a felony.) About two weeks before the attempted robbery the two had a conversation in which the defendant stated that he knew "where we can make a piece of money." Roberts said "where and how?" The defendant replied "at Brandon's Cafe" on Fair Oaks Avenue. Roberts asked him how he knew that there would be money at that place and defendant's reply was that his father had "cased" the place and had informed him that it was good for at least $1,500 on a Sunday night just before closing time, and that the money would be "in a sack under the bar." Roberts at first said that he "had just got out of prison" and wanted no part of it, but later he agreed to go along with the plan. The defendant stated that they needed a gun. Roberts said that his sister, Inez Bustos, who lived in Burbank, had a .410 shot gun which might be obtained. On the afternoon of Sunday December 29th (the attempted robbery took place at about 1:30 a. m. following) the defendant and Roberts, in the company of two women friends, called at the home of Mrs. Bustos, using the defendant's Chevrolet car. During the course of an afternoon party at that place Roberts proposed to his sister that he borrow the .410 shot gun, on the pretense that he and the defendant wanted to go rabbit hunting. The sister refused, whereupon Roberts suggested that he buy the gun. The sister refused on the ground that he was not allowed to have a gun in his possession. Roberts then proposed that she sell the gun to the defendant. She consented provided he would pay her price of $25. This was agreed to and when the two men left the sister's home in the late after noon they took the shot gun with them, placing it in the back of the car with some shells which Roberts had obtained from a chest of drawers in the bedroom where the gun had been kept. After the two left with their women friends, the four visited eating and drinking places until later in the evening when the women were returned to their homes.

Roberts and the defendant then went in the latter's automobile to a house in Pasadena where the defendant's wife Mickey Henderson was living with her six year old son. From there the two went to Monrovia to the house of the defendant's father where, with the defendant's assistance, the father, in the latter's garage, sawed off about one-half of the barrel of the shot gun while Roberts held a light. It was then that the father again related how easy it would be to obtain the money from Brandon's Cafe. For his part in the enterprise and in "fingering" the job he was to receive $250 of the loot. From the father's home the two returned to the defendant's place in Pasadena where at the defendant's request his wife cut some flesh-colored stockings for masks and made slits in them for eye holes. It was there that the defendant picked up a black toy pistol belonging to his son and handed it to Roberts for use in the hold-up. They waited at that place until about 1 o'clock in the morning which was estimated as about closing time at the cafe. For Mickey Henderson's part in the transaction and in furnishing the "hide-out" to stay "under cover" she was to receive $250.

Roberts and the defendant then went about half a block from his house and entered a "Chrysler or a De Soto" car which Roberts understood was a stolen car. They put on the flesh-colored stocking hoods and proceeded to Brandon's Cafe. They entered and the defendant shouted "This is a stick-up, everybody turn around and face the bar and put your hands up." There were from ten to fourteen people in the cafe at the time. Roberts, with the toy pistol which resembled a .38 automatic, in one hand, walked toward the "end of the bar to go around and pick up the money where it was supposed to be" and get out as quick as he could. When Roberts was "about half way up to the bar" the sawed-off shot gun in the hands of the defendant accidentally discharged. Some of the shot struck Roberts on the right side of his face, resulting in the loss of sight in his right eye. Barton Williams, the organist, was hit in the back of the neck, the shoulders and his right hand and he fell to the floor. A customer, Richard Berry, was hit in the face and rendered unconscious. Roberts and the defendant fled through the door at which they had entered and escaped without consummating the robbery. They went to the defendant's house in Pasadena where Roberts fainted. He was revived by the treatment of cold compresses administered by the defendant's wife. Before daybreak he was taken by Floyd Henderson, the defendant's father, and Lester Henderson, the defendant's uncle, to the latter's home in Colton many miles distant. Later in the day the defendant "showed up with a doctor" who, Roberts understood, was a chiropractor. Roberts stayed at the house of Lester Henderson in Colton for over a week. He did not see the defendant again until "a few days before he [the defendant] was sentenced to San Quentin for car theft" which was some time in February 1948.

The defendant did not testify. Neither did his wife, nor his father. His uncle

Lester Henderson was called as a witness for the prosecution but the court sustained him in his refusal to answer questions on the ground that his testimony might incriminate him and he was dismissed from the witness stand without testifying.

It is contended that the testimony of the accomplice Roberts is lacking in corroboration sufficient to connect the defendant with the commission of the offenses. An examination of the record shows corroboration in the following respects:

It was established by the testimony of the accomplice's sister and by the two women companions that Roberts and the defendant were together most of the day preceding the attempted robbery and that they were together in the defendant's car when the women were taken to their homes which was about three hours before the crime was committed.

It was established by the testimony of the accomplice's sister that in the afternoon of the day preceding the crime she sold a .410 shot gun to the defendant for $25 and that the gun was taken from her home on that day.

The testimony of Roberts that the gun used in the attempted robbery was the .410 gauge shot gun purchased from the sister was corroborated by the testimony of the victim customers in the cafe at the time of the crime who stated that the gun discharged was a sawed-off shot gun. One of these witnesses testified that he was familiar with fire arms and that the gun discharged was a .410 gauge shot gun.

The testimony of Roberts that he held the black pistol and that the defendant held the shot gun at the time of its discharge has some corroboration in the testimony of the victims in the cafe who stated that one of the culprits had a shot gun and the other a black pistol.

The testimony of the victims in the cafe that both men wore flesh-colored stockings as hoods with slits cut in them for eye holes shows circumstances in substantiation of the testimony of Roberts that he and the defendant wore hoods so described by him at the time of the commission of the crime.

[6] We are satisfied that the cumulative effect of the testimony of the women companions of the two men, the testimony of Roberts' sister and the testimony of the victims in the cafe, none of whom could be deemed accomplices, point sufficiently to the establishment of the fact that the defendant was the other participant in the crime, and that the code requirements of evidence tending to connect the defendant with the commission of the crime have been sufficiently met.

[7] The defendant's reliance on People v. Sawaya, 46 Cal.App.2d 466, 115 P.2d 1001, is of no assistance to him. In that case the purported corroborating evidence consisted solely of testimony of association and a conversation antedating the day of the crime. There was an absence of any evidence tending to connect the defendant with the commission of the crime. When as in the present record it is discovered that there is testimony aside from that of the accomplice which tends to connect the defendant with the commission of the crime, the function of the appellate court is performed. Questions of the weight of the evidence and the credibility of the witnesses are for the trial court, and since the circumstances reasonably justify the finding of guilt, an opposing view that they also may be reconciled with innocence will not warrant interference with the judgment on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, and cases cited.

[8] No merit may be accorded the defendant's contention that, as Roberts is a confessed accomplice, the charge in the fourth count of assault with a deadly weapon upon him does not constitute an offense. The principle that the shooting of a person other than the one intended transfers the intent to the former, People v. Wells, 145 Cal. 138, 140, 78 P. 470, has been applied where one of the participants in a robbery accidentally killed another. People v. Cabaltero, 31 Cal.App.2d 52, 87 P.2d 364.

The judgment and order are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent. The evidence purporting to connect defendant with the robbery is clearly insufficient to corroborate the testimony of the accomplice Roberts. I reaffirm my views expressed in People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681, but am compelled to point out that the corroborating evidence here is even weaker than that in the Trujillo case. Here the sole evidence is that defendant obtained and thus had in his possession before the robbery a .410 gauge shot gun. There is no independent evidence as to whether such gun had a normal barrel or a shortened one, whether it was a double or single barrel gun, or whether it was a single shot, repeater or automatic. In fact there is no description whatsoever of the gun except that it was a .410 gauge shot gun. The evidence concerning the gun used in the robbery is even more vague. One witness said that he did not notice whether the barrel was shortened and later that it was "sawed off"; that it looked like a small caliber shot gun. One witness testified that the report when the shot gun was discharged sounded like a .410 gauge. No other description of the gun was given. It seems manifest to me that there was a total absence of evidence to show that the gun obtained by defendant was the same gun that was fired at the robbery. Such being the case, there is no corroborating evidence connecting defendant with the robbery. In Kitchens v. Commonwealth, 279 Ky. 785, 132 S.W.2d 327, the corroborating evidence offered was the statement by an eye witness that a car seen at the scene of the crime was of the same general description as one owned by defendant. Finding such evidence insufficient, the court declared: "We do not think that the mere fact that appellant owned a car answering the same general description of the one seen at the time and place of the robbery, is of probative value tending to connect appellant with the commission of the offense. It is not shown that appellant's car and the car seen by the prosecuting witness at the place of the robbery, bear any peculiar marks of identification tending to show that they were of the same class of cars. It is thus seen that the evidence relating to the car does not any more tend to connect appellant with the commission of the offense than any other person who might own a car of the same class, or same general description." The same reasoning applies here. Merely because a shot gun of a certain gauge (although the evidence is far from satisfactory on that subject) was used in the commission of the crime and that that class of a gun was in defendant's possession is not enough to inculpate defendant. If it is, then all those persons owning .410 gauge shot guns, .38 caliber revolvers, or any of the other varities of firearms are under suspicion when a crime is committed wherein a gun such as he owns is used. This is especially pernicious when it is remembered that there was no independent evidence showing that defendant was present at the scene of the crime or any place in that vicinity.

Stress is laid by the majority on the testimony of Roberts that hoods were worn by him and defendant and the testimony of the people in the cafe that hoods were worn, but corroborating evidence must tend to connect defendant with the crime. I fail to see how such evidence would have that effect. Suppose both groups of evidence showed the participants wore hats, or pants, or were men, or women. Certainly that would not show any connection of the defendant with the crime.

There being no evidence, other than the testimony of an accomplice, connecting defendant with the crime charged, I would reverse the judgment.

34 Cal.2d 304

WILKE v. CROFTON.

L. A. 20564.

Supreme Court of California, in Bank.

Sept. 28, 1949.

Rehearing Denied Oct. 27, 1949.

Fred L. Wilke sued James N. Crofton for breach of contract whereby defendant was to grant the plaintiff a share in a corporation to be organized to operate a race track.

The Superior Court of Los Angeles County, Kaufman, J. pro tem, rendered a judgment for the plaintiff for $9,750, and the defendant appealed, and the plaintiff cross-appealed, claiming that the damages were inadequate.

The Supreme Court, in bank, Gibson, C. J., reversed the judgment, holding that the evidence sustained the finding that there was a breach of contract and that damages were inadequate, and that entire case should be re-examined on remand.

Prior opinion, 203 P.2d 66.

1. Appeal and error ⚿931(1)

Conflicts in the evidence were required to be resolved in favor of the judgment on appeal.

2. Corporations ⚿30(5)

In action for breach of contract whereby defendant was to give plaintiff an interest in corporation organized to operate race track, evidence sustained finding that defendant was liable.

3. Corporations ⚿30(5)

Where defendant admitted that his interest in original lease of race track was worth not less than $500,000, award to plaintiff of only $9,750 because of breach of contract by defendant to give plaintiff 15 per cent of the stock in corporation organized to operate the race track, was inadequate.

4. Appeal and error ⚿1178(6)

Where evidence as to liability of defendant for alleged breach of contract was sharply conflicting, and damages awarded to plaintiff were so grossly inadequate as to indicate a compromise of the issues of liability and damages, case would be remanded for re-examination of all issues and not merely issue of damages alone.

David L. Sefman, Clifford Thoms, Los Angeles, Robert P. Dockeray, Burbank, and Glen A. Lane, Los Angeles, for plaintiff and appellant.

Wood, Crump, Rogers, Arndt & Evans and Guy Richards Crump, Los Angeles, for defendant and appellant.

GIBSON, Chief Justice.

Fred L. Wilke brought this action for breach of contract, fraud, an accounting and a declaration of his right to receive a proportionate interest in the profits of Hipodromo de Tijuana, a corporation operating a race track in Mexico. The trial court, sitting without a jury, rendered judgment for Wilke, and defendant Crofton has appealed on the ground of insufficiency of the evidence. Wilke has appealed from the part of the judgment awarding damages claiming they were improperly computed and are inadequate.

In August 1942, Wilke obtained from members of the Arguello family, the owners of Rancho Tijuana, an agreement to lease a race track and hotel for a term of twenty years. The property had been expropriated by the Mexican government, and Wilke planned by litigation and negotiation to regain possession of the property and secure authority to reopen the race track. He immediately assigned the lease agreement to Crofton who agreed to use his capital and influence to secure a cancellation of the expropriation order and obtain a racing permit. It was understood that Crofton would operate the property either personally or through a corporation, and that certain persons who were to assist him in obtaining permission from the government to reopen the track would receive a share in the enterprise. Crofton promised to give Wilke a 15% interest, but the parties entered into a subsequent agreement which Crofton claims reduced the percentage Wilke was to receive.

During the next two years Crofton spent much time and approximately $70,000 of his own money in an effort to obtain possession of the property and secure a racing permit. In these activities he was assisted by Augustin Silveyra, a citizen of Mexico who had worked for Crofton and companies in which he was interested since 1927. Crofton paid Silveyra's expenses and promised him an interest in the project for his services. It was first agreed that Silveyra would receive 5%, but later Crofton agreed to increase his interest to 10%.

After two years of litigation, the Supreme Court of Mexico ordered that the Rancho Tijuana be restored to the Arguellos, and on December 13, 1944, Silveyra took possession of the track as agent of Crofton and custodian for the Arguellos. On December 15, Crofton obtained from the Arguellos a ten year lease in his name as lessee covering all the premises save the hotel. He told Wilke that he had been advised that the twenty year lease agreement was illegal. On December 28, Hipodromo de Tijuana was organized in Mexico City. Silveyra signed the articles of incorporation and 21% of the stock was issued to him. A racing permit was granted to Silveyra as manager of Hipodromo de Tijuana, and on December 31, 1944, he supervised the opening of the track. Two days later a lease was made by the Arguellos to Hipodromo as lessee for nine years, eleven months and twenty-five days.

The net profits of the race track were distributed to the shareholders of Hipodromo in proportion to their holdings. Wilke never received anything from the enterprise, and he brought this action against Crofton seeking damages of $1,500,000, allegedly the value of 15% of the capital stock of the corporation. Crofton claims that he was frozen out by Silveyra and others, and that the only thing he received was $10,000 as reimbursement by Hipodromo for money expended in promotion.

The trial court found that Crofton entered into a scheme with Silveyra to defraud Wilke by making it appear that Crofton had lost his interest in the enterprise, that in furtherance of this conspiracy Crofton, acting through Silveyra, organized the Hipodromo de Tijuana, took 21% of the stock in Silveyra's name, arranged for a racing permit to be issued to Silveyra and caused the Arguello heirs to execute a lease on the race track property directly to Hipodromo. The court found and concluded that Wilke had been damaged in the amount of $9,750.

[1] Crofton contends that the evidence does not support the findings with respect to his liability. The evidence is sharply conflicting as to many essential facts, but these conflicts must, of course, be resolved in favor of the judgment on this appeal. Crofton points out, however, that there is no direct evidence that he had anything to do with the organization of Hipodromo de Tijuana, or that he had any interest in the stock which was taken in Silveyra's name, or that he received anything from the enterprise other than the $10,000 reimbursement. The record is not clear as to the parts played by Silveyra and Crofton in the organization of Hipodromo, but we are of the opinion that the trial court could infer from the facts proved that Crofton used his agent Silveyra to by-pass Wilke through the formation of Hipodromo and the issuance of the stock in Silveyra's name.

There appears to be no question that Silveyra acted as Crofton's agent and followed his instructions in all matters connected with the project until Hipodromo was organized on or about December 26, 1944. As we have seen Silveyra took possession of the race track as agent and custodian for Crofton and the Arguellos on December 13, 1944, and a new lease was obtained by Crofton in his own name from the Arguellos on December 15. On the same day, or within a day or two thereafter, Crofton told Wilke in San Diego, "I now have possession of the race track. I have arranged for the permit. I have got everything now." Crofton went to Mexico City on December 24 to form a company to operate the track and to obtain a racing permit so that the track could open on January 1. Silveyra arrived in Mexico City at about the same time, and on December 26 he went with Crofton to see officials regarding the issuance of a racing permit. A few days later a racing permit was issued to Silveyra as manager of Hipodromo.

Silveyra disclaimed having anything to do with the actual organization of Hipodromo de Tijuana, but he was listed in the articles as one of the five incorporators, and he signed the articles on December 28, 1944. Some of the other incorporators represented men who had been associated with Crofton in the development of the enterprise. Silveyra did not explain why he received 21% of the stock in Hipodromo or why no provision was made for Crofton, but he said he did not feel that he had "double-crossed" Crofton. The stock which was issued to Silveyra represented approximately the same percentage as that which Crofton, according to his own testimony, then expected to receive in the enterprise.

Silveyra knew when he went to Mexico City that Crofton held the lease on the race track, and he also knew that it was in force when the track opened on December 31. So far as the record shows the Crofton lease was never surrendered, the Hipodromo lease was for a period approximately the same as the unexpired portion of the Crofton lease, and the terms and conditions of the two leases were the same.

[2] While Crofton was in Mexico City persons employed by him were preparing the track for racing, and when Silveyra returned to Tijuana the track was ready to begin operations. The track officials and employees, including Crofton's brother Ernest, had been hired by Crofton, and they all remained with the track under Silveyra's management. Crofton had a box next to Silveyra at the races, they appeared to be on friendly terms, and in March 1945, they purchased two horses which they raced at Hollywood Park. Crofton brought no action against Silveyra or any of his associates who participated in the formation of Hipodromo to establish an interest in the enterprise or recover any of the profits of the race track. Nor did Crofton bring any action against the Arguellos or make any demand upon them to enforce the provisions of the lease which they had given to him. In our opinion the evidence is sufficient to support the findings with respect to Crofton's liability.

[3] Wilke's contention that the damages allowed by the trial court are inadequate and that they were improperly computed must be sustained. The court found that "plaintiff was entitled to one-third (1/3) of defendant's twenty-one (21%) per cent interest in said corporation, Hipodromo de Tijuana, and in the profits therefrom" and "that plaintiff has been damaged in the amount of $9,750."

In their original agreement Crofton promised to give Wilke 15% of the stock in the corporation which was to be formed to operate the race track. Later, when difficulties were encountered in obtaining the cancellation of the expropriation order, Crofton represented to Wilke that he would have to give his other associates a larger interest in the enterprise than he had anticipated and urged Wilke to reduce his interest to 5%. In a letter directed to Crofton dated December 11, 1944, Wilke agreed to accept an amount equivalent to 10% of Crofton's interest in the enterprise instead of 15% of the whole, as originally agreed upon. Wilke stated in the letter, "In this connection, Jim, I am relying upon your statement to me that you expect to pull up with at least a 40% or a 50% interest." The letter agreement was delivered by Wilke and signed by Crofton on December 15, 1944.

The trial court found that the reduction agreement did not become effective for the reason that Crofton did not comply with its terms. The basis for this finding is not entirely clear because the reduction agreement is not expressly conditioned upon Crofton's receiving a 40% or a 50% interest. Crofton testified, however, that when the second agreement was entered into, he did not expect to receive more than approximately 20%, and there may be sufficient evidence in the record to support a finding that the reduction agreement was not binding on Wilke. It is unnecessary for us to determine this question, however, because the trial court in computing damages did not use 15% of the whole enterprise or 10% of Crofton's interest therein. Instead, the court found that Wilke was entitled to one-third of Crofton's 21% interest in Hipodromo de Tijuana. There is no support in the evidence for an award on this basis, and we can find no logical explanation for it under any interpretation of the agreements made between the parties.

Furthermore, even if we should accept as correct the finding that Wilke was entitled to one-third of 21%, the court could conclude that this was equivalent to the sum of $9,750, the amount awarded Wilke, only on the premise that the entire capital stock of Hipodromo was worth but $139,285.71. It is impossible to justify such a premise on the record before us. The net profits of Hipodromo for ten racing days of the first meet alone amounted to $270,804.14, and Wilke estimated that the ten-year lease held by Hipodromo was worth between $15,000,000 and $18,000,000. Crofton offered no evidence as to the value of the Hipodromo holdings, but in a counterclaim filed in this action he alleged that his interest in the original lease was worth not less than $500,000, and the court so found. This, of course, is not a finding as to the value of Crofton's interest in Hipodromo, and it involves certain undetermined factors, but it is some evidence of Crofton's appraisal of the value of the enterprise. All the evidence shows that the Hipodromo stock was worth far in excess of $139,285.71.

[4] In our opinion the damages were improperly computed, the sum awarded is inadequate, and the judgment must be reversed. The question arises whether the case should be remanded on all issues or on the issue of damages alone. In many instances a retrial of the single issue of damages would meet the requirements of substantial justice, see Collins v. Ramish, 182 Cal. 360, 368–369, 188 P. 550; Gray v. Cotton, 166 Cal. 130, 139, 134 P. 1145; Pearsall v. Henry, 153 Cal. 314, 330, 95 P. 154, 159; Paul v. Williams, 64 Cal.App.2d 696, 703, 149 P.2d 284, but where, as here, the evidence as to liability is sharply conflicting and the damages awarded are so grossly inadequate as to indicate a compromise of the issues of liability and damages, the entire case should be re-examined. See Keogh v. Maulding, 52 Cal.App.2d 17, 19–22, 125 P.2d 858; Wallace v. Miller, 26 Cal.App.2d 55, 57, 78 P.2d 745; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 529–530, 67 P.2d 398; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 10–11, 175 P.2d 26, 177 P. 845.

The judgment is reversed, defendant to pay costs on appeal.

SHENK, EDMONDS, CARTER, TRAINOR, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 300

Ex parte SWAIN.

Cr. 5015.

Supreme Court of California, in Bank.

Sept. 26, 1949.

Application of Cecil Swain for a writ of habeas corpus.

The Supreme Court, Schauer, J., denied the application without prejudice on the ground that the petitioner failed to allege facts upon which the allegations were based and failed to explain reason for belated collateral attack, and delay in raising question of validity of conviction.

1. Habeas corpus 🔑53

Supreme Court will require, substantially, that one seeking to show that his conviction was obtained by prosecution's knowing use of perjured testimony, quote or otherwise designate specifically precise testimony which it asserted was perjured, state in detail what actual facts were, and name or otherwise identify person connected with prosecution who knew testimony was perjured and persisted in using it, stating also circumstances establishing such person's knowledge of the facts.

2. Habeas corpus 🔑50

Supreme Court will require one who belatedly presents a collateral attack on a judgment of conviction by application for writ of habeas corpus to explain delay in raising question.

3. Habeas corpus ⚷54

In proceeding for a writ of habeas corpus on ground that petitioner, when convicted, was mentally infirm, application which alleged that an examination was made by request of trial judge of defendant's insanity but that question was not submitted to a jury for a consideration, but which did not state evidence upon which judge determined sanity, and did not allege that petitioner demanded jury trial was insufficient. Pen.Code, § 1368.

4. Habeas corpus ⚷54

Application for writ of habeas corpus on ground that attorney, who represented petitioner at trial, obtained case through fraud, and that attorney was untruthful, unfaithful, and worked hand-in-hand with prosecutor in depriving petitioner of his life and liberty without due process of law, was insufficient, in absence of allegations of specific facts supporting conclusions of fraud and untruthfulness.

5. Habeas corpus ⚷25(1)

Where application for writ of habeas corpus alleged that prison warden refused petitioner a certified copy of warrant of arrest sent to petitioner in warden's care, that petitioner was denied legal communication in connection with proceedings, and that outgoing registered mail was not delivered, refusal of officials to permit correspondence was not shown to be improper, in absence of allegations as to how copy of warrant of arrest could affect legality of petitioner's conviction, and allegations as to substance and nature of communications.

6. Habeas corpus ⚷62

Application for writ of habeas corpus which failed to allege facts on which allegations were based, and failed to explain delay in raising question of validity of final judgment, was insufficient and would be denied without prejudice to the filing of a new petition.

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Cecil Swain, in pro. per., for petitioner.

Fred N. Howser, Attorney General, and Clarence A. Linn, Deputy Attorney General, for respondent.

SCHAUER, Justice.

In November, 1945, petitioner was convicted of first degree murder and sentenced to state prison for the term of his natural life; by this application for habeas corpus he (appearing in propria persona) attacks the validity of the judgment of conviction. For the reasons hereinafter stated, we have concluded that his application should be denied.

The petition contains averments of conclusions which, if they were entitled to acceptance at full value, would require issuance of the writ. Petitioner alleges that the judgment was "obtained through 'FRAUD, FALSE PERJURED TESTIMONY,' knowingly, consciously and deliberately used by the . . . prosecuting attorney in prosecuting the petitioner . . . That your petitioner was knowingly, consciously and deliberately denied an eye witness at the seen [sic] of the offense by the said prosecuting attorney, in the proceedings against petitioner. That the said witness is Mrs. Mollokoff, and lived at that time at 1318½ E Street, Sacramento, California . . . That the said prosecuting attorney substituted one Norvin E. Smith, to translate the testimony of said witness that the petitioner was denied of, and that the said Norvin E. Smith, consciously and deliberately 'FALSELY TESTIFIED' as to the statements made by the said witness that was denied the petitioner, and that he, the said Norvin E. Smith, made FALSE and PREJUDICE [sic] STATEMENTS against the petitioner in his testimony."

[1] It is the practice of this court to require, substantially, that one who seeks to show that his conviction was obtained by the prosecution's knowing use of perjured testimony quote or otherwise designate specifically the precise testimony which it is asserted was perjured, state in detail what the actual facts are, and name or otherwise identify the person connected with the prosecution who knew it was perjured and persisted in using it, stating also the circumstances establishing such person's knowledge of the facts. Petitioner has not informed us what testimony of

Mrs. Mollokoff was assertedly suppressed or what testimony of Mr. Smith was assertedly false, nor has he stated the circumstances establishing that the "prosecuting attorney" knew these facts.

[2] Furthermore, it is the practice of this court to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question. Such an explanation is particularly necessary in the present case, where petitioner did not appeal from the judgment of conviction and, despite ten previous attacks upon its validity,[1] has raised the question of perjury for the first time in the courts of this state in the present proceeding.

[3] The above requirements of detailing the facts upon which a conclusionary allegation is based, and of explaining delay in raising the question, apply also to petitioner's second contention: "That your petitioner was proceeded against, convicted and sentenced to prison for his NATURAL LIFE while he was MENTAL INFIRMITY [sic] incapable of making his defense, for the reason of his involuntary servitude of long-continued intoxication for over a period of years." Petitioner alleges that there was an "Examination made by the request of the trial judge, of the defendants [sic] insanity" but complains that the question was not "submitted to a jury for their consideration." However, petitioner does not state the evidence upon which the trial judge determined that he was sane, and therefore we have no means of knowing whether the determination is subject to attack. Furthermore, petitioner does not allege that he demanded a jury trial, as he should have done under section 1368 of the Penal Code if he wished the question of his sanity submitted to a jury. That section, in material part, provides, "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, *if a trial by jury is demanded* * * *." (Italics added.)

[4] Next, petitioner alleges that the attorney who represented him at the trial "obtained the case through fraud from the Brother of the petitioner for the sum of one hundred (100) dollars" and that the attorney "is untruthful, unfaithful and working hand to hand with the prosecutor in depriving the defendant of his 'life' and 'liberty' without 'due process of law.'" There are no allegations of specific facts supporting the conclusions of fraud and untruthfulness.

[5] Finally, petitioner alleges that the warden of the prison refuses to allow petitioner to have a certified copy of the warrant of his arrest which, pursuant to petitioner's request, was sent to petitioner, in care of the warden, by the clerk of the municipal court; that on the 9th and 19th of April, 1948, "petitioner was denied legal communication with the said clerk on obtaining information in connection with the proceedings against petitioner. That your petitioners [sic] out-going 'Registered Mail' which was registered in the post office and charged to him here at San Quentin Prison was not delivered to the place so addressed. That your petitioner has good cause to believe that the said 'Registered Mail' was kept or destroyed by the authorities here at the prison, and can produce the numbers and dates of all mail and copies of same." Whatever the certified copy of the warrant of arrest may show, it is not made to appear here how it

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[1] Petition for habeas corpus in the trial court, petition for habeas corpus in the District Court of Appeal (1 Cr. 2575), two previous petitions for habeas corpus in this court (Cr. 4895, 4968), three petitions for habeas corpus in the United States District Court, two petitions for certiorari in the United States Supreme Court (Swain v. Duffy, 335 U.S. 833, 69 S.Ct. 20, 93 L.Ed. 386, Id., 336 U.S. 928, 69 S.Ct. 651, 93 L.Ed. 1039), petition for habeas corpus in the United States Supreme Court (Id., 337 U.S. 903, 69 S.Ct. 1042, 93 L.Ed. 1716), all denied without opinion.

could affect the legality of petitioner's imprisonment under the subsequent judgment of conviction. And in the absence of allegations as to the nature and substance of the communications which petitioner assertedly is not allowed to send to the court clerk, we cannot say that the prison officials are not justified in refusing to permit such correspondence.

[6] It should be noted that no question of the abuse of the writ of habeas corpus is before us (cf. Price v. Johnston (1947), 334 U.S. 266, 286, 68 S.Ct. 1049, 92 L.Ed. 1356), and that our determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (cf. Pyle v. Kansas (1942), 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214; Williams v. Kaiser (1944), 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; Tomkins v. Missouri (1944), 323 U.S. 485, 65 S.Ct. 370, 89 L.Ed. 407; Rice v. Olson (1944), 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 637). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.

The application for the writ is denied without prejudice to the filing of a new petition which shall meet the requirements above specified.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

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93 Cal.App.2d 736

PEOPLE v. SCHERBING.

Cr. 2547.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1949.

Hearing Denied Oct. 20, 1949.

Richard Scherbing was convicted in Superior Court, Marin County, Edward I. Butler, J., of possessing a homemade sharp pointed knife while a prisoner in state prison and he appealed.

The District Court of Appeal, Peters, P. J., affirmed, holding that the Youth Authority had statutory authority to commit defendant to the state prison, that the statutes conferring such authority are not unconstitutional, and that even if they were unconstitutional, defendant could still be convicted for possessing the knife.

1. Criminal law ⚷999(1)

A "commitment" in the legal sense may be lawfully issued by other than a judicial body.

2. Convicts ⚷5

Where execution of sentence against a convicted defendant was suspended and defendant was "committed" to the Youth Authority, and Authority committed the defendant to state prison, defendant was "committed" to state prison within statute prohibiting a prisoner "committed" to state prison from possessing a sharp instrument, as against contention that term committed in the statute referred only to action by a court or judicial body. Pen.Code, §§ 4502, 5077; Welfare and Institutions Code, § 1767.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Committed".

3. Infants ⚷16.5

The purpose of the Youth Authority Act is to rehabilitate youthful offenders, and all provisions of Act should be construed in view of such purpose. Welfare and Institutions Code, § 1700 et seq.

4. Infants ⚷16.11

Under Youth Authority Act, Authority to which a person convicted of misdemeanor was committed, could commit him to state prison notwithstanding conviction was only for a misdemeanor. Pen.Code, §§ 17–19, 5077; Welfare and Institutions Code, §§ 1700, 1737.1, 1742(f), 1753, 1766, 1767, 1772.

5. Infants 🔑12

The legislature may authorize an administrative agency such as the Youth Authority to "commit" or transfer charges within its control to state prisons. Welfare and Institutions Code, §§ 1742(f), 1753, 1766, 1772.

6. Constitutional law 🔑250
Infants 🔑12

The Youth Authority Act is not unconstitutional as denying equal protection of the laws in so far as it permits Authority to commit a youthful misdemeanant to state prison whereas an adult misdemeanant must be confined in a county jail. Welfare and Institutions Code, §§ 1742(f), 1753, 1766, 1772.

7. Constitutional law 🔑250
Infants 🔑12

The fact that a youthful offender committed to the Youth Authority may be restrained of his liberty for a longer period than an adult could be for the same offense does not render the Youth Authority Act unconstitutional as depriving youthful offender of equal protection of the laws. Welfare and Institutions Code, § 1770.

8. Convicts 🔑5

A person confined to state prison may be convicted under statute for possession of a sharp instrument even if the statute under which he is confined is unconstitutional. Pen.Code, § 4502.

Natalie J. Holly, San Rafael, W. O. Weissich, San Francisco, for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, B. Abbott Goldberg, Deputy Attorney General, for respondent.

PETERS, Presiding Justice.

Appellant was convicted of a violation of § 4502 of the Penal Code. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Section 4502 provides that "Every prisoner committed to a State prison who, while at such State prison * * * possesses or carries upon his person * * * any dirk or dagger or sharp instrument, * * * is guilty of a felony and shall be punishable by imprisonment in a State prison for a term not less than five (5) years." The uncontradicted evidence shows that appellant, while an inmate of San Quentin under what purports to be a commitment from the Youth Authority, was found to possess a homemade sharp-pointed knive with a five and one-half inch blade sharpened along one side. Appellant does not attack the sufficiency of the evidence. His basic contentions are that he was not lawfully committed to San Quentin, and that only one who has been lawfully committed to a state prison can violate § 4502.

The basic facts are not in dispute. In 1946, when appellant was 18 years of age, he was convicted, after a plea of guilty, of second degree burglary and sentenced to one year in the county jail. Execution of the sentence was suspended and appellant was formally "committed" to the Youth Authority. Section 1732, Welfare and Institutions Code. This was in May, 1946. Under the then existing law, both the commitment and the judgment erroneously refer to the offense as a felony. See 1947 amendment to § 17 of the Penal Code for the present law on this subject. Under date of August 27, 1946, the Youth Authority issued its "commitment" which states that, upon the recommendation of its diagnostic clinical officer, the Authority "orders" and "adjudges" that appellant be committed to San Quentin Prison. Appellant was received at the prison by virtue of this document and has been confined there ever since. He was so confined on July 5, 1947, the date upon which he admittedly possessed a knife in violation of § 4502, if that section is applicable to him.

The theory of appellant is that, on the date in question, he was not a prisoner "committed" to a state prison within the meaning of § 4502. He argues that the Legislature has used the term "commitment" in that and other sections of the Penal Code to refer only to action by a court or judicial body, and has not used the term to refer to action by any administrative agency such as the Youth Authority. Therefore, so he contends, the commitment under which he was being detained was void, he was being unlawfully held in San Quentin, and therefore could not violate § 4502.

[1, 2] These arguments are fallacious. A "commitment," in the legal sense, may be issued, lawfully, by other than a judicial body. The Penal Code clearly provides that the Youth Authority and the Adult Authority may make orders transferring prisoners under their supervision from one state institution to another. Such orders of transfer are lawful, and the prisoner confined pursuant to such order is lawfully committed to the new prison. People v. Howard, 120 Cal.App. 45, 8 P.2d 176; People v. French, 61 Cal.App. 275, 214 P. 1003. Section 5077 of the Penal Code expressly confers on the Adult Authority the power of "commitment of a prisoner to a particular State prison." Section 1767 of the Welfare and Institutions Code provides that the power of the Youth Authority to make orders "committing to an institution" any person under the control of the Authority may not be delegated. These sections demonstrate that the Legislature has not used the word "commitment" to refer solely to judicial action.

Next, appellant urges that he was not lawfully committed because he was only convicted of a misdemeanor, and misdemeanants, according to appellant, may not be confined lawfully in the state prison. He also contends that, in any event, the Youth Authority has no power to confine a youthful offender in the state prison. The respondent concedes that appellant was convicted only of a misdemeanor. Such concession is undoubtedly in accordance with the law here applicable. See § 17 of the Penal Code as it read prior to the 1947 amendment. On these points the argument is that, traditionally, misdemeanors have never been punishable in a state prison in California. See §§ 17, 18 and 19, Penal Code; Ex parte Arras, 78 Cal. 304, 20 P. 683; Ex parte Ah Cha, 40 Cal. 426. It is then contended that, in enacting the Youth Authority Act, the Legislature could not have intended to modify this well-settled procedure by permitting youthful misdemeanants to be confined in a state prison while continuing to prohibit like punishment for adult misdemeanants. It is pointed out that the main purpose of the Youth Authority Act was to protect society by substituting for retributive punishment of youthful offenders "training and treatment directed toward the correction and rehabilitation of young persons." § 1700, Welfare and Institutions Code. Appellant argues that youths cannot be corrected and rehabilitated by confining them with hardened and adult offenders.

[3] These arguments are interesting but unsound. We agree that it is the purpose of the Youth Authority Act to rehabilitate youthful offenders, and that all the provisions of the Act should be construed in view of this main purpose. To accomplish this main purpose the Authority is given the broadest powers in the broadest terms to utilize all state institutions and facilities. Thus, § 1766 of the Welfare and Institutions Code gives the Authority power to confine all offenders committed to its charge "under such conditions as it believes best designed for the protection of the public." Section 1753 provides that "For the purpose of carrying out its duties, the Authority is authorized to make use of law enforcement, detention, probation, parole, medical, educational, correctional, segregative and other facilities, institutions and agencies, whether public or private, within the State." These sections make no distinction between youthful offenders who are convicted of a misdemeanor and those convicted of a felony. The sections empower the Authority to use all state institutions, including prisons, for any person within its control, whether felon or misdemeanant. See, also, §§ 1742(f) and 1772 of the Welfare and Institutions Code, specifically referring to offenders under con-

trol of the Authority who have been placed in state prisons. While under § 1737.1 of the Welfare and Institutions Code as amended in 1945, Stats. 1945, Chap. 781, p. 1470, the Authority, when it finds a youthful offender to be incorrigible, "may return him to the committing court" and such court may "commit" the offender to the state prison or county jail in accordance with law, such section is not exclusive. The purpose of the act was to give the Authority flexible powers in the handling of its charges. Only when the case is one that, in the opinion of the Authority, is completely hopeless, would resort be had to § 1737.1. That is so because if the Authority returns the offender to the Court, the offender would then have to serve the minimum term fixed for the offense and could not be discharged or placed under less stringent control.

[4] It thus appears that, under the terms of the statutes involved, the Authority had legislative power to commit appellant to San Quentin. But, says appellant, if the statutes be so construed they are unconstitutional, either because they result in an unlawful delegation of judicial power, or because, so construed, they deny equal protection of the laws to youthful misdemeanants by permitting them to be confined in state prisons.

[5–7] These arguments are unsound. Once it is determined that the Legislature did not intend the term "commit" to be limited to judicial action, the law is well settled that the Legislature may authorize an administrative agency such as the Youth Authority to "commit" or transfer charges within its control to state prisons. See annotation on this subject in 95 A.L.R. p. 1455. The treatment of youthful offenders, differently from adult offenders, even where such treatment results in a longer confinement of youthful offenders than could be imposed on adult offenders for the same offense, has been upheld in this state. Thus, under the Act, a misdemeanant committed to the Authority, may be kept under its control until the person so committed reaches the age of 23. § 1770, Welfare and Institutions Code. The fact that a youthful offender may thus be restrained of his liberty for a longer period than an adult could be for the same offense, does not render the Act unconstitutional. In re Herrera, 23 Cal.2d 206, 143 P.2d 345; Ex parte Nichols, 110 Cal. 651, 43 P. 9; Ex parte Liddell, 93 Cal. 633, 29 P. 251; see annotation in 3 A.L.R. page 1614. Appellant, while recognizing the rule of these cases, nevertheless urges that the juvenile has been deprived of equal protection when he is subjected to a harsher punishment than that imposed on adults, namely, confinement in a state prison, when an adult misdsmeanant must be confined in a county jail. The argument goes that such a classification has no substantial, just and reasonable relation to the object of the legislation; that longer detention of juveniles and their segregation are reasonably related to their peculiar need for and adaptability to reform, education and rehabilitation, but that no such justification exists for placing adults in county jails and juveniles in a state prison where they will come into contact with hardened offenders; that legislation that singles out the youth for such purposes cannot be justified on reformation grounds and therefore cannot be upheld. The basic premise of this argument is that there is a better chance of rehabilitation in the county jail than exists in state prisons. In view of the well-known fact that no rehabilitative efforts at all are made in many of the county jails, this basic premise may well be questioned. Moreover, the basic theory of the Act is to empower the Authority to make its treatment fit the individual offender rather than to be predicated on the crime committed. There are vicious, hardened youthful offenders who are extremely dangerous to society. The Legislature has determined that the Authority should have power to imprison such offenders in a state prison. Such a classification is not unreasonable, and, in our opinion, is valid.

[8] There is another complete answer to the points raised by appellant. Even if the various provisions of the Youth Authority Act here under attack were uncon-

stitutional (which they are not), it would not result in a reversal of the conviction. Appellant was confined under a commitment in the state prison. While so confined he unlawfully possessed a knife. It is no defense to a prosecution for unlawfully possessing a knife in prison under § 4502 of the Penal Code, that the statute under which the inmate is confined is unconstitutional. The statute was passed to protect the guards and other inmates of the prison. It is a reasonable regulation. The fact that the particular inmate may be unlawfully confined certainly does not confer upon him the right to possess weapons denied to other inmates. If the purpose of the statute is to be achieved, and obviously the purpose is a sound one, it makes no difference why the prisoner has been confined, or that he may be legally entitled to release. While an inmate, necessity requires that the prisoner submit to prison regulations, and certainly § 4502 is a reasonable regulation.

Appellant has cited no case holding that a statute such as § 4502 does not apply to one unlawfully confined. He does cite some cases relating to escape statutes. There are cases holding that one unlawfully confined who escapes from such confinement, where the confinement is without color of authority, does not violate a statute making it unlawful to "escape" from prison. People v. Clark, 69 Cal.App. 520, 231 P. 590; People v. Ah Teung, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190. These cases, however, deal with situations where a person has been confined either without any authority at all or where the judgment was void on its face. But where the imprisonment is made under authority of law and the process is simply irregular in form, or the statute under which he is confined is unconstitutional, the escape is unlawful. People v. Ah Teung, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190; People v. Howard, 120 Cal. App. 45, 8 P.2d 176; People v. Belknap, 137 Cal.App. 366, 30 P.2d 576; People v. Crider, 76 Cal.App. 101, 244 P. 113; People v. McPheeley, 92 Cal.App.2d 589, 207 P.2d 651. This is likewise the general rule in other states. Kelley v. Meyers, 124 Or. 322, 263 P. 903, 56 A.L.R. 661; People ex rel. Haines v. Hunt, 229 App. Div. 419, 242 N.Y.S. 105; People of State of New York ex rel. Scrum v. Hunt, 230 App.Div. 801, 244 N.Y.S. 790. It is also the view adopted by the federal courts. Aderhold v. Soileau, 5 Cir., 67 F.2d 259; Giese v. United States, 79 U.S.App.D.C. 126, 143 F.2d 633; United States v. Jerome, 2 Cir., 130 F.2d 514, reversed on other grounds 318 U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640; Bayless v. United States, 9 Cir., 141 F.2d 578, certiorari denied 322 U.S. 748, 64 S.Ct. 1157, 88 L.Ed. 1580. Many cases are collected and commented upon in annotations in 56 A.L.R. 666 and 163 A.L.R. 1137. These cases make sense. To allow prisoners to use force to escape and then to permit the defense that they were unlawfully confined, would create chaos in a prison. In a democracy the right of self-help is seldom permitted. Resort to the courts is the normal and traditional method of correcting an unlawful confinement. While some argument can be made that an inmate has a lawful right to escape where his confinement is completely unlawful, because the constitutional right of freedom has been infringed, no one has a lawful right to possess a knife or other dangerous weapon while confined in a prison.

We think that appellant was lawfully confined in San Quentin. But even if the statutes so providing were unconstitutional, he cannot raise that defense to a prosecution under § 4502 of the Penal Code.

The judgment and order appealed from are affirmed.

BRAY, J., concurs.

WARD, Justice.

I concur, as held in effect in the main opinion, that any inmate lawfully or unlawfully confined in a state prison does not possess the right "while at such State prison" to possess a dirk or dagger. Pen. Code § 4502. In my opinion a discussion of other points is not necessary to decide the merits of this appeal.

93 Cal.App.2d 826

Ex parte STEWART.

Cr. 2627.

District Court of Appeal, First District,
Division 1, California.

Sept. 30, 1949.

Esther Stewart petitioned for a writ of habeas corpus.

The District Court of Appeal, Bray, J., discharged petitioner on the ground that she had served the maximum sentence of one year under the Penal Code for conviction of a misdemeanor.

Infants 🔑20

Provision of Welfare and Institutions Code fixing maximum term of imprisonment for contributing to juvenile delinquency to two years in county jail was repealed to extent of conflict with subsequently enacted Penal Code provision limiting confinement in county jail on conviction for misdemeanor to one year. Welfare and Institutions Code, § 702; Pen. Code, § 19a.

James A. Toner, San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., for respondent.

BRAY, Justice.

Petition for writ of habeas corpus on the ground that the term of sentence under which petitioner is imprisoned was beyond the jurisdiction of the court.

Petitioner was convicted of a violation of section 702 of the Welfare and Institutions Code (contributing to the delinquency of a minor) and sentenced to imprisonment in the county jail for the term of two years. Her confinement began on July 16, 1948, and on the date of the filing of the petition, August 24, 1949, she had actually served more than 13 months of such term.

In the recent case decided by this court, In re Chiapetto, 93 Cal.App.2d 497, 209 P.2d 154, we held that section 19a of the Penal Code, which provides that "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor * * * or for any reason, be committed for a period in excess of one year * * *" controlled over the penal provisions of section 702 of the Welfare and Institutions Code. Upon the authority of that case, petitioner has served more than the maximum time for which she could lawfully be imprisoned for the offense of which she was convicted.

Pending the hearing the prisoner was released on bail. The petitioner is discharged and the bail exonerated.

PETERS, P. J., and WARD, J., concur.

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93 Cal.App.2d 594

LARKIN et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 16987.

District Court of Appeal, Second District,
Division 1, California.

Sept. 16, 1949.

Richard D. Larkin and Marie A. Larkin sued Bank of America National Trust and Savings Association and others to quiet title to tax delinquent land purchased by plaintiffs from the state.

The Superior Court of Los Angeles County, Thurmond Clarke, J., quieted title to the property in plaintiffs and named defendant appealed.

The District Court of Appeal, White, P. J., affirmed the judgment, holding that defendant's right of redemption expired with reconveyance by the state to plaintiffs and that in view of named defendant's conduct it would be unconscionable to deprive plaintiffs of the property.

1. Taxation 🔑696

Code section 3511.4, as enacted in 1945, was retroactive in effect and permitted redemption of all of tax deeded property that had been sold or deeded to the state and had not yet been sold by the state, notwithstanding section 3511.3, terminating right of redemption on execution of deed to the state. Revenue and Taxation Code, §§ 3511.3, 3511.4.

2. Taxation ⚿695

Code section 3511.4 as enacted in 1945, suspending the operation of section 3511.3, relating to termination of right of redemption of tax delinquent property, preserved taxpayer's right of redemption only with respect to property deeded to the state and not yet sold by the state. Revenue and Taxation Code, §§ 3511.3, 3511.4.

3. Taxation ⚿615

Code section 3707 dealing with sales to private parties of delinquent tax property after deed to state, was not affected by section 3511.4, enacted in 1945, temporarily suspending the operation of certain statutes relating to termination of right of redemption, which does not prohibit sales by state of tax deeded property thereby terminating right of redemption. Revenue and Taxation Code, §§ 3511.4, 3707.

4. Taxation ⚿722(4)

Where bank's action against state and various interested taxing districts to establish bank's right to redeem tax delinquent property, which had been deeded to state, was commenced after plaintiffs had acquired title from state, and plaintiffs were not made parties to such action, decree in favor of bank could not affect plaintiffs' title. Code Civ.Proc. § 1908, subd. 2; Revenue and Taxation Code, §§ 3511.3, 3511.4, 3571–3578, 3691 et seq., 3707.

5. Judgment ⚿707

Record owner is not bound by any proceedings commenced or judgment rendered after he secured title where he is not made a party to the action. Code Civ. Proc. § 1908, subd. 2.

6. Appeal and error ⚿845(2)

When parties stipulate in writing to all facts and cause such stipulation to be made a part of record, facts so recited take place of findings, and, on appeal, appellate tribunal must look to stipulation.

7. Appeal and error ⚿845(2)

Where stipulation of facts authorized either party to submit further oral or documentary evidence at time of trial and such further evidence was adduced, stipulated facts did not take place of findings, and, on appeal, appellate tribunal was not restricted to stipulation for facts of case.

8. Equity ⚿66

The rule that one seeking intervention of equity, must do equity, is applicable to an action to quiet title against a tax deed where, in good conscience, a party should have paid the tax in first instance.

9. Mandamus ⚿120

Mandamus will lie to compel acceptance from taxpayer by proper officials of requisite sums of money by way of payment upon delinquent taxes and assessments on real property to permit taxpayer to redeem prior to expiration of right of redemption.

10. Taxation ⚿796(2)

Where taxpayer had allowed delinquencies to accumulate over a number of years, took no steps to clear its title when it inadvertently became involved in a third party's tax litigation with state, or to prevent tax sale, or to put prospective purchasers on notice that it was claiming that property had been effectively redeemed and thereafter permitted purchasers to make large expenditures for improvements, taxpayer was barred in equity from quieting its title against purchasers of tax title.

11. Equity ⚿54

To entitle one to equitable relief he must present such a case as appeals to the conscience of the court.

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Chambers & Lyman, Robert Chambers, Los Angeles, for appellant.

Sprague & Sparks, Richard W. Sprague, Los Angeles, for respondents.

WHITE, Presiding Justice.

This is an appeal by defendant from an adverse judgment in an action to quiet title.

The cause was submitted to the trial court on an agreed statement of facts as follows: "The above named plaintiffs * * *, and the above named defendant * * *, hereby agreed that the following is a Statement of Facts, in said action, and that the Court may determine the issues based upon this statement. *Provided, that if the Court requires, or if either of the parties hereto at the time of trial desire, they may submit further evidence, oral or documentary.* (Emphasis added.) * * *

I.

"The property involved in this action is described as follows:

"Lots 260 and 262 of Tract 8500 in the City of Los Angeles, County of Los Angeles, State of California, as per Map recorded in Book 92, Pages 88 and 89 of Maps, in the office of the County Recorder of said County.

II.

"That on the 30th day of June, 1932, Lot 260, was sold to the State of California for non-payment of delinquent taxes levied for the year 1931.

"On July 1st, 1939, the Tax Collector of the County of Los Angeles deeded to the State of California, Lot 260.

"On March 27, 1946, pursuant to provisions of Division 1, Part 6, Chapter 7, of the Revenue and Taxation Code of the State of California, Lot 260 was sold to the plaintiffs. No person having redeemed said property prior to the sale.

"The amount paid by the plaintiff for the property at the sale is $1250.00 and the subsequent taxes paid by the plaintiffs on said lot is $7.99 making a total paid by plaintiffs of $1257.99.

III.

"On June 30, 1928, Lot 262 was sold to the State of California for delinquent taxes levied for the year 1927.

"On September 8, 1933, the Tax Collector of the County of Los Angeles deeded to the State of California Lot 262.

"On March 27, 1946, pursuant to provisions of Division 1, Part 6, Chapter 7, of the Revenue and Taxation Code of the State of California, Lot 262 was sold by the State of California to the plaintiffs.

"The amount paid by the plaintiffs at the sale for the property is $2750.00 and the subsequent taxes paid by the plaintiffs on said lot is $21.32 making a total paid by plaintiffs of $2771.32.

IV.

"The defendant is the owner of and is entitled to redeem Lots 260 and 262 unless its title thereto has been divested pursuant to the Revenue and Taxation Laws of the State of California and the proceedings in causes numbered respectively 476-720 and 518-010 referred to in this Agreed Statement.

V.

"That in the year 1943, an action was commenced by Fee Title Company v. the State of California, cause No. 476-720, records of the Superior Court of the State of California, in and for Los Angeles County; that said action was brought to set aside the tax sales and tax deeds set forth in paragraphs II and III hereof; that among the property included in said action were Lots 260 and 262. An Interlocutory Decree was made in said cause July 30, 1943, setting aside the tax sales and tax deeds and permitting the Fee Title Company to redeem the property including lots 260 and 262. The Fee Title Company did not redeem lots 260 and 262 and a Final Decree was entered in said cause August 1, 1945, quieting title to lots 260 and 262 in the State of California. That at the time of the commencement of said action, and at the time of the entry of the Interlocutory and Final Decrees the Fee Title Company was not the owner and had not the right to redeem lots 260 and 262.

"On July 12, 1946, the Interlocutory and Final Decrees in said cause were, by the consent of all parties to said action and of all interested taxing authorities, amended, eliminating from said Decrees Lots 260 and 262. Plaintiffs and defendant were not parties to the action.

"The files and records of said cause No. 476-720 may be examined by the Court and considered a part of this Statement of Facts.

VI.

"On August 15, 1946, this defendant commenced an action in the Superior Court of the State of California, in and for Los Angeles County, cause numbered 518-010, wherein the State of California and all of the interested taxing districts were made defendants. The plaintiffs in this action were not parties to said suit. The action was brought to obtain the rights to redeem the property. A decree was made August 16, 1946, and entered August 19, 1946 which decree adjudged this defendant to be the owner of lots 260 and 262 and entitled to redeem the same. That the decree was not appealed from, set aside or amended, and is now final.

"The files and records in cause No. 518-010 may be examined by the Court and are to be considered a part of this Statement of Facts.

VII.

"In the month of June, 1943, one Stewart A. McLeod, as beneficiary under a declaration of trust, for and on his own behalf and on behalf of the defendant Bank of America National Trust and Savings Association, went to the Redemption Division of the Tax Collectors office and stated that he desired to redeem the property here in question and redemption by the Tax Collectors office was refused for the reason given that cause No. 476-720 was then pending; that in September, 1945, said Stewart A. McLeod again went to the Redemption Division of the County Tax Collectors office and stated that he desired to redeem the property and redemption was refused for the reason given that said Stewart A. McLeod could not redeem it because of the Decree Quieting Title in the State in cause No. 476-720; that in February, 1946, said Stewart A. McLeod again went to the Redemption Division of the County Tax Collectors office and stated that he desired to redeem the property and was again refused for the same reason that in cause No. 476-720 a Final Decree had been made quieting title in the State; in the month of May, 1946, said Stewart A. McLeod again went to the Redemption Division of the County Tax Collectors Office, stating that he desired to redeem the property and was refused for the reason that the State had sold the property to the plaintiff in this action. In September, 1946, said Stewart A. McLeod again went to the Redemption Division of the County Tax Collectors office and stated that he desired to redeem the property taking a certified copy of the Decree in cause No. 518-010 and redemption was refused on the ground that the plaintiff had commenced an action to quiet title. Said Stewart A. McLeod did not produce money or check at the Tax Collectors office on any of the attempts to redeem the property.

VIII.

"The pleadings of each of the parties may be considered amended to conform with this agreed Statement of Facts."

At the trial the plaintiff, Richard D. Larkin, testified to certain additional facts, viz., that plaintiffs paid amounts due under improvement bonds in the sum of $445.26, that plaintiffs further improved the property as shown by an exhibit received in evidence, that plaintiffs expended approximately $6,190.00 on these improvements and that the work was done in order to get it completed prior to the effective date of a city ordinance prohibiting such type of excavation. That in order to protect plaintiffs' right to make the improvements in question they were compelled to and did file a mandamus suit. That Mr. McLeod, beneficiary under a declaration of trust, was fully aware of plaintiffs' interest in the property and the necessity to complete the improvement work within a limited period of time. That the improvement work done by plaintiffs increased the value of the property from "worthless" to a fair market value of $15,000.00. That plaintiffs cut a roadway through their own property to get access to the property in question. There was also introduced into evidence a letter dated April 26, 1946, from defendant to the County Counsel of Los Angeles from which it appears that defendant at all times was aware that the Fee Title Company, which had commenced the actions mentioned in the agreed statement of facts, had no right, title or interest in and to the property here involved.

The court made findings of fact and conclusions of law in favor of plaintiffs upon which judgment was accordingly entered quieting title in plaintiffs and against defendant.

On this appeal it is first contended by appellant that the sale of the property in the year 1946 was prohibited by statute. The lots here in question were deeded to the state in the years 1933 and 1939.

The termination of the right of redemption of all property deeded to the state prior to June 1, 1942, is governed by Sections 3571 to 3578, inclusive, of the Revenue and Taxation Code. In 1941 the legislature provided by Section 3511.3 of the Revenue and Taxation Code that "On and after June 1, 1942, and prior to January 1, 1947, on execution of the deed to the State, the right of redemption is terminated as to all property * * * (with an exception not here material)." Stats.1941, ch. 290, § 4.8, p. 1425. Then in 1945 an act was passed (Sec. 3511.4, Rev. & Tax. Code—Repealed June 5, 1947) reading in part as follows: "The operation of Sec(s). 3511.3 (and eleven other sections) of this code (Rev. & Tax.) shall be postponed and suspended both insofar as their past operation as well as their future operation. * * * This section shall remain in effect until the ninety-first day after final adjournment of the Fifty-seventh Regular Session of the Legislature or until the cessation of hostilities in all wars in which the United States is now engaged, whichever last occurs. * * *" (Stats.1945, ch. 700, § 1; Repealed by Stats. 1947, ch. 606, § 1.) The date of adjournment of the fifty-seventh session of the legislature was June 5, 1947.

[1] We entertain no doubt that the provisions of the last cited section were retroactive and permitted the redemption of all tax deeded property that had been sold or deeded to the state and had not yet been sold by the state. Gartner v. Roth, 26 Cal. 2d 184, 157 P.2d 361. In the case just cited we find at page 189 of 26 Cal.2d, at page 363 of 157 P.2d the following language: "Moreover, it would be unreasonable to assume that the Legislature, in granting in 1943 general relief to taxpayers whose lands had been deeded to the state and had not yet been sold by the state, intended a different treatment for those taxpayers whose lands had been deeded between June 1, 1942, and August 4, 1943—the period when section 3511.3 was in effect—so that particular group should be denied the rights and privileges of redemption enjoyed by all the others whose property was tax-deeded to the state either prior or subsequent to that period. In according retroactive force to the 1943 act, such discrimination is avoided, and the phraseology of the act is given its full breadth of meaning in achievement of the manifest legislative design. In line with the cardinal rule of statutory construction requiring an interpretation of a statute which will give effect to the legislative intent as implied in the terms of the statute evidencing its real object and purpose (23 Cal.Jur. § 107, p. 725), the Legislature's choice of language in the 1943 act compels the conclusion that it was thereby intended to suspend the entire operation and effect of section 3511.3, so that it would be ineffective for any purpose until June 1, 1945."

[2, 3] While the remedial legislation above referred to preserved to appellant its right of redemption, such preservation applied only to property deeded to the state and not yet sold by the state. Section 3511.4, supra, specifically postponed and suspended the operation only of those sections therein enumerated, all of which are contained in Chapter 4 and Chapter 4.6 of the Revenue and Taxation Code. Section 3511.4 in no way refers to or affects the provisions of Section 3707 contained in Chapter 7 of such code and which deals with the sale to private parties after deed to the state. In other words, nothing contained in Section 2511.4 which relates to the termination of the right of redemption as to the sections mentioned in Section 3511.4 prohibits sales by the state of tax-deeded property pursuant to the terms of Section 3707 of the Revenue and Taxation Code. Appellant's right of redemption was not impaired or destroyed by the deed to the state, but there was no statutory stricture upon the right of the state to sell property deeded to it after expiration of the statutory period and thereby terminate the right of redemption. Appellant's contention, as set forth in Paragraph VII of the agreed statement of facts, that on numerous occasions it sought to redeem the property is hereinafter answered by what is said in giving consideration to respondents' claim that appellant is equitably estopped and barred from now quieting its claimed title to the property here in dispute. The case of Hossom v. City of Long Beach, 83 Cal. App.2d 745, 189 P.2d 787; relied upon by appellant is not helpful. In the cited case it was held that the ordinance terminating the right of redemption was invalid, and that the city had not disposed of the property but was, in fact, using it for park purposes. Also, that there was no valid deed to the city. Such facts are totally dissimilar to the ones present in the instant case wherein we are confronted with the provisions of Section 3707 of the Revenue and Taxation Code, a valid statute terminating the right of redemption on completion of any sale under Chapter 7. And also, in the case at bar there was a valid deed to the state, which conveyed absolute title to the property upon the expiration of the five-year period, free of any encumbrance, except a lien for certain taxes not here material. Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111.

Appellant next contends that the judgments made and entered in the Superior Court in the case of Fee Title Company v. State of California, numbered 476–720, and Bank of America National Trust and Savings Association v. State of California, et al., numbered 518-010, establish ownership of the lots with right of redemption in appellant bank. The proceedings had in the foregoing actions are made a part of the agreed statement of facts. In action No. 476-720 the decree empowered plaintiff Fee Title Company to redeem within six months but this was not done with reference to the property here in question because at the time of the entry of the interlocutory and final decrees the Fee Title Company was not the owner and consequently had not the right to redeem lots 260 and 262. On July 12, 1946, the interlocutory and final decrees in said cause were, by the consent of all parties to said action and of all interested taxing authorities, amended so as to eliminate therefrom lots 260 and 262. Furthermore, the evidence shows that appellant was at all times aware of the fact that Fee Title Company had no right, title or interest in and to the aforesaid lots.

[4, 5] As to the second cause of action, numbered 518-010, respondents herein were not named as defendants. The action was commenced and terminated many months after respondents acquired their title. Respondents having acquired title prior to the commencement and termination of this action, the State of California and the taxing agencies no longer had any right, title or interest in or to said lots and the decree could in no way affect the title thereto The rule is firmly established that a record owner is not bound by any proceedings commenced or judgment rendered after such owner secured title where such owner is not named as a party to the action. Taylor v. Chapman, 17 Cal.App.2d 31, 34, 61 P.2d 476; Wyser v. Truitt, 95 Cal.App. 727, 731, 273 P. 147; Snodgrass v. Errengy, 86 Cal.App. 664, 667, 261 P. 497; McDonald v. McCoy, 121 Cal. 55, 69, 53 P. 421; Code Civ.Proc. sec. 1908, subd. 2.

[6, 7] Appellant attacks the findings of fact as being entirely unnecessary and urges that the only question before the trial court was, what is the law applicable to the facts agreed upon? That a stipulation of facts is binding upon the parties and the court and that evidence contrary to such facts is inadmissible. Undoubtedly, it is the law that when parties stipulate in writing to all the facts and cause such stipulation to be made a part of the record, the facts so recited take the place of findings, and on appeal the appellate tribunal must look to the stipulation of facts for the facts of the case. Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 335, 253 P. 726; People v. Gabriel, 57 Cal.App.2d 788, 792, 135 P.2d 378; Los Angeles Athletic Club v. Board of Harbor Com'rs, 130 Cal.App. 376, 394, 20 P.2d 130. However, in the instant

proceeding the agreed statement of facts provided that "* * * if either of the parties hereto at the time of trial desire, they may submit further evidence, oral or documentary." Pursuant to this portion of the stipulation, respondents introduced oral and documentary evidence at the trial. It is therefore manifest that the entire facts with respect to all of the issues were not stipulated. Thus the rule that when the issues are submitted on an agreed statement of facts findings ordinarily become unnecessary is not here applicable.

[8] Respondents earnestly urge that appellant is barred in equity from quieting its title. The rule that one seeking the intervention of equity must do equity is applicable to an action to quiet title against a tax deed where in good conscience a party should have paid the tax in the first instance. Woody v. Security Trust & Savings Bank, 137 Cal.App. 29, 36, 29 P.2d 898.

[9] In the case at bar appellant had, as to one lot, the period from 1931 to 1936 to pay the taxes, and as to the other lot, a period from 1927 to 1946. Appellant urges that the pendency of the foregoing Fee Title Company case prevented it from redeeming. But there was evidence that at all times appellant was aware of the fact that Fee Title Company had no right, title or interest in the two lots now engaging our attention and also, that as early as June, 1943, an agent of appellant was advised that redemption could not be made because of the pendency of the Fee Title Company action. Notwithstanding such notice and knowledge, appellant took no steps to clear title. It also appears that in September, 1945, and again in February, 1946, appellant was informed of the fact that title had been quieted in the state, but took no steps whatever to clear title or to prevent the tax sale which took place in March, 1946. Appellant not only failed to take any affirmative action to prevent the sale, but advised respondents that the property "was in such a bad state" that respondents "should put it up for tax sale." Assuming appellant made valid efforts to redeem prior to the tax sale and such redemption was refused, it is now established law in this state that appellant could have protected its rights by a mandamus proceeding to compel the acceptance by the proper officials of the requisite sums of money by way of payment upon delinquent taxes and assessments on real property. Anglo California Nat. Bank of San Francisco v. Leland, 9 Cal.2d 347, 70 P.2d 937; Lachmund v. Johnson, 47 Cal. App.2d 377, 378, 117 P.2d 920. There is no denial that appellant received notice of the tax sale and could have taken some steps to prevent the sale from being held or to put the prospective purchasers on notice that it was claiming that said property had been effectively redeemed.

In addition to the foregoing, we are confronted with the very substantial sum shown by the evidence to have been expended for improving the property by respondents after receipt of the tax deed. Such expenditures and improvements were made with the full knowledge of appellant's agent and are imputed to it. For several months prior to commencing the improvements respondents endeavored to secure a quitclaim deed from Stewart A. McLeod, beneficiary under a declaration of trust, and by the agreed statement of facts (Par. VII) admittedly an authorized representative of appellant, who, according to the testimony of respondent Mr. Larkin, "kept on stalling me for several months." The same respondent also testified that he informed Mr. McLeod that the former had to take immediate action to level the lots or the proposed city ordinance concerning such excavating would become effective and he would be foreclosed from making the lots usable. Unable to secure a definite answer from Mr. McLeod, respondents proceeded with the foregoing expenditures, and in order to complete the work were required to bring a mandamus action against the city. During this period appellant remained inactive. The evidence showed that as a result of these expenditures and improvements the value of these lots increased until their fair market value was $15,000. In completing these improvements respondents constructed a roadway over adjacent property owned by them, thereby depreciating in value such adjacent property.

[10, 11] Law and good morals should be one and inseparable. Under the facts here present we are persuaded it would be unconscionable to permit appellant to set aside the tax deeds here in question, secured by respondents at a tax sale instigated in part by appellant's own acts or failure to act under circumstances that in conscience and good faith required action. To entitle one to equitable relief "he must present such a case as appeals to the conscience of the court." Hyman v. Boyle, 239 Mich. 357, 214 N.W. 163, 164; see also 30 C.J.S., Equity, § 1, p. 320.

For the foregoing reasons the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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93 Cal.App.2d 692

BARDER v. McCLUNG et al.

Civ. 17135.

District Court of Appeal, Second District, Division 1, California.

Sept. 21, 1949.

Hearing Denied Nov. 17, 1949.

Verda E. Barder sued Ellery G. McClung, Raymond E. Pierce, and Hannah Mae Pierce for damage based on alleged fraud of defendants in sale to plaintiff of residence property consisting of a five room dwelling and detached garage containing a dwelling unit which unit was being maintained and used in violation of zoning ordinances.

The Superior Court, Los Angeles County, J. F. Moroney, J., gave judgment to the plaintiff and the defendants Raymond E. Pierce and Hannah Mae Pierce appealed.

The District Court of Appeal, Drapeau, J., held that the defendants had a duty to disclose to plaintiff that the apartment was maintained and used in violation of existing zoning ordinance and affirmed the judgment.

1. Appeal and error 🔑1008(1)

In action by vendee against vendors for damages based upon alleged fraud of vendors in sale of residence property and detached garage containing dwelling unit, whether vendors had knowledge that kitchen in dwelling unit was maintained in violation of existing zoning ordinances and building regulations was for trier of facts.

2. Fraud 🔑58(2, 4)

In action by vendee against vendors for damages based upon alleged fraud of vendors in sale of residence property and detached garage containing a dwelling unit, evidence was sufficient to sustain trial court's finding that vendors substantially altered garage building and fitted it with a dwelling unit and kitchen in violation of existing zoning ordinances and building regulations and that vendee relied upon vendors' fraudulent representations.

3. Fraud 🔑20

Where vendee purchased dwelling and detached garage containing a dwelling unit from vendors, and kitchen and garage were maintained and used in violation of existing zoning ordinances, but vendors failed to disclose that fact to vendee, that vendee had examined premises before purchase did not preclude recovery of damages.

4. Fraud 🔑23

An independent investigation or an examination of property does not preclude reliance on representations where the falsity of the statement is not apparent from an inspection, or the person making the representations has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance.

5. Fraud 🔑20

Where vendee purchased dwelling and detached garage containing kitchen which was maintained and used in violation of existing zoning ordinances, vendee who relied on fraudulent misrepresentations of vendors was not bound by constructive notice of the zoning ordinance.

6. Fraud 🔑20

Purpose of recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.

7. Fraud ⚷1

Fraud may be either actual or constructive.

8. Fraud ⚷16

Suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud. Civil Code, § 1572.

◆

Henry C. Rohr, Los Angeles, for appellants.

Richard M. Thompson, Los Angeles, for respondent.

DRAPEAU, Justice.

The instant action for damages is based upon the alleged fraud of defendants in a sale to plaintiff of residence property in Los Angeles consisting of a five room dwelling and a detached garage containing a dwelling unit of one room, kitchen and bath. When the buildings were originally constructed in 1941, separate building permits were issued upon application of defendants' contractor, the permit for the garage building carrying the notation: "Double Garage—with living quarters—Den and Bath—No kitchen." Also "Zone & yards O.K. Byron 6–20–41."

In 1943, without obtaining a permit therefor, defendants extended the garage unit about two and one-half feet and added a kitchen. According to defendants' story the labor incident to this change was performed on a daily wage plus materials basis by a man sent to them by the original contractor, Ed. Smith. Defendants were unable to remember this man's name or the amount of money they paid him for the work.

In July of 1946, defendants sold the property to plaintiff for $13,150, and in August of 1947, plaintiff was notified by the City Zoning Administrator that the garage unit was being maintained in violation of the city zoning ordinances. Thereafter, on September 15, 1947, plaintiff was granted a variance on a temporary basis permitting the use and maintenance of a second detached dwelling unit on an R–2 zoned lot for a period of five years, upon the conditions (1) that all kitchen facilities be removed at the end of the period on September 30, 1952, and (2) that she file and record an agreement to that effect "in the office of the County Recorder of Los Angeles County prior to the issuance of any building permits or electrical power permits, such agreement to run with the land and be binding upon all future owners, heirs, or assigns in interest."

In her complaint, plaintiff alleged that defendants knew both at the time of construction and at time of sale that the buildings did not conform to the zoning ordinances, and in order to induce her to purchase the property, defendants represented to her and her husband that it was improved with two dwelling units, and that they could occupy one of them as their own residence and lease the other unit for income purposes; that such representations were false and fraudulent and made with the intention that plaintiff and her husband should rely thereon, which they did to their damage in the sum of $4,650.

The trial court gave judgment to plaintiff for $1,250 and found, among other things, that: In the year 1943, defendants substantially altered the garage building and fitted it with a kitchen "in violation of then existing zoning regulations and building restrictions" knowing that such altering and fitting were in violation of existing zoning regulations and building restrictions, both at the time the work was done and at the time of sale to plaintiff. That plaintiff was wholly unfamiliar with the violation, but relying upon fraudulent statements made to her by defendants was induced to purchase the property for $13,150, when it was not worth in excess of $11,900.

[1] Defendants appeal from the judgment on the ground that the evidence is insufficient to sustain it because of lack of proof of the applicable zoning ordinance, or that defendants had knowledge thereof. In this connection, defendants urge that "Plaintiff's burden was first to prove what Defendants were charged with knowing, and then to prove that Defendants actually had such knowledge when they sold the property to Plaintiff."

Plaintiff offered in evidence the Comprehensive Zoning Plan of the City of Los Angeles, effective as of June 1, 1946, which provides that its terms "in so far as they are substantially the same as existing ordinances relating to the same subject matter, shall be construed as restatements and continuations and not as new enactments"; and that its purpose "is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan * * *".

While the exact terms of the zoning regulation applicable to the instant property in 1943 were not presented in evidence, the Comprehensive Zoning Plan and the ruling of the City Zoning Administrator, made after a hearing before him on August 25, 1947, support an inference that the property was in an R–2 zone in 1943, and that the addition of a kitchen to the detached garage unit constituted a violation of a then existing zoning regulation.

The following evidence tends to prove that defendants, at the time they sold the property to the plaintiff, knew they were using and maintaining a building in violation of zoning regulations:

The 1941 permit to construct a double garage, with living quarters, den and bath, "No kitchen."

The testimony of Mrs. Bertha Griffin that when defendant Hannah Mae Pierce was showing her the garage apartment in September of 1941, the witness asked: "Why don't you make a kitchen out of this room? And she said that the FHA wouldn't let them, that they did not have a permit to have a kitchen there."

The testimony of Mrs. Marjorie Barden, daughter-in-law of plaintiff, that she first met defendants on July 22, 1946; that about a year later while she was living in the garage unit, an electrical company refused to wire the place for an electric range; that she took up the matter with defendants, at which time Mrs. Pierce told her: "You have no business getting an electric range anyway. You should use the gas that was already back there. * * * Well, if you wouldn't have stirred all this up, they wouldn't have found it * * * I mean, we wouldn't have had any trouble over it * * * Nothing would have occurred if you wouldn't have insisted on having an electic stove. * * * Well, why on earth don't you just use the gas stove."

Mr. Pierce was called under Section 2055, Code of Civil Procedure, and testified that when he erected the buildings in 1941 he was not told that he could not have a kitchen; that all they wanted was "a little den off the back of the garage"; that in 1943 he helped dig the trench for gas pipes "for the little apartment on the back of the garage", for the kitchen in the rear; that he had no permit, having left "those matters" to the contractor Ed Smith; that the work was done by Mr. Smith's friend, whose name the witness did not know, and who was paid $400 for his work; that the witness did not know from the permit issued in 1941 that he could not put a kitchen in the garage unit.

Mr. Pierce testifying for the defense stated that before the property was sold to plaintiff, he was not aware of any purported violation of any zoning plan; that when he added the kitchen in 1943, contractor Smith was "supposed" to handle the matter of a permit. On cross-examination, this witness testified that he understood he had to have permission to install a kitchen from the FHA which held the loan on the property; that he never signed any papers of any kind for a permit of any type.

Mrs. Pierce stated that in 1943 she talked to Mr. Smith regarding the alterations to the garage and that "He told us that we would have to get permission from the FHA as we hadn't completed paying off our mortgage from them, so we were both working and he said he would see about it for us." When asked if she knew that the rear dwelling may have been completed in violation of the City of Los Angeles Zoning Ordinance, she replied: "No, sir." She also testified that she paid the man who did the work each week in cash and took receipts therefor. However, she was unable to locate these receipts and was unable to remember the man's name.

Mrs. Beatrice Smith testified that her husband, Ed Smith, died on June 6, 1945; that she assisted him in his business of contracting during his lifetime, and "filled out all of the permits and went up to the City Hall and procured them"; that after 1941, neither she nor her husband had constructed any further buildings for defendants, and that her husband had not sent any carpenter to defendants' residence to do any work in 1942 or 1943.

[2] The question of knowledge on the part of defendants was one of fact. The foregoing résumé discloses sufficient evidence in support of the trial court's finding that defendants altered the garage building and fitted it with a kitchen, knowing that such alteration was in violation of then existing building restrictions and zoning regulations.

While defendants assert that they never told plaintiff and plaintiff never asked them whether the rear house could be maintained as a separate apartment, they admit that they listed the property with a real estate agent as "a five room stucco and two room apartment." Moreover, the property was open to inspection; plaintiff was invited to look at it, and in conversations with plaintiff, defendants referred to the unit in the rear of the garage as having "an inner door bed in the living room and a kitchen and a bath."

[3, 4] Defendants argue that since plaintiff purchased the property in reliance upon her own examination of the premises, she was not misled by them. Apropos of this, the following appears in Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935, 937: "An independent investigation or an examination of property does not preclude reliance on representations where the falsity of the statement is not apparent from an inspection, or the person making the representations has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 434-435, 159 P.2d 958; Shearer v. Cooper, 21 Cal.2d 695, 702, 704, 134 P.2d 764."

Again in Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 68, 113 P.2d 465, 467, it is said: "But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and 'where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee'. Clauser v. Taylor, 44 Cal.App.2d 453, 112 P.2d 661 * * *."

[5, 6] Neither can it be said that plaintiff was bound by constructive notice of the zoning ordinance, because as stated in Seeger v. Odell, 18 Cal.2d 409, 415, 115 P.2d 977, 980, 136 A.L.R. 1291: "The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations, but to bona fide purchasers for value."

[7, 8] In the circumstances presented, it was the duty of defendants to disclose to plaintiff that the rear apartment was maintained and used in violation of existing zoning ordinances. Instead, they remained silent, to their profit. Fraud may be either actual or constructive. The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud. Sec. 1572 of the Civil Code; Snyder v. Security First Nat. Bank, 31 Cal.App.2d 660, 664, 88 P.2d 760. "Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false." 12 Cal.Jur. 770.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

93 Cal.App.2d 783

HALBERT v. JONES et ux.

Civ. 7604.

District Court of Appeal, Third District, California.

Sept. 28, 1949.

J. C. Halbert sued C. V. Jones and Gladys M. Jones, husband and wife, for a declaration of plaintiff's rights and duties under a lease. Defendant C. V. Jones filed a cross-complaint.

The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for defendant C. V. Jones on his cross-complaint, and plaintiff appealed.

The District Court of Appeal, Peek, J., reversed the judgment, holding that the admission of evidence of an oral agreement was error, that findings were insufficient to support judgment and that the tenant was relieved from liability for rent because of constructive eviction.

1. Evidence ⚷417(7)

Where lease admittedly executed by lessor contained no provision reserving to lessor any right to enter and farm demised premises and there was no allegation of an oral agreement giving such right to the lessor, admission of any evidence of such an oral agreement violated the parol evidence rule.

2. Appeal and error ⚷1071(5)

A finding that written lease did not embody entire agreement between parties and that part of lease agreement was oral would be disregarded on appeal where finding was on an issue not raised by the pleadings, and was inconsistent with the theory of respondent.

3. Appeal and error ⚷1071(5)

Findings contrary to the facts admitted by the pleadings are outside the scope of the issues raised by the pleadings and must be disregarded on review.

4. Appeal and error ⚷1071(5)

Answer that landlord in farming some of the rented land was acting with consent of tenant, was insufficient to raise issue as to existence of oral agreement not embodied in written lease, so as to render finding that lease did not embody entire agreement, and that part of agreement was oral, a finding upon issue raised by pleadings and to permit review thereof on appeal.

5. Trial ⚷395(2)

Where tenant alleged eviction by act of landlord in farming a portion of rented premises, finding that landlord farmed to "a more or less extent" certain portions of land during certain years, without objection by tenant, was too uncertain to support judgment for landlord on his cross-complaint for rent.

6. Landlord and tenant ⚷112½

Evidence established that tenant under a lease of land with right to remove surface dirt was constructively evicted by landlord who caused soil to be unfit for use as top-soil, so as to entitle tenant to surrender possession and be relieved of liability for rent for remainder of the term.

7. Landlord and tenant ⚷190(1)

Any interference by a landlord by which tenant is deprived of the beneficial enjoyment of the premises amounts to a "constructive eviction" if tenant so elects and surrenders possession, and tenant will not be liable for rentals for portion of term following eviction.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Constructive Eviction".

◆

Preston, Braucht & George and Howard C. George, Merced, for appellant.

Adams, Griswold, Winton & Mayes, and Don C. Mayes, Merced, for respondents.

PEEK, Justice.

By this action plaintiff, as lessee of certain lands situated in Merced county, sought a declaration of his rights and duties under a certain lease agreement entered into with the defendant as lessor. The complaint alleged that plaintiff had been evicted by the act of defendant in farming a portion of the leased premises and that plaintiff's duty to pay rent was thereby terminated. The defendant filed both an answer and a cross-complaint. In the first he denied that plaintiff had been evicted and in the second he sought the rent alleged to be due under the lease and damages for certain items of personal property allegedly removed from the premises by plaintiff. Plaintiff's answer denied generally the allegations of said cross-complaint. Upon the questions so presented the case was tried before the court sitting without a jury, and at the conclusion thereof findings of fact favorable to defendant were adopted. From the resulting judgment in favor of the defendant upon his cross-complaint, plaintiff has appealed.

Plaintiff's main attack is directed at those findings wherein the trial court found that by a written agreement the plaintiff leased 49 acres of land from defendant as a gravel pit, with the right to remove therefrom sand, gravel, and surface dirt for a period of five years from August 1943 to August 1948, but that said written lease did not embody the entire agreement of the parties, and the specific findings being that a "part" of the agreement was "oral"; that the plaintiff orally agreed that the defendant might use certain portions of the leased premises for farming purposes during the term of the lease as long as he did not interfere with plaintiff's right to remove sand, gravel and dirt from the land; that plaintiff "felt that it was beneficial to him" for defendant to so use the leased premises so that the undergrowth thereon could be kept under control, and that pursuant thereto defendant did farm "to a more or less extent" certain portions of the leased property during the years 1944 to 1947 inclusive.

It is appellant's contention (1) that the trial court erred in admitting evidence of the oral agreement as found by the court, and (2) that the findings are not supported by the evidence and (3) therefore do not sustain the judgment.

[1, 2] The pleadings of the parties would appear to sustain plaintiff's first contention since defendant by his answer admitted execution of the lease (a copy of which was attached to and incorporated in the complaint), and since no provision appears in that document reserving any right whatsoever in the lessor to enter and farm the demised premises, and since defendant's answer contains no allegation of any kind relative to an oral agreement between the parties giving such right to defendant, that therefore the admission of any evidence of an oral agreement violated the parol evidence rule, and that the subsequent finding of the court that the lease did not embody the entire agreement between the parties but that part of said agreement was oral, was a finding upon an issue not raised by the pleadings. To this might be added the further observation that said last mentioned finding also is inconsistent with what respondent now contends the evidence to be and with what he advances as one of his theories of the case, that is, that the oral agreement was subsequent to the written lease.

[3, 4] It is the settled rule that findings contrary to the facts admitted by the pleadings are outside the scope of the issues raised by such pleadings and must be disregarded on review. Stoneman v. Fritz, 34 Cal.App.2d 26, 92 P.2d 1035; Beatty v. Pacific States Savings & Loan Co., 4 Cal.App.2d 692, 41 P.2d 378. While it is true, as respondent asserts, that his answer alleges that he was acting with the "consent" of plaintiff, such an allegation is insufficient to raise an issue as to the existence of an oral agreement not embodied in the written lease, the execution of which was admitted.

[5] The further findings that the defendant "farmed to a more or less extent" certain portions of the property during certain years mentioned without any objection from plaintiff, and that all of defendant's farming operations during the term of the lease were done with the knowledge, consent and approval of plaintiff, are likewise insufficient to sustain the judgment. Defendant nevertheless contends that by such findings the court in effect found that he had a license to farm portions of the leased premises, and therefore the question concerning the oral agreement becomes immaterial. Assuming that the court so intended, still such findings are too uncertain to support the judgment.

The only evidentiary basis for such license, according to defendant's argument, consists of the conduct of plaintiff in not objecting to farming operations in the years 1944, 1945, and 1946. The record in this regard discloses that such operations were conducted upon relatively small portions of the premises and did not materially interfere with plaintiff's operations in removing gravel, sand and dirt. However, in 1947 defendant cleared and leveled approximately 8 acres or as plaintiff contends about one-third of the premises then remaining for use as contemplated by the lease, and planted a crop of tomatoes. While defendant testified that plaintiff must have known he was doing this because of his presence on the premises, plaintiff testified that he in fact had no knowledge thereof until the work had been completed and the crop planted. It is not disputed that defendant neither sought plaintiff's permission nor did he notify him of his intention. Assuming that because of such conduct defendant thereby became a licensee to enter, clear the land and plant crops in 1947, such license would necessarily be dependent upon the inference, if any, which could be drawn from plaintiff's passive consent to the work performed by defendant in prior years. But, as it is impossible to determine whether defendant's acts in 1947 were within the scope of such license in view of the uncertainty of the court's finding in regard thereto, namely that the defendant farmed certain portions of the property in the years 1944, 1945 and 1946 to a "more or less extent", such findings do not sustain the judgment.

[6] The further finding that the defendant did nothing to render the premises unfit or unsuitable, in whole or in part, for the purposes for which they were leased, is contrary to the undisputed evidence that his act in leveling the eight acres in 1947 prior to planting the tomato crop spread "Johnson grass" roots through that portion of the soil which rendered it unfit for use as topsoil. The evidence also discloses that plaintiff had built up a substantial business in the sale of topsoil removed from the leased premises. Thus, such actions by defendant did deprive plaintiff of the beneficial enjoyment of the premises since, as previously stated, defendant's farming operations covered nearly one-third of the remaining premises or substantially all of what remained for the uses contemplated by the lease. In this regard it should be noted also that the oral agreement found by the court only permitted the defendant to farm certain portions of the premises so long as he did not thereby interfere with plaintiff's right to remove gravel, sand, and surface soil.

[7] The rule is well established that any interference by a landlord by which a tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession, and the tenant will not be liable for rentals for the portion of the term following the eviction. Kulawitz v. Pacific Woodenware & Paper Co., 25 Cal. 2d 664, 155 P.2d 24.

Further inconsistencies appear in the court's findings in regard to the possession of the leased premises. First it found that while plaintiff gave notice to defendant on June 30, 1947 that he would drop the lease on September 1, he did not surrender possession until October 1947, and second, it found that plaintiff remained in actual possession during the full term of the lease which did not expire until August 1948. Thus it is apparent that such findings are irreconcilable.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

NORMAN v. BURKS.

Civ. 16886.

District Court of Appeal, Second District,
Division 1, California.
Sept. 21, 1949.

Rehearing Denied Oct. 7, 1949.

Hearing Denied Nov. 17, 1949.

Andrew Norman while estranged from his wife and after he had defaulted in her divorce action, paid for home furnishings, a ring and other personalty selected by Dorothy Evelyn Burks, and caused title to a house to be placed in her name, after conversations between them relative to marriage. The donee married another man and the donor brought an action to recover the property.

The Superior Court of Los Angeles County, William S. Baird, J., rendered judgment for plaintiff and defendant appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment and held that the action was not a heart balm action prohibited by statute and that a resulting trust was properly found in favor of the donor.

1. Contracts 🔑141(1)

While the law does not countenance any contract having for its object the dissolution of the marriage contract or facilitating that result, there must be proof that the agreement falls within the category of a collateral bargaining promotive of divorce.

2. Trusts 🔑86

Payment of purchase price of realty gives rise to presumption that party paying for it has an equitable interest therein.

3. Trusts 🔑62

A resulting trust may be established in personal as well as real property.

4. Judgment 🔑18(2)

A complaint pleads sufficient ultimate facts to support findings and judgment of a resulting trust, even if a resulting trust is not expressly alleged, or if complaint is ambiguous or contains conflicting statements.

5. Trusts 🔑72

Where estranged married man who had entered default in wife's divorce action which was never completed, paid for furnishings and house and caused title to be placed in second woman's name and paid for other personalty selected by her after they had talked of marriage, and thereafter second woman married another man, court could, in absence of anything but a friendship between the parties, find a resulting trust and permit the donor to recover both personalty and realty. Civ. Code, § 853.

6. Gifts 🔑34

Action by donor of house, furnishings and personalty to woman with whom marriage had been discusssed to recover the property after the woman married another man was not a heart balm action barred by the statute. Civ.Code, § 43.5.

Hugh B. Rotchford, Richard T. Drukker, Chase, Rotchford, Downen & Chase, Los Angeles, for appellant.

Paul Overton, Gail B. Selig and Horace S. Wilson, Los Angeles, and Neil G. Locke, Beverly Hills, for respondent.

DRAPEAU, Justice.

Plaintiff is a married man, part owner with his wife, in what must have been a lucrative cosmetics business. They built up the business as individuals; later on it was incorporated.

He and his wife fell out. They lived separate and apart; the wife brought an action for divorce, and they entered into a property settlement agreement. He was served with summons and complaint, his default was entered, but the case went no further.

While estranged from his wife, plaintiff met the defendant, who must have been a personable and experienced young woman. Her first marriage in Kansas ended in a divorce. Her second marriage also ended in a divorce.

She and plaintiff knew one another casually before her second marriage. When that marriage was apparently going on the rocks, she telephoned plaintiff, seeking advice, and they went to dinner. Beginning with this meeting, they became more and more friendly. On many occasions they talked of marrying. The impediment to any immediate marriage, of course, was the fact that the plaintiff was still a married man. Indeed, at the time of the trial he was still married.

During their friendship plaintiff caused title to a dwelling house costing him $40,255.97 to be placed in defendant's name. He also paid for expensive furnishings and household goods. He paid directly therefor $17,497.48, and furnished cash or credit to defendant $58,945.20, the greater part of which she spent on the house and furnishings. He also paid for an engagement ring costing $18,375.50.

The house, the furnishings, and the ring were selected by the defendant. In addition to these things, the plaintiff gave to defendant many other articles, among them being a fur coat and an automobile, which he has not attempted to recover.

Then, a day or two after plaintiff gave defendant a check for the last $9,000 to pay final bills for furnishings, a swimming pool, a built-in radio system, and a private bar, she called him on the telephone and told him that all was off between them and that she was going to marry another man—which she did. Thus ended this idyl of Acadie.

Plaintiff brought his action for recovery of the house and furnishings and the ring on the theory that the defendant took them in consideration of her promise to marry him; that her promise was fraudulently made, and that she holds the property for his use and benefit. After hearing the evidence the trial judge found that as to the property in suit, a resulting trust was established for the use and benefit of the plaintiff.

The court could have impressed a constructive trust upon the property. In the recent case of Janes v. Goyne, 80 Cal.App.2d 686, 182 P.2d 231, a deed was canceled as to property held in joint tenancy by a man and woman, the purchase price having been paid by the man. These two people were each married, and were living with each other in illicit relations. She promised to marry him when their divorces became final, but would not do so. It was held that under these facts plaintiff could properly claim he was the victim of defendant's fraud, and that it was his right to have the gift annulled upon that ground.

There is no substantial conflict over the facts in this case as stated. Defendant relies principally upon the proposition that the promise to marry was contrary to public policy in that plaintiff's divorce was contemplated therein, and the law will leave the parties right where they stand and will not enforce plaintiff's asserted rights. This proposition is stated and restated in several different ways: (a) that the pleadings do not state a cause of action; (b) that the proof shows the parties were in pari delicto in an agreement against public policy; and (c) that there was no evidence of fraud or false representations.

Also, defendant contends that there is no evidence to support the findings and judgment of a resulting trust and that there is a variance between the case pleaded and the proof, and that the plaintiff is barred by the provisions of Section 43.5, Civil Code, which forbids heartbalm actions.

[1] The court found no implication of anything other than friendship between these two parties. There is sufficient evidence of a resulting trust. Therefore, public policy will not deny to plaintiff the right to recover his property. In reaching this result it was the province of the judge to resolve an important question of fact. While the law does not countenance any contract "having for its object the dissolution of the marriage contract, or facilitating that result", Pereira v. Pereira, 156 Cal. 1, 5, 103 P. 488, 490, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107, there must be proof that the agreement falls within the category of a "collateral bargaining promotive of (divorce)." Howard v. Adams, 16 Cal.2d 253, 257, 105 P.2d 971, 974, 130 A.L.R. 1003. The judgment here is based upon evidence that the agreement which defendant interposes to permit her to keep property for which she gave no consideration was not promotive of divorce. As in the case of Howard v. Adams, supra, the court was influenced by the fact that

there was a complete, matured cause of action for divorce before the agreement was made.

[2, 3] Our Civil Code, section 853, provides that "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Payment of the purchase price of property gives rise to the presumption that the party paying for it has an equitable interest in it. Tryon v. Huntoon, 67 Cal. 325, 7 P. 741. A resulting trust may be established in personal as well as real property. Kirk White & Co. v. Bieg-Hoffine Co., 6 Cal.App.2d 188, 44 P.2d 439.

[4, 5] A complaint pleads sufficient ultimate facts to support findings and judgment of a resulting trust, even if a resulting trust is not expressly alleged, or if the complaint is ambiguous or uncertain, or contains conflicting statements. Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441.

[6] Defendant's suggestion that this is a heart balm action and barred by Section 43.5 of the Civil Code is without merit.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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93 Cal.App.2d 765

MENDIONDO v. GREITMAN.

Civ. 7616.

District Court of Appeal, Third District, California.

Sept. 28, 1949.

Peter Mendiondo sued Charles E. Greitman, as administrator of the estate of George Dewey Greitman, deceased, for specific performance of deceased's agreement to sell certain realty to plaintiff.

From a judgment of the Superior Court of Placer County, Ben R. Ragain, J., for defendant, plaintiff appealed.

The District Court of Appeal, Peek, J., affirmed the judgment, holding that the evidence sustained the trial court's finding of the inadequacy of the amount of plaintiff's check to defendant as consideration for the sale.

1. Specific performance 🔑117

In action for specific performance of executory agreement to sell land, burden is on plaintiff to allege affirmatively and prove adequacy of consideration for sale. Civ.Code, § 3391.

2. Specific performance 🔑49(2)

Vendor, by accepting purchaser's check, did not waive claim of inadequacy of consideration for sale of realty, so as to render such issue immaterial in purchaser's suit for specific performance of sale contract, in view of court's finding, substantially supported by record showing only delivery of check to vendor, that it was not delivered in payment of purchase price. Civ.Code, § 3391

3. Payment 🔑21

Mere giving of check does not constitute payment of amount thereof to payee.

4. Payment 🔑65(2)

Payee's mere acceptance of check raises no presumption of payment of amount thereof by maker.

5. Payment 🔑65(6)

Since a check is not payment until cashed, party attempting to prove payment by showing mere delivery and acceptance of check must also prove that such delivery and acceptance were in accordance with agreement to accept check as payment.

6. Specific performance 🔑121(3)

In suit for specific performance of contract to sell realty to plaintiff, evidence sustained court's finding of inadequacy of amount of plaintiff's check to vendor as consideration for sale, in absence of showing that witnesses' estimates of value of land were based on inflationary values.

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Manwell & Manwell, Marysville, for appellant.

L. C. Anderson, Roseville, for respondent.

PEEK, Justice.

Plaintiff commenced this action against the administrator of the estate of George Dewey Greitman, deceased, to specifically enforce an alleged agreement to sell certain real property owned by the decedent. The cause was tried by the court sitting without a jury. Findings favorable to the defendant were adopted and judgment was entered accordingly. Plaintiff's appeal is from the judgment so entered as well as from the order denying his motion for a new trial.

The trial court found that the decedent executed and delivered to plaintiff the following written instrument:

"January 20, 1947

"This is to acknowledge that I have received a check from Peter Mendiondo in the sum of Five Thousand ($5000.00) Dollars which represents the purchase of that certain 240 acres of real property in Placer County located in Sections 24 and 25 of Township 13, Range 5 East owned by myself. The said Five Thousand Dollar check is not to be cashed, however, until title insurance has been furnished to me showing the property to be clear of all liens and encumbrances except current taxes, and a good and sufficient deed conveying the same to me.

"It is understood that I am to pay the cost of title insurance and one-half of the legal costs of Manwell and Manwell in connection therewith.

"/s/ George Dewey Greitman"

The remaining portions of the findings pertinent to the issues raised and which compel an affirmance of the judgment are that at the time said instrument was executed plaintiff delivered his check for $5,000 to decedent but that such check was not given in payment of the purchase price; that upon decedent's death the check was discovered among his personal effects and was delivered to the defendant administrator of his estate who refused to accept the same, returning it to the plaintiff prior to the inception of this action, and that the sum of $5,000 mentioned in the foregoing writing was not a just, fair and adequate consideration for the land therein described, and that the fair market value of said land at the time the foregoing writing was executed was not less than $9,000.

Appellant has raised two contentions (1) that since the agreement between the parties was duly executed by the delivery and acceptance of the check the adequacy of the consideration for the sale was not a material issue, and (2) that even if it was the trial court should not have considered inflationary values.

[1] Under the provisions of section 3391 of the Civil Code inadequacy of consideration is a distinct ground for refusing specific performance Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; Haddock v. Knapp, 171 Cal. 59, 151 P. 1140, hence it is the rule that in an action to enforce specific performance of an executory agreement for the sale of land the burden is cast upon plaintiff to affirmatively allege and prove adequacy of consideration. O'Hara v. Wattson, 172 Cal. 525, 535, 157 P. 608.

[2-5] In support of his first contention that the adequacy of the consideration was not a material issue, appellant invokes the further rule that the acceptance of the agreed consideration is a waiver of any claim of inadequacy. Peters v. Binnard, 219 Cal. 141, 25 P.2d 834.

Appellant's contention in this regard must fail in view of the finding that the check was not delivered by appellant to decedent "in payment of the purchase price of the property." Such finding is substantially supported by the record which shows nothing more than that the check was delivered by appellant to decedent. The mere giving of a check does not constitute payment, Weger v. Rocha, 138 Cal.App. 109, 32 P.2d 417; Drukker v. Howe & Haun Investment Co., 136 Cal.App. 437, 29 P.2d 289, nor does the mere acceptance thereof raise a presumption that such acceptance constitutes payment. Towey v. Esser, 133 Cal.App. 669, 24 P.2d 853. And since a check of itself is not payment until cashed the party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance was in accordance with an agreement that it was to be accepted as payment. Weger v. Rocha, supra.

[6] The record likewise fails to sustain appellant's remaining contention that the trial court considered inflationary values in determining the inadequacy of the consideration. The testimony of respondent's witnesses in regard to the value of the land related to such value as of the date of execution of the writing by deceased. One witness estimated such value to be $9,600, another placed it at $12,000, and the rest of the witnesses fixed the value between these two amounts. Obviously, therefore, the finding as to the adequacy of consideration is amply sustained. Mayers v. Alexander, 73 Cal.App.2d 752, 167 P. 2d 818. We find nothing whatever in the record to indicate that such estimates were based on what appellant terms "inflationary values."

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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93 Cal.App.2d 780

PEOPLE v. THOMPSON.

Cr. 4349.

District Court of Appeal, Second District, Division 3, California.

Sept. 29, 1949.

James Carl Thompson was convicted of assault with a deadly weapon in the Superior Court of Los Angeles County, Clement D. Nye, J., and he appealed.

The District Court of Appeal, Shinn, P. J., affirmed the judgment holding that defendant's conduct was sufficient to prove assault with a deadly weapon.

Assault and battery 🔑56

Conduct of defendant in pointing revolver toward police officers and aiming between them demanding that they raise their hands constituted crime of assault with a deadly weapon though revolver was not fired.

David Silverton, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Willian E. James, Deputy Attorney General, for respondent.

SHINN, Presiding Justice.

Defendant was convicted in a trial to the court of two offenses of assault with a deadly weapon, one upon Walter E. Shaw and one upon Lawrence C. Merritt, both deputies of the sheriff. Defendant's motion for new trial and his application for probation were denied and he was sentenced under each judgment to confinement in the county jail for one year, the sentences to run concurrently. He appeals from the judgments and the order denying his motion for a new trial.

The evidence of the People established the following facts: About midnight, in the home of defendant and his wife, defendant, while in a state of intoxication, struck his wife with a shoe, inflicting a wound which bled. Mrs. Thompson telephoned the sheriff's office and deputies Shaw and Merritt, in uniform, responded, conversed with Mrs. Thompson, who had her head wrapped in a bloody towel, entered the house with her and proceeded to the threshold of the bedroom where defendant was seated on the bed. Mrs. Thompson requested the officers to arrest defendant for intoxication and disturbing the peace; Officer Shaw replied that he could not arrest the defendant, not having been present when the altercation occurred. An argument with defendant ensued. Defendant challenged the officers to arrest him but the latter made no attempt to do so. Defendant removed his coat and, as developed on cross-examination of one of the officers, acted in a belligerent manner, as if he wished to fight. He then went to a chest of drawers which was about three feet from Officer Shaw, who was standing in the doorway with Mrs. Thompson and Officer Merrill, and removed a loaded revolver from the top drawer with his right hand. Standing there, he pointed the revolver toward the officers, aimed between them and pointed downward and he said: "No God damn law is going to take me without a search warrant (or a warrant)." He then ordered the officers to raise their hands and when they did not comply immediately he said to Officer Shaw: "I said to raise your hands. Your partner too." The officers did so, holding their hands up for about 30 seconds, in which interval no one moved. Defendant turned his head aside, Officer Shaw drew his gun, covered the defendant told him he was under arrest, defendant replaced the gun in the drawer, was placed under arrest, handcuffed and taken to jail.

The only point argued on the appeal is that the evidence is insufficient to prove assault with a deadly weapon. In his opening brief, after reciting the evidence substantially as we have given it, his attorney says: "This counsel feels that the facts herein shown do not indicate that any agency intervened to make the defendant put down his pistol and it cannot be said from the facts herein shown that the defendant ever intended the pointing of the gun to be more than a mere idle gesture."

It has long been settled, and has not been questioned in any case with which we are familiar, that acts such as those above related constitute the offense of assault with a deadly weapon. In People v. McMakin, 8 Cal. 547, a conviction of assault with a deadly weapon was affirmed upon evidence that the accused pointed a loaded gun toward the prosecuting witness and demanded that he leave the premises immediately. We refer to 8 Cal. pages 548 and 549 of the opinion and adopt them as a part of our own. Although defendant here did not fire the gun, his demand that the officers raise their hands was an implied threat. While he did not point the gun directly at them or either of them, it was in a position to be used instantly. Although the implied threat was that he would shoot if the officers did not raise their hands, he was demanding immediate compliance. Whether he intended to shoot if they failed to comply was to be determined from his conduct. His testimony was not that he pointed the gun without intending to use it, but that he did not take it from the drawer or have it in his hand. The argument that the offense of assault with a deadly weapon is not established unless the accused goes further than defendant here did in an attempt to commit a violent injury upon the person of another is contrary to the decisions. See People v. McCoy, 25 Cal.2d 177, 153 P.2d 315; People v. Duncan, 72 Cal.App.2d 423, 164 P.2d 510. As was said in the McMakin case, "It would indeed be a great defect in the law if individuals could be held guiltless under such circumstances."

The judgments and order are affirmed.

WOOD and VALLÉE, JJ., concur.

SCHEFF et al. v. ROBERTS et al.

Civ. 16884.

District Court of Appeal, Second District,
Division 3, California

Sept. 26, 1949.

Hearing Granted Nov. 21, 1949.*

Jack Scheff and Alice Nascher sued Raymond W. Roberts (sued as Raymond W. Williams); California Refrigerator Repair Shop, a corporation and Charles L. Fink, doing business as Norge Refrigerator Repair Shop and others for injuries and property damage sustained when a truck owned by defendant Fink and operated by Raymond W. Roberts collided with one operatted by Jack Scheff in which Alice Nascher was riding.

The Superior Court, Los Angeles County, Ray P. Brockman, J., gave judgment for the plaintiffs and the defendants Charles L. Fink, and Charles L. Fink, doing business as Norge Refrigerator Repair Shop appealed.

The District Court of Appeal, Vallée, J., held that the evidence was sufficient to support the trial court's finding that Roberts was operating the truck with consent of its owner Fink and affirmed the judgment.

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* Subsequent opinion 215 P.2d 925.

1. Automobiles ⚷192(1)

Under statute providing that owner of motor vehicle is liable for death or injury to persons or property resulting from negligence in operation of motor vehicle by any person using same with permission, express or implied, of such owner, foundation of liability of owner is permission, given to another to use vehicle. Vehicle Code, § 402.

2. Automobiles ⚷244(22)

In action by occupants of truck against driver of another truck and against owner of such other truck for injuries and property damage sustained in collision, evidence was sufficient to sustain trial court's finding that defendant driver was operating truck with consent and permission of owner. Vehicle Code, § 402.

◆

Charles A. Thomasset, Los Angeles, for appellants.

Borah & Borah, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by defendants Charles L. Fink and Charles L. Fink, doing business as Norge Refrigerator Repair Shop, from a judgment for plaintiffs in an action for damages for personal injuries and property damage tried by the court without a jury. The appeal is presented on a settled statement. Rules on Appeal, Rule 7; 22 Cal.2d 1, 7.

On January 23, 1947, a truck owned by defendant Fink and operated by Raymond W. Roberts collided with one operated by respondent Jack Scheff, in which respondent Alice Nascher was riding. It is conceded that Roberts was negligent and that his negligence proximately contributed to the happening of the accident. The court found that at the time of the accident California Refrigerator Repair Shop, a corporation, was the alter ego of Charles L. Fink; that Roberts was employed by California Refrigerator Repair Shop, a corporation, and Charles L. Fink; that Roberts was operating the truck after his regular hours of employment and with the consent and permission of Fink. Appellants contend that there is no evidence to support these findings.

California Refrigerator Repair Shop is a corporation. Fink is its president and general manager and owns about 90% of its stock. Its business is repairing refrigerators and other appliances. Fink is in control of and runs the business. The equipment for repairing the refrigerators and appliances is owned by Fink personally. The corporation does not pay him anything for the use of his equipment. The corporation has not paid any dividends in the last two or three years. All profits went into the business. Fink is paid a salary by the corporation. Roberts was employed by Fink about three years before going into the service. After Roberts left the service, he was again employed by Fink and had been working about eight months prior to the accident. Fink testified that Roberts was employed by the corporation and that he had not employed him personally in any capacity. The corporation carried all records of Roberts' employment, paid his wages, his social security, withheld taxes from his wages, and made employer's returns thereon.

The truck involved in the accident, a Studebaker, was owned by Fink personally. It had been used by California Refrigerator Repair Shop prior to 1943. It was not being used in the business at the time of the accident. It was up for sale. Roberts testified that in the course of his employment he drove a truck. On the day of the accident Roberts quit work at 6:30 p. m. and drove the truck out of the shop to go home. He was in a hurry to get home to take his wife for a treatment. He had worked late and did not want to ride a streetcar. Fink was at the shop at the time but did not see Roberts leave. Roberts did not tell Fink that he was taking the truck. He did not ask Fink if he could use the truck and Fink did not know anything about his using it. When he took the truck it was not visible from the place where Fink was in the shop. Roberts obtained the key from a drawer in the main office. He knew where the key was kept. He did not ask Fink for the key and Fink did not see him take it. Roberts had used one of Fink's regular trucks, with Fink's permission, to take his wife for treatments after working hours two or three times before this occasion. Roberts testified:

"Q. Had you ever taken this truck home before? A. Well, two or three times I took the truck home, but that was right after I come out—I didn't—

"Q. Did you ever have any conversation with Mr. Fink in which he told you not to take the truck? A. Well, I took a couple of other trucks, but they were regular trucks. He had rather I wouldn't take them, but under the circumstances, he loaned them to me."

On at least one occasion when he had taken the Studebaker truck prior to the accident, he had Fink's consent to take it. Fink testified:

"Q. Had he [Roberts] ever asked you for the truck to take his wife for treatments? A. He had asked me several weeks before that.

"Q. You had let him have other trucks? A. I let him have a Dodge."

Roberts was not discharged after the accident, nor was he proscecuted for taking the truck.

There is a stipulation in the record that "the judgment herein against defendant Charles L. Fink and Charles L. Fink doing business as Norge Refrigerator Repair Shop is predicated solely upon the findings that defendant Raymond W. Roberts was operating the Studebaker truck with the consent and permission of defendant Charles L. Fink and Charles L. Fink doing business as Norge Refrigerator Repair Shop."

[1] Vehicle Code section 402 provides in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." The foundation of the liability of an owner under this section is the permission, express or implied, given to another to use the vehicle. Burgess v. Cahill, 26 Cal.2d 320, 323, 158 P.2d 393, 159 A.L.R. 1304. The statute does not operate if permission is absent. Krum v. Malloy, 22 Cal.2d 132, 134, 137 P.2d 18. Prior knowledge is not necessary in order that implied permission be inferred. Burford v. Huesby, 35 Cal.App.2d 643, 644, 647, 96 P.2d 380. Statements to the contrary in Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93 and Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, were impliedly, if not expressly, disapproved in Burgess v. Cahill, 26 Cal.2d 320, 323, 324, 158 P.2d 393, 159 A.L.R. 1304.

[2] We are of the opinion that it cannot be held as a matter of law that the evidence is insufficient to support the finding that Roberts was operating the truck with the consent and permission of its owner, Fink. Property of the corporation and property of Fink were used together. Roberts had been permitted to drive the trucks used in the business and the Studebaker truck on several occasions, particularly when he had special need to do so. The key was left where it was available for his use. He took the truck without apparent hesitation or without apparent consciousness of disobeying instructions or violating the law. He was not discharged from his employment after allegedly taking Fink's property for his own use but was retained as before. This evidence was sufficient to justify the trial court in inferring that Roberts had implied permission to use the truck. Reed v. Cortez, 88 Cal.App.2d 416, 198 P.2d 911; Casey v. Fortune, 78 Cal.App.2d 922, 179 P.2d 99; Brown v. Aldrich, 77 Cal.App.2d 693, 176 P.2d 89; Flemmer v. Monckton, 73 Cal.App.2d 271, 166 P.2d 380. Roberts obviously took the truck in the honest belief that Fink had no objection to his using it. From the fact that one gives another permission on several occasions to use his property in certain circumstances, it may be implied that permission to use the same under similar circumstances holds good

until revoked. Appellants argue that because Roberts and Fink testified that Roberts did not have express permission to use the truck on the occasion of the accident, that permission cannot be inferred. Such evidence may not influence the result on appeal where there is evidence from which implied permission may be inferred.

In view of our conclusion, it is unnecessary to pass on appellants' contention that the evidence is insufficient to support the finding that the corporation was the alter ego of Fink and that Roberts was an employee of Fink.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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93 Cal.App.2d 815

ST. GEORGE et al. v. SUPERIOR COURT IN AND FOR SAN MATEO COUNTY et al.

Civ. 14323.

District Court of Appeal, First District,
Division 1, California.
Sept. 30, 1949.

Daniel St. George and others sought a writ of mandate to require the Superior Court of the State of California in and for the county of San Mateo, Honorable A. R. Cotton, J., and others to certify a proposed settled statement of a case for appeal.

The District Court of Appeal, Peters, P. J., denied the writ holding that the trial court did not abuse its discretion in requiring petitioners to include as a part of the record a map which was used in conjunction with examination of a witness although it was not introduced in evidence, where there was no allegation that the map had been lost or was unavailable.

1. Appeal and error 🔑524

A map or plat used in conjunction with examination of a witness but not introduced into evidence is properly a part of record on appeal.

2. Appeal and error 🔑985

So long as trial judge does not act in an arbitrary fashion he has full and complete power over a settled statement. Rules on Appeal, rules 4(e), 7(d).

3. Appeal and error 🔑985

When appellant does not avail himself of preparing record on appeal by using reporter's transcript either because a reporter was not present at proceedings or for other reasons and when he fails to convince trial judge that his statement accurately reflects proceedings in question, action of trial judge who heard and tried case must be regarded as final so long as his action is not arbitrary

4. Appeal and error 🔑635(3)

If map or plat used in conjunction with examination of witness but not introduced into evidence is lost, appellant should not be prevented from appealing simply because map, plat or diagram is not available to be included as part of record on appeal.

5. Appeal and error 🔑985

Trial court did not abuse discretion in requiring appellant to include in settled statement of case a plat which was used in conjunction with examination of a witness but which was not introduced into evidence where there was no allegation that map had been lost or was unavailable. Rules on Appeal, rules 4(e), 7(d).

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Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for petitioners.

Frank V. Kington, Redwood City, for respondents.

PETERS, Presiding Justice.

The petition for a writ of mandate must be denied.

The petition alleges that a civil action was tried before the court without a jury, and resulted in a judgment for the plaintiffs; that defendants, petitioners here, appealed; that a reporter's transcript was duly prepared covering all but the last day of trial; that as to that day no reporter was present; that defendants objected to the filing of the transcript without the last day's testimony; that thereafter the trial court, acting pursuant to Rule 4(e) of the Rules on Appeal, ordered appellants to prepare a proposed settled statement of the proceedings of the last day of trial and specifically ordered that such statement include a certain plat or diagram used by a witness on such day to explain his testimony; that thereafter appellants prepared a proposed settled statement of the proceedings in question without including the plat or diagram; that plaintiffs objected to the proposed statement; that, after a hearing, the motion was denied, the order reciting "that such proposed settled statement is incomplete and insufficient and omits an exhibit, to wit, a map or plat used by defendants in the examination thereby of Ellis Anderson, a witness called by defendants, which said map or plat said defendants failed and refused to have placed in evidence." The petition for mandate alleges that the order of denial was based solely on the failure of the proposed statement to contain the map or plat. Petitioners' sole contention is that, since the map or plat was not introduced into evidence, it was not properly part of the record, and that, therefore, the refusal to certify the proposed statement was arbitrary and capricious.

[1] The basic premise of petitioners that a map or plat used in conjunction with the examination of a witness, but not introduced into evidence, is not properly part of the record on appeal, is unsound. Such a map or plat is an integral part of the witness' testimony. It is as much a part of the witness' testimony as his oral statements. As stated by Wigmore, Evidence, 3rd ed. Vol. 3, § 790, at p. 175, such a document "takes an evidential place simply as a non-verbal mode of expressing a witness' testimony."

[2, 3] There is another principle involved. Under the new rules a trial judge, while no longer required to certify a reporter's transcript, is required to certify to a settled statement. Rule 7(d) of the Rules on Appeal. The rules confer full power over such a record in the trial judge. As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record. Thus, in Burns v. Brown, 27 Cal.2d 631, at page 636, 166 P.2d 1, at page 4, the Supreme Court stated: "When appellant cannot or does not want to avail himself of this method of preparing the record on appeal [reporter's transcript], either because a reporter was not present at the proceedings or for other reasons, and when he fails to convince the trial judge that his statement accurately reflects the proceedings in question, the action of the trial judge, who heard and tried the case, must be regarded as final." See, also, Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119; and Witkin, "Four Years of the Rules on Appeal," 35 Cal.L.Rev. 477.

[4] This does not mean the appellant cannot secure relief from arbitrary action by the trial court. It will be noted that the sole contention made by petitioners is that the court was arbitrary because the plat or map was not introduced into evidence. That contention is unsound. There is no allegation that the map or plat is lost or unavailable. It would seem clear that, if such a map or plat were lost, or if it were a blackboard diagram that was not photographed, the appellant should not be prevented from appealing simply because the map, plat or diagram is not available. In such event, if the appellant desires to appeal knowing that he must assume the risks of the testimony being unintelligible without such a document, and knowing of the presumptions against him, he should be permitted to do so. It would be an abuse of discretion to refuse to certify solely on that ground. The certification, in such case, could quite properly recite the failure of the statement to contain the document in question. But if the document is available, it should be produced if the trial judge believes it necessary.

[5] In the present case, there being no allegation that the document has been lost or is unavailable, and there being no al-

legation that such fact (if it be a fact) was presented to the trial judge, the petition fails to make out a case of abuse of discretion.

The petition for a writ of mandate is denied.

WARD and BRAY, JJ., concur.

93 Cal.App.2d 678

NEAL v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 16844.

District Court of Appeal, Second District, Division 3, California.

Sept. 20, 1949.

Theodore T. Neal, sued Bank of America National Trust & Savings Association, a corporation, for money had and received.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., on defendant's motion, struck amended complaint from the files as a sham and dismissed the action and plaintiff appealed.

The District Court of Appeal, Shinn, P. J., affirmed judgment, holding that amended complaint was a sham and that lack of statutory authority did not preclude striking amended complaint from the files.

1. Money received 🔑17(1)

Where common count for money had and received, pleaded as third cause of action, was based upon same transaction as defectively set out in two other specific counts, common count was equally vulnerable to demurrer.

2. Pleading 🔑360(3)

In determining defendant's motion to strike amended complaint from files as a sham and to dismiss action, trial court properly considered original complaint although amended complaint omitted without explanation facts alleged in original complaint.

3. Pleading 🔑356(2)

Where amended complaint consisted solely of a mere reiteration, in two separate but substantially identical paragraphs, of common count in original complaint, which was demurrable because based on same transaction as was defectively set out in two other specific counts of original complaint, amended complaint was properly stricken from the files as sham.

4. Courts 🔑26

Courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their process.

5. Pleading 🔑354(2), 356(3, 4)

Court upon motion may strike from files an amended complaint filed without requisite leave of court, an amended complaint setting up an entirely new cause of action, or an amended complaint or cross-complaint not timely filed, although there is no statutory provision for striking complaints from the files as there is in respect to sham or frivolous answers. Code Civ. Proc. § 453.

6. Pleading 🔑356(1)

An amended complaint could be stricken from the files on defendant's motion as being a sham despite lack of statutory authority to strike complaints from the files as there is in respect to sham or frivolous answers. Code Civ.Proc. § 453.

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Geo. P. Cook, Glendale, for appellant.

Hugo A. Steinmeyer, G. L. Berrey, and Geo. L. Beckwith, Los Angeles, for respondent.

SHINN, Presiding Justice.

The original complaint in this action, which named the Bank of America as sole defendant, attempted to state three causes of action, in substance as follows:

First: Plaintiff had entered into separate written contracts with Milan and Zella Babcock and with Jack and Barbara Lease to construct homes for them for agreed prices of $9,500 and $9,283 respectively, payable in stated installments during the course of construction, the final payment of 20 per cent to be upon expiration of the lien period; the Babcocks and Leases had negotiated building loans with the defendant Bank of America, to finance the contracts; defendant had, by letter, accepted plaintiff as contractor, and authorized him to proceed with construction; both of the houses have been erected by plaintiff, and have been completed and accepted by the respective owners, and the time for filing liens against them has long since expired; "there is still due and unpaid to plaintiff on said contracts of construction the sum of $3550.00 which said sum the above named defendant refuses to pay to plaintiff."

Second: The principal facts of the first cause of action are realleged by incorporation; plaintiff had subcontracted the erection of the walls of the two houses to H. A. Clarno, doing business as Lifetime Homes; Clarno had not constructed the walls in accordance with plaintiff's specifications, and a dispute had arisen between them; at the time of the dispute, Clarno had received all but $1,350 of his contract price; plaintiff notified defendant of the controversy with Clarno as to the amount due him; "notwithstanding this, said defendant paid to H. A. Clarno, without any notice to plaintiff and without any right or authorization from plaintiff, the sum of $1350.00, and deducted said amount out of monies due plaintiff from said building loans," and refuses to reimburse plaintiff therefor; in addition, defendant has in its possession and control "the sum of $2200.00 which is due and payable to plaintiff under the aforesaid building contracts," which defendant refuses to pay plaintiff unless he will execute a release in full of all demands.

Third: Within two years last past "defendant became indebted to plaintiff in the sum of $3550.00 on account of money had and received by defendant for the use and benefit of plaintiff."

Defendant's demurrer for failure to state a cause of action, defect of parties, and uncertainty having been sustained with leave to amend, plaintiff filed an "amended complaint" in two counts which omitted all of the factual allegations of the original complaint. The first count merely alleged that the defendant had in its possession "the sum of $3550.00, which it is holding for the use and benefit of plaintiff and subject to the order of plaintiff, but which it unjustly refuses to turn over to plaintiff." The second was a common count for money had and received in the same amount. No new defendants were added. Defendant's motion to strike the amended complaint from the files as a sham, and to dismiss the action, was granted, and its demurrer was ordered off calendar. Plaintiff appeals from the judgment of dismissal which followed.

The deficiencies of the original complaint are obvious. The first and second counts are devoid of allegations that the bank made any promise or agreement with plaintiff, other than to recognize him as contractor. Plaintiff concedes as much in his brief, stating that the building contracts were "merely pleaded as matter of inducement and to show in what manner the defendant is holding money for the use of plaintiff." It nowhere appears that the Babcocks and the Leases, or either of them, directed the bank to pay any sums to plaintiff; or that the contract price of the houses was to be paid from particular funds in the possession of the bank; or that the bank has not fully complied with the terms of its loan agreements. The second count, moreover, fails to disclose in what manner plaintiff was injured, if at all, by the bank's payment to Clarno without plaintiff's consent. It also fails to show that such consent was necessary; or that the sum of $1,350 was not rightfully due to Clarno. No facts are alleged in either the first or second counts from which it appears that the loan agreements were made for the benefit of plaintiff or which give rise to any contractual duty on the part of the bank to pay any money whatsoever to plaintiff. Nor does it appear from the facts alleged, as distinct from the mere conclusions of the pleader, that the bank is withholding from plaintiff any money which, in good conscience, it has no right to retain.

[1] Moreover, since any funds in the hands of the bank would presumably be the proceeds of loans made to the Bab-

cocks and Leases, and payable to them alone, it would follow that the entire controversy could not be determined without joining them as parties. It was unquestionably proper to sustain the demurrers to the first two causes of action. And since the common count pleaded as the third cause of action was concededly based upon the same transaction as was defectively set out in the other two specific counts, it was equally vulnerable to the demurrer. Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 489, 110 P.2d 396; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248.

[2, 3] Plaintiff's so-called "amended complaint" consists solely of a mere reiteration, in two separate but substantially identical paragraphs, of the common count in the original complaint. No attempt is made to state new facts, or to state the facts more fully, or to bring in any new parties. Resort to pleading mere conclusions of law in the form of common counts was evidently had to avoid the effect of the verified allegations of fact contained in the original complaint, which the court had held insufficient to state a cause of action, and which disclosed the identity of necessary parties who had not been joined. Facts once alleged, however, cannot be withdrawn from consideration by merely filing an amended pleading omitting them without explanation. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Williamson v. Joyce, 137 Cal. 151, 153, 69 P. 980; Fox Chicago Realty Corp. v. Zukor's Dresses, 50 Cal. App.2d 129, 135, 122 P.2d 705; Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 724, 161 P.2d 677. Accordingly, in determining defendant's motion, the court was fully justified in examining and considering the original complaint. See Silica Brick Co. v. Winsor, 171 Cal. 18, 22, 151 P. 425; Hoyt v. Beach, 104 Iowa 257, 73 N.W. 492, 65 Am.St.Rep. 461; 21 Cal.Jur., sec. 168, p. 244. So considered, the "amended" complaint was no better than the original complaint.

[4-6] It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. Code Civ.Proc., sec. 453. However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. 41 Am.Jur., secs. 346, 347, p. 527; anno. 13 Am.St.Rep. 640. Thus, entirely apart from statute, the authorities have recognized the propriety of a motion to strike an amended complaint filed without requisite leave of court; W. H. Marston Co. v. Kochritz, 80 Cal.App 352, 359, 251 P. 959; Harvey v. Meigs, 17 Cal.App. 353, 362, 119 P. 941; an amended complaint setting up an entirely new cause of action, Pagett v. Indemnity Insurance Co., 54 Cal.App.2d 646, 649, 129 P.2d 700, and cases there cited; see also East Riverside Irr. Dist. v. Holcomb, 126 Cal. 315, 58 P. 817; or an amended complaint or cross-complaint not timely filed. Lincoln Holding Corp. v. Union Indem. Co., 129 Cal.App. 399, 18 P.2d 744; Collins v. Bicknell, 41 Cal.App. 291, 182 P. 763; see also Gilbert v. Sherrod, 75 Cal. App. 437, 243 P. 30. In Santa Barbara County v Janssens, 44 Cal.App. 318, 186 P. 372, it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. A complete answer to plaintiff's claim of error in this regard is provided by the case of Wilson v. Shea, 194 Cal. 653, 659, 229 P. 945, 947, wherein the court affirmed an order striking an amended complaint from the files on the ground that "it utterly fails, and in fact does not attempt to remedy the defects" in the plaintiff's previous pleading, and "is in all its essential averments but a repetition" thereof. The case

is also authority for the proposition that it is immaterial what form of procedure was followed, for had the demurrer to the amended complaint been sustained without leave to amend, no error would have appeared. It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion. The complaint having been stricken, the judgment of dismissal was, of course, proper. 21 Cal.Jur., sec. 167, p. 243.

The judgment is affirmed.

VALLÉE, J., concurs.

WOOD, J., deeming himself disqualified, did not participate.

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93 Cal.App.2d 761

CREDIT BUREAU OF SAN DIEGO, Inc. v. WOLF et al.

Civ. 3955.

District Court of Appeal, Fourth District, California.

Sept. 26, 1949.

The Credit Bureau of San Diego, Inc., a corporation, sued Myron Samuel Wolf and others to determine title to an automobile conditionally sold to Wolf and which was attached while in his possession after a transfer to Elbert L. Crow, third-party claimant.

The Superior Court of San Diego County, Arthur L. Mundo, J., rendered judgment for claimant, ordering that the automobile be released from the attachment and the plaintiff appealed.

The District Court of Appeal, Mussell, J., affirmed, holding that whether there was sufficient change of possession to satisfy the statute and defeat the claims of an attaching creditor of Wolf was for the trial court and that after the transfer, Wolf had no interest subject to attachment.

1. Appeal and error 🔑1008(1)

Whether there was sufficient delivery and change of possession of conditionally sold automobile by buyer to claimant within the statute so as to defeat claim of attaching creditor of buyer, was a question of fact for the trial court, notwithstanding buyer had automobile temporarily in his possession at time of attachment, where claimant paid a valuable consideration for a transfer to him of the automobile and buyer did not claim ownership or right of possession of the automobile at any time after the transfer to claimant. Civ.Code, § 3440.

2. Sales 🔑483

Where conditional buyer of automobile was in default on his payments to finance corporation and there was an immediate delivery and actual and continued change of possession as to the corporation when it repossessed the automobile, the corporation became the "owner" and the "transferor" within the statutes and the conditional buyer had no interest subject to attachment. Vehicle Code, § 66; Civ.Code, § 3440.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Owner" and "Transferor".

3. Fraudulent conveyances 🔑281

Where when conditional buyer of automobile signed instrument permitting finance corporation to accept sum in payment from another of the balance due on the purchase price, the automobile had already been taken from buyer's possession and was in exclusive control of finance corporation, buyer was not the "person having at the time the possession or control of the property sold" within the statute so as to create presumption that buyer's transfer of automobile to claimant was in fraud of buyer's creditors. Civ.Code, § 3440.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Person Having Possession or Control of Property Sold".

Ruel Liggett, Roy M. Cleator, San Diego, for appellant.

A. T. Procopio, San Diego, for respondent.

MUSSELL, Justice.

Plaintiff appeals from a judgment in favor of a third party claimant in proceedings had under the provisions of Section 689 of the Code of Civil Procedure to determine title to an automobile which had been attached by plaintiff.

The defendant Myron Samuel Wolf, prior to July 22, 1948, was the registered owner, and the General Motors Acceptance Corporation the legal owner of a 1948 Cadillac Convertible automobile. On July 18th or 19th the General Motors Acceptance Corporation took the car from defendant Wolf because of his default in payments due on the purchase price. The car was stored in a garage and demand was then made on Wolf for payment of the balance due. Wolf being unable to pay, the car was repossessed by the Acceptance Corporation.

On or about the 25th of June, 1948, defendant Wolf obtained a loan in the sum of $500.00 from the third party claimant, Elbert L. Crow. After Crow had repeatedly asked Wolf to pay the loan it was suggested by Wolf, after the car was repossessed, that Crow take it in payment of the debt. Crow then went to the office of the Commercial Credit Plan, Incorporated, and made arrangements to purchase the car. He obtained an authorization for "pay-off", signed by Wolf, which authorized the General Motors Acceptance Corporation to accept the sum of $2617.07 from the Commercial Credit Plan, Inc., in payment of the balance due on his account and authorized the surrender of the documents of title properly endorsed and released. Mr. Arthur, a representative of Commercial Credit Plan, Inc., caller General Motors, found out where they had stored the car and personally investigated the automobile as well as the financial responsibility of Mr. Crow. Commercial Credit Plan, Inc., then paid General Motors the sum of $2617.07 and took a note from Crow in the sum of $2933.04, secured by a chattel mortgage on the car. The note was payable at the rate of $244.42 per month and the first payment was due August 25, 1948. Crow took possession of the car which was delivered to him by the Commercial Credit Plan, Inc., and made the monthly payments until December 31st, 1948, when the car was attached. Mr. Crow testified that on several occasions he permitted Wolf to use the Cadillac for business purposes and it was on one of these occasions that the car was attached while in Wolf's possession.

The trial court, after a hearing on a third party claim filed by Crow, found that the automobile was, on the 31st of December, 1948, and since the 22nd of July, 1948, the property of Crow and that he was entitled to its possession and ordered the car released from the attachment.

Plaintiff's sole point on appeal is that the transfer to Crow of the automobile in question is conclusively presumed to be fraudulent and void as to creditors under Section 3440 of the Civil Code. We cannot agree with plaintiff's contention. Section 3440 of the Civil Code, as far as it may be said to be applicable here, provides that "Every transfer of personal property, * * * is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *."

[1] Whether there was a sufficient delivery and change of possession to satisfy the requirements of the statute was a question of fact for the trial court. Jarvis v. Webber, 196 Cal. 86, 89, 236 P. 138; Lamanet v. Lamanet, 18 Cal.App.2d 402, 405, 63 P.2d 1195. We cannot here say that the decision of the trial court was without substantial support in the record. The fact that Wolf had the car temporarily in his possession at the time of the attachment does not of necessity determine the question of change of possession as the evidence shows that Wolf also drove another car owned by Crow and that he frequently

used other cars than the two owned by Crow. It is apparent that Crow paid a valuable consideration for the transfer to him of the car in question; that Wolf did not claim ownership or right of possession of it at any time after July 22, 1948; that Crow purchased tires for it and made the payments from his own funds.

[2] It was stipulated at the hearing that at the time of the seizure of the car by the sheriff it was registered by the Department of Motor Vehicles in the name of Elbert L. Crow as registered owner and that the Commercial Credit Plan, Inc., was the legal registered owner. As we view the situation this was in effect a stipulation that General Motors Acceptance Corp., in consideration of the payment to it of the sum of $2617.07, transferred the legal ownership of the automobile to Commercial Credit Plan, Inc.; that upon consummation of this transfer Commercial Credit was the owner and Wolf had no interest whatever subject to attachment. Since Wolf was in default on his payments to General Motors the corporation had the right to re-possess and having done so it had the right of possession and became the "owner" within the meaning of Section 66 of the Vehicle Code, and the transferor within the meaning of Civil Code Section 3440. As to the corporation there was an immediate delivery and an actual and continued change of possession. Under such circumstances the transfer was not in violation of Civil Code Section 3440. Midwest Air Filters Pacific, Inc., v. Finn, 201 Cal. 587, 595, 596, 258 P. 382.

[3] Plaintiff contends that the actual ownership of the car was transferred to Crow by Wolf. But if this be so, Civil Code Section 3440 is not applicable as by the terms of the statute the requirements thereof are conditioned upon the fact that the transfer be made "by a person having at the time the possession or control of the property." The record shows that when Wolf signed the "pay-off" instrument the automobile had already been taken from his possession and was in the possession of and under the exclusive control of General Motors. Under such circumstances the provisions of the Code Section do not apply since Wolf was not the " 'person having at the time the possession or control of the property' sold." Anglo-California Nat. Bank v. Rasmussen, 6 Cal.App.2d 337, 339, 44 P.2d 407, 408; Bush Theatres, Inc., v. Symons, 22 Cal.App. 2d 205, 207, 70 P.2d 500; Cosby v. Cline, 186 Cal. 698, 701, 200 P. 801.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

93 Cal.App.2d 729

WEAVER v. SUPERIOR COURT IN AND FOR CITY & COUNTY OF SAN FRANCISCO.

Civ. 14204.

District Court of Appeal, First District, Division 1, California.

Sept. 23, 1949.

Hearing Denied Nov. 21, 1949.*

Frank C. Weaver petitioned for writ of mandamus compelling the Superior Court of the State of California, in and for the City & County of San Francisco, to discharge a writ of attachment.

The District Court of Appeal, Peters, P. J., discharged the alternative writ of mandate and denied application for peremptory writ, holding that plaintiffs, who elected to rescind contract for purchase of furnishings and lease and removed from the property and retained none of the property in their possession, had no lien precluding issuance of attachment.

1. Mandamus 🔑36

Mandamus is the proper remedy to secure the dissolution of a writ of attachment improperly issued where the lower court has improperly denied a motion for discharge.

2. Mandamus 🔑172

In determining the right to an attachment, all facts in record before District Court of Appeal must be considered, and conclusions of law in affidavit used to secure writ of attachment contrary to pleaded facts in other pleadings will be disregarded.

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* Subsequent opinion 210 P.2d 246.

3. Attachment ⚷6, 11

Where a buyer is induced to enter into a contract of purchase by fraud of seller and rescinds and buyer receives nothing of value, but brings an action for consideration paid by him, action is based on implied promise to pay and is therefore ex contractu, and an attachment will lie, but if buyer has received something of value, so that failure of consideration is partial and not total, and has a lien on property retained, no attachment will issue.

4. Sales ⚷391½

The lien created by statute providing that where buyer can rescind sale and elects to do so, and seller refuses to accept offer of buyer to return goods, buyer thereafter holds goods as bailee for seller, subject to a lien to secure repayment of portion of price which has been paid, is dependent upon possession. Civ.Code, § 1789(5).

5. Attachment ⚷11

Where purchasers elected to rescind contract to purchase interest in furniture and in a lease for misrepresentations of defendant and removed from the property and retained none of it, purchasers had no lien precluding issuance of attachment in action for money paid on the purchase price. Civ.Code, § 1789(5).

6. Attachment ⚷11

Where purchasers elected to rescind contract for purchase of interest in furniture and in a lease for misrepresentations of the defendant and removed from the property and retained none of it, and they at no time had any security, they were entitled to issuance of attachment in action for money paid on the purchase price without averring as required by statute that the security had without any act of theirs, become valueless. Code Civ.Proc. § 537.

7. Attachment ⚷11

The sale of a lease for a term of years was not the sale of "real property" within the statute conferring a lien upon realty in favor of one paying part of purchase price for such part of the amount paid as purchaser was entitled to recover for failure of consideration, so as to preclude attachment by purchasers in action for money paid on the sale price when the purchasers rescinded for the seller's misrepresentation. Civ.Code, § 3050.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Real Property".

Carroll, Davis & Freidenrich, San Francisco, for petitioner.

Henry C. Clausen, San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding in mandamus the petitioner seeks to compel the trial court to discharge a writ of attachment.

The background of the dispute is as follows: On March 9, 1949, J. H. and Grace Davis, husband and wife, brought an action against Milton Meizel, petitioner Frank C. Weaver, Inter City Company and certain others, for $12,000 damages. The pleading is entitled "Complaint for Money after Rescission," and alleges that Weaver engaged in business as the Inter City Company, a real estate corporation, and acted as agent for Meizel; that Meizel owned a lease on the Mariana Apartments in San Francisco; that he also owned the furniture and furnishings in the apartment; that Meizel desired to sell an interest in the lease and furniture and furnishings; that Meizel and Weaver represented to Davis and his wife that if they would purchase a one-half interest in the lease and the furniture and furnishings, that said apartments would be completely redecorated and refurnished; that the income from the apartments would be $2,400 a month gross, and $1,400 per month net; that the Davises would receive $200 a month and a free apartment for managing the apartment house, and half of the profits; that in reliance upon such representations the Davises entered into a contract on January 7, 1949, to buy a half interest in the lease and the furniture and furnishings, and paid to Meizel and Weaver $7,500 cash and a note for $1,500; that the representations were false and known by defendants to be false and made with intent to deceive; that the apartments were not refurnished and redecorated; that the gross income was not $2,400 a month but $1,400 to $1,500 a month, and the net income was not more than $100 per month; that on February 18, 1949, the Davises rescinded the contract and served upon defendants a notice of rescission and offer of restoration; that while the contract was in force the Davises performed labor and services of the reasonable value of $4,500. The prayer is for $12,000. There are five other causes of action. The second alleges a prior rescission based upon a failure of consideration through the fault of defendants; the third, a prior rescission based on failure of consideration caused by mutual mistake; the fourth alleges an account stated; the fifth sets forth a common count for money had and received; and the sixth a common count for services rendered. The contract executed by the parties and dated January 7, 1949, entitled "Agreement of Sale of Half Interest and Agreement of Partnership" is attached to the complaint as an exhibit. It shows that Meizel had a ten-year lease on the apartment, and owned the furniture and furnishings, but had given a chattel mortgage thereon to the landlord to secure the lease; that Meizel transferred to the Davises a one-half interest in the furniture, and furnishings, and the lease; that the parties were to become partners in the ownership of the personal property and in the operation of the apartment house; that the Davises paid Meizel $7,500 cash and executed a promissory note for $1,500; that Davis and his wife were to act as managers and to receive $200 a month and a free apartment; that the apartments were to be redecorated at a cost estimated at $6,000 to be paid for from the profits of the partnership.

Upon the filing of this complaint the Davises secured a writ of attachment. The affidavit supporting the request for the writ avers "that the defendants in the said action are indebted to plaintiffs in the sum of $12,000.00 * * * over and above all legal setoffs or counterclaims upon an express and implied contract for the direct payment of money, to wit; rescinded contract; account stated; money had and received; services performed; and that such contract was made and is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property." It also appears from the pleadings before us that the Davises, after giving the notice of rescission, immediately removed from the apartment and no longer have any of the property in their possession. The writ of attachment was levied on the bank account of Weaver which, at the time of the levy, contained $4,297.90. Weaver, thereupon, by motion, sought to have the attachment dissolved. The Superior Court denied the motion, whereupon this proceeding in mandate was instituted.

[1, 2] Preliminarily, it should be stated that mandamus is the proper remedy to secure the dissolution of a writ of attachment improperly issued where the lower court has improperly denied a motion for discharge. McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019. It is also the law that in determining the right to an attachment all of the facts set forth in the record before us must be considered, and that conclusions of law set forth in the affidavit used to secure the writ of attachment contrary to the pleaded facts in other pleadings will be disregarded. Yosemite Growers Co-op. Assn., v. Case-Swayne Co., 73 Cal.App.2d 806, 167 P.2d 541.

[3] It is now settled in this State that where a buyer is induced to enter into a contract of purchase by reason of fraud of the seller and rescinds, and where the buyer has received nothing of value, but brings an action for the consideration paid by him, such action is based on an implied promise to pay and is therefore ex contractu, and an attachment will lie. But if the buyer has re-

ceived something of value, so that the failure of consideration is partial and not total, and has a lien on the property retained, no attachment will issue. McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019.

[4] Thus, the real question involved in the present case is whether Davis and his wife had a lien on the furniture, furnishings and on the leasehold. If they did not, the attachment properly issued. If they had such a lien, the writ should be discharged. Petitioner contends that the Davises had a lien on the property covered by the contract by virtue of § 1789(5) of the Civil Code. That section provides that: "Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 1773."

[5, 6] Under the facts, the plaintiff did not have a lien by virtue of this section. Under the contract of sale Davis and his wife had a one-half interest in the furniture and furnishings and in the leasehold. Prior to the rescission they were half owners of the property, and, therefore, had no lesser interest in the nature of a lien. They discovered that they had been defrauded. They could have rescinded and remained in possession of the apartment house and its contents. In such event the quoted section would apply, they would have had a lien, and no attachment could have been secured. But they were not required to follow this procedure. They elected to rescind, and simultaneously they elected to remove from the premises. Thus, at all times they were in possession of the property they were part owners, and at no time were they lienholders. The lien created by § 1789(5) of the Civil Code is obviously dependent on possession, because how otherwise could the buyer "hold the goods as bailee for the seller" as provided in the section? The section is a part of the Uniform Sales Act, and, as to this very section, it has been held that the lien thereby created is dependent on possession. See Uniform Laws Annotated, 1 Sales, 1948 Supp. p. 341. It therefore follows that the averment in the affidavit that the obligation to repay was unsecured correctly states the true facts. Nor is this a case where Davis and his wife were required to aver that "such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." (§ 537, Code of Civil Procedure.) Such averment is only required where the plaintiff was once secured by a lien and such security has become valueless. In the instant case Davis and his wife at no time had any security. The fact that they could have had a lien by retaining possession did not render their "security" valueless. Their failure to exercise their right to have had a lien cannot deprive them of the right to an attachment.

[7] Petitioner also contends that Davis and his wife have a lien by virtue of § 3050 of the Civil Code, as interpreted in Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800. That section, by its very terms, only applies to the purchaser "of real property." The sale of a lease for a term of years is not the sale of real property. Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L.R.A.,N.S., 609; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871.

Since it appears from the record that Davis and his wife have no lien on the property, they had a legal right to attach. The alternative writ is discharged and the application for a peremptory writ is denied.

WARD and BRAY, JJ., concur.

PEOPLE v. WALKER.

Cr. 2586.

District Court of Appeal, First District,
Division 1, California.

Sept. 30, 1949.

Hearing Denied Oct. 27, 1949.

Frank Stanton Walker was convicted in the Superior Court of Santa Clara County, Wm. F. James, J., of kidnapping and rape by force and violence and from judgment of conviction and order denying his motion for new trial, he appealed.

The District Court of Appeal, Bray, J., reversed the judgment and order on ground that trial judge's remark to jury, which stood 10 to 2 for conviction, that they were close to an agreement constituted prejudicial error.

1. Criminal law ⚿865(1)

The trial court may properly remind jury that the principal purpose of trial is to reach some verdict and that they should not give up without making all possible efforts to do so and that a new trial will be an expense to all taxpayers.

2. Criminal law ⚿865(1)

Trial judge on disagreement may ask the numerical division of jury, but not which number is for conviction.

3. Criminal law ⚿865(1)

Whether trial court's remarks in urging agreement of jury were prejudicial depends upon the closeness of the case and whether the remarks were likely to have influenced jury in the type of verdict it rendered.

4. Criminal law ⚿1186(4)

If, under the circumstances, remarks of judge, who knew how jury stood, were such as to bring to bear in some serious degree, although not measurable, an improper influence upon the jury, or to indicate to jury that a particular result should be reached, such remarks constitute prejudicial error. Const. art. 6, § 4½.

5. Criminal law ⚿865(1)

Trial judge, after being advised that jury stood 10 to 2 for conviction, was bound to be more than careful in his remarks so that jury would clearly understand that he was not urging or even suggesting a verdict one way or the other. Const. art. 6, § 4½.

6. Criminal law ⚿1039, 1186(4)

Trial judge's remark to jury, after being informed that they stood 10 to 2 for conviction, that they were close to an agreement constituted prejudicial error, which could be urged on appeal, though defendant did not request an instruction that jury disregard judge's remarks. Const. art. 6, § 4½.

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Raymond G. Callaghan, San Jose, (Dante Giannini, San Jose, Peter Anello, San Jose, David S. Lull, San Jose, Edward J. Niland, Santa Clara, of counsel), for appellant.

Fred N. Howser, Attorney General, Clarence A. Linn, Deputy Attorney General, for respondent.

BRAY, Justice.

Defendant was convicted by a jury of eight felonies—four counts of kidnapping (Penal Code, § 207), and four counts of rape by force and violence (Penal Code, § 261). After judgment he moved for a new trial. From the judgment and the order denying the motion for new trial, he has appealed.

Contentions.

Defendant does not attack the sufficiency of the evidence to support the convictions, other than to claim that the proof of identification is not strong. His contentions are: (1) the remarks of the court to the jury were prejudicial; (2) the district attorney prejudicially misstated evidence in his arguments to the jury; and (3) the court abused its discretion in denying the motion for a new trial. Inasmuch as we have concluded that the first contention is sound, and that the case will have to be retried, it becomes unnecessary to consider the other two contentions.

Facts.

A general statement of the facts is sufficient for the purposes of the opinion.

Each of the four prosecuting witnesses was seized and raped in Santa Clara County under circumstances which indicated that the same man committed each offense. The modus operandi was very much the same in each case. The victim, after alighting from a bus on a lonely corner, was accosted by a man who got out of the left side of his car, leaving the door open, the lights on, and the motor running. The man usually asked some question and then seized the victim, pulling her in to the car, making her get in the front seat from the left side. The victim then was forced to kneel on the floor of the car with her head resting on the seat, while the man drove for some five or ten minutes. During this time the victim usually was told to remove her clothing or the assailant started ripping it off. A knife was used to intimidate the victim. The victim was usually taken from the car for the act of intercourse, during which her face was covered, often with an article of her own clothing. Following the attack, the victim was returned to the spot where she had been picked up, and there released. The assailant's car was a dark-colored 1936 Ford sedan with a broken handle on the right front door. The assailant took great precaution to prevent any of his victims seeing his face, flashing his flashlight in their eyes, covering their faces with an article of their own clothing, threatening with a knife to kill them if they looked at his face or screamed. There were other similarities in the mode of attack. The question of identification of the defendant was the main issue in the case. The victims, with the exception of one who said she saw his face, had little, if any, opportunity to see it. Defendant denied the charges and offered evidence to show that the condition of his car was different than that described by at least one of the witnesses. There was also his testimony, and that of his girl friend, his sister, and his mother, which if believed would have proved an alibi for the time of the commission of the last offense. While the identification of defendant and his car by the victims was sufficient, it was by no means overwhelming. Taking the evidence as a whole, it shows that the case was a close one on the question of the identification of defendant.

Remarks of the Court.

The jury retired for deliberation at 11 a. m. At 3:20 p. m. the record shows that the jury returned for instructions. They requested and were read the testimony of one of the victims and of two police officers. They retired again at 3:40, and later, at the request of the court, were returned to the courtroom. The following then transpired:

"The Court: (Addressing the Jury.) You haven't reached a verdict, Ladies and Gentlemen of the Jury?

"The Foreman: We haven't your Honor; we are unable to agree.

"The Court: I would like to ask you a question or two. I don't want to know how you stand, but I would like to ask you one way or another how nearly you were in agreement. In other words, I don't want you to tell me you are mostly for one side or the other—but numerically,—do you stand eight to four; five to seven, or what?

"The Foreman: A. The vote is ten to two for conviction.

"Q. I don't want any statement about conviction; did you say eight to four? A. Ten to two.

"Q. And how recently has that vote changed? A. It hasn't changed; it has been the vote all along.

"Q. You mean they started 'ten-to-two' and are still 'ten-to-two'? A. That's right, your Honor.

"Q. Do you think there is any possibility of reaching a conclusion if you stay out a little longer? A. I do not, your Honor."

The judge then interrogated each juror as to whether in his opinion there was any chance of an agreement. Ten jurors, including the foreman, said that in their opinion there was no such chance. One juror answered, "I think there is." Another juror first answered, "I really wouldn't know; I couldn't tell." After repeating that she didn't know, she said, "There is a possible chance." The court then said: "I always endeavor to make things as easy as I can for everyone I come in contact with, and sitting here on the bench I am particularly desirous of not putting jurors to any more inconvenience than I can help. At the same time, I have a heavy sense of my responsibility to the taxpayers, and to the public of the County, and a trial like this is an expensive thing, and a hung jury means it all has to be gone over again before another jury, and that means double expense to the County—to the taxpayers. If there is not any chance of your agreeing, of course, I haven't anything else to do,—it would be foolish for me to keep you and lock you up, which I would not do, of course. (Addressing Counsel). Have counsel any suggestions at all?

"Mr. Callaghan [for the defense]: Only that if this jury can't agree, your Honor, under the circumstances they are through.

"The Court: If you think there is a chance—

"Mr. Callaghan: Ten of them say there is not, and two say there is. I would say the jury is the best judge.

"Mr. Menard [for the prosecution]: Of course, your Honor knows how we feel about these things. If there is any chance at all of obtaining a verdict we would like to see it done. The thought went through my mind that perhaps another little while in the jury room wouldn't be any great inconvenience to anyone.

"The Court: Now, ladies and gentlemen, I will tell you what I think. It is twenty minutes after 5, and I am going to let you go back to the jury room and take half an hour and see if you can't reach an agreement. Talk it over fairly; I don't want anybody to do violence to his own judgment, *but at the same time there are twelve of you,—and ten one way and two the other—that is coming pretty close to an agreement.* Talk it over among yourselves, and then when six o'clock comes maybe I will call you in and see what the result is. All right, you will retire again." (Emphasis added.)

[1,2] There are a number of California decisions on the question of possible prejudice from instructions to the jury urging agreement on a verdict. Certain principles seem well established: 1. It is proper for the court to remind the jury that the principal purpose of the trial is to reach some verdict, and that they should not give up without making all possible efforts to do so. People v. Rhodes, 17 Cal.App. 789, 121 P. 935; People v. D'A Philippo, 220 Cal. 620, 32 P.2d 962. 2. It has been held proper for the court to remind the jury that a new trial will be an expense to all taxpayers, People v. Miles, 143 Cal. 636, 77 P. 666; People v. Swanson, 120 Cal.App. 173, 7 P.2d 380, although such statements have been characterized as "hazardous." People v. Miles, supra. 3. The judge may ask the numerical division of the jury, People v. Lee, 34 Cal.App. 702, 168 P. 694, but cannot ask which number is for conviction. People v. Talkington, 8 Cal.App.2d 75, 47 P.2d 368.

[3] Upon the question of just how far a court may go in urging a jury to agree and how prejudicial a judge's remarks on that subject may be, there seems to be some inconsistency in the decisions. However, the difference in the effect of the judge's remarks seems to be based upon the closeness of the particular case and the question of whether the remarks were likely to have influenced the jury in the type of verdict it rendered.

In People v. Carder, 31 Cal.App. 355, 160 P. 686, after having once returned to have certain evidence read to them, the jury again returned and informed the court that they were unable to agree. The judge, after telling them that they must come to a verdict, if they possibly could, stated, 31 Cal.App. page 356, 160 P. page 686: "You oughtn't to make up your mind you are not going to agree on this kind of a case, simply calls for the sensible reasoning of men according to the evidence and talk it over together." Furthermore, in reply to a juror's question, the court said: "I don't want to decide any question of fact for you; *that question though it seems very plain to me.*" The next morning the judge was again informed that the jury could not agree. After finding out that there were two "contrary" jurors (which way did not appear), and after, in effect, telling them that he would keep them out all that day and the next, which was Sunday, the judge stated, 31 Cal.App. page 356, 160 P. page 686: "Questions of fact you must decide. *There oughtn't to be any trouble. It's a case you ought to decide, ought to agree upon, and don't make up your minds that you can't agree, don't get contrary, but just in a good humor, good natured way work it out.* Juryman Cleland: Your Honor, we worked all night in there and we have talked all night. I think we have got it down to where they say we have made up our minds and no use to argue." The judge, after again urging them to try to agree, sent them back to the jury room. The appellate court reversed the conviction on the ground that the language used constituted coercion or persuasive influence on the part of the judge towards a verdict of conviction. It stated that it was obvious that the "contrary" jurors were for acquittal. In People v. Kindleberger, 100 Cal. 367, 34 P. 852, the jury, after being out all night, were brought into court. A juror informed the court that the jury could not agree. The court then said, among other things, 100 Cal. page 368, 34 P. page 853: "* * * in view of the testimony in this case, the court is utterly at a loss to know why twelve honest men cannot agree in this case." He repeated this remark, and sent the jury out. The court set aside the conviction because of the remarks of the judge, particularly the one above quoted.

In People v. Bruno, 49 Cal.App. 372, 193 P. 511, 514, the judge stated to the jury on their return to the courtroom for further instructions, "The Court does not want to try this case again. It feels that it is unnecessary to do so." (Emphasis omitted.) The court said that although the use of such language was "hazardous" it did not suggest how the verdict should go, and hence the defendant was not prejudiced.

In the three cases last mentioned the judge was not informed as to which way the jury stood. In the following cases he was so informed. People v. Blackwell, 81 Cal.App. 417, 253 P. 964, 965, discloses a situation where the jury, after being out approximately three hours, returned to the courtroom. The foreman stated that after taking three ballots "with the result nine for conviction and three for acquittal," the jury felt that there was no chance of agreement. Thereupon a discussion ensued between the judge and the foreman as to the cause of the disagreement. The judge then sent them back to the jury room, saying, 81 Cal.App. page 421, 253 P. page 966: "* * * You have heard the evidence here, and you all understand all of the evidence. I think the jury ought to agree on a verdict. I think you better retire and deliberate further." Concerning these remarks the court said, 81 Cal.App. page 421, 253 P. page 966: "Under all the circumstances, there is merit in appellant's contention that the statement of the court, 'I think the jury ought to agree on a verdict,' amounted to 'a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find.' The foreman had just announced that the jury stood nine to three for conviction, and that some of the jurors 'refused to believe certain witnesses.' The defendant was the only witness for the defense who gave testimony in denial of his participation in the alleged offense. Three witnesses for the prosecution testified to the defendant's connection with the offense. From the foreman's statement that 'some members of the jury refused to believe certain witnesses,' the natural inference is that the three jurors voting for acquittal refused to believe the witnesses for the prosecution rather than that the nine others refused to believe the defendant's testimony. As was said in People v. Kindleberger, 100 Cal. 367, 369, 34 P. 852, 853: 'We think the jury understood, or at least may have understood, from these unguarded remarks that in the opinion of the judge the defendant was guilty.' And, as said in People v. Conboy, 15 Cal.App. 97, 98, 113 P. 703: 'These remarks amounted to a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find.'" The court also pointed out that "The evidence of the defendant's guilt is not of such character as to enable this court to say that the error of the trial court was not prejudicial."

In People v. Piscitella, 90 Cal.App. 528, 533, 266 P. 349, 351, "After the jury retired for deliberation they reported that they were unable to agree, and, according to the bailiff, requested further instructions. When brought into court their foreman announced that they had been unable to agree and that they stood eleven to one for conviction. The latter portion of the statement was not made in response to any question asked by the court." The judge then instructed them that he did not think they had been out long enough and that possibly he should have given them an instruction concerning their duty not to be arbitrary, to discuss the testimony, but to change their votes only in accordance with their convictions. The court held that these remarks were not prejudicially erroneous. "We find nothing therein which indicated that the trial court viewed the evidence as pointing to the defendant's guilt, nor does the language used indicate coercion." 90 Cal.App. page 534, 266 P. page 352.

In People v. Miles, supra, 143 Cal. 636, 77 P. 666, 668, the jury came into court for further instructions. On their second return they announced that they had agreed upon a verdict as to one defendant but not as to the other. On their third return they informed the court that they could not agree upon a verdict as to either defendant. They were sent back to the jury room, and on their fourth return the foreman stated that they could not agree. However, four of the jurors indicated a chance for agreement. The court then referred to the fact that retrials were expensive matters and urged them as taxpayers to save the county the expense of a new trial, if there was any possibility of their agreeing on a verdict. The Supreme Court held that the judge's statements were not prejudicial. "No intimation whatever was given as to how the court regarded the evidence; its whole purpose was to require a reasonable effort on the part of the jury to come to some conclusion one way or another, and not cause a mistrial." 143 Cal. page 638, 77 P. page 668.

[4] While most of the cases upon this subject were before the enactment of section 4½ of article VI of the Constitution, the rule would appear to be the same now as then, namely, that if, under the circumstances of the particular case, the remarks of the judge, who knew how the jury stood, were such as to bring to bear in some serious degree, although not measurable, an improper influence upon the jury, or to indicate to the jury that a particular result should be reached, such remarks constitute prejudicial error.

[5, 6] With the foregoing rules in mind, it is clear from a reading of the judge's remarks in our case that the two jurors voting for acquittal (and who apparently had consistently so voted from the beginning), well could have believed that the judge felt they should agree with the majority. Undoubtedly, the judge did not intend to influence the jury as to the type of verdict to be rendered, but we must realistically consider the effect of the language used. There was no impropriety in his asking how the jury stood numerically, but the moment he gained the information concerning which way they stood, it was his duty to be more than careful in his remarks thereafter, so that the jury would clearly understand that he was not urging, or even suggesting a verdict one way or the other. Instead he said, "there are twelve of you,—and ten one way and two the other,—that is coming pretty close to an agreement." It was close to an agreement *only* if the two for acquittal would change their view and join the majority. As said in People v. Kindleberger, supra, 100 Cal. 367, 369, 34 P. 852, 853, "The remarks of the judge in this case could not fail to create the impression that he thought the jury ought to convict upon the the evidence before them."

In view of the character of the judge's remarks, it was not necessary in order to urge the error on appeal for defendant to request an instruction that the jury disregard the judge's remarks. Berguin v. Pacific Electric Ry. Co., 203 Cal. 116, 263 P. 220.

The judgment and the order denying the motion for new trial are reversed.

PETERS, P. J., and WARD, J., concur.

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93 Cal.App.2d 698

HARDY et al. v. MUSICRAFT RECORDS, Inc.

Civ. 17104.

District Court of Appeal, Second District, Division 2, California.

Sept. 21, 1949.

Kenneth C. Hardy and Myrtle W. Hardy sued Musicraft Records, Inc., alias Jefferson-Travis Corporation, to recover purchase price of shares of stock in Jefferson-Travis Corporation, predecessor of Musicraft Records, Inc.

The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered judgment for defendant, and plaintiffs appealed.

The District Court of Appeal, Wilson, J., reversed the judgment holding that certificates representing shares were void under controlling California law because issued without permit of California Commissioner of Corporations and that plaintiffs could recover purchase price and were not precluded therefrom by their failure to ascertain whether permit was secured.

1. Licenses ⇨39.10

Shares of stock, certificates of beneficial interest, and other securities issued by a foreign or domestic corporation without a permit of the California Commissioner of Corporations are void. Gen. Laws, Act 3814, §§ 2(a) 3, 3.

2. Corporations ⇨114

Title to certificate of stock of corporation, and to the shares represented thereby, can be transferred only by delivery of the certificate. Civ.Code, § 330.1.

3. Corporations ⇨114

Where foreign corporation mailed to California resident a form of purchase commitment letter to be executed in connection with purchase of stock of corporation, and resident signed commitment letter in form requested by corporation and mailed it from California to foreign corporation outside of California, and stock certificate was delivered to resident in California by agent of foreign corporation, validity of certificate and shares represented thereby was governed by California law. Gen. Laws, Act 3814, §§ 2(a) 3, 3; Civ.Code, § 330.1.

4. Licenses ⇨18½(3)

The provisions of the Corporate Securities Act are leveled against the seller and not against the buyer. Gen.Laws, Act 3814.

5. Licenses ⇨39.17

Buyer of corporate stock of foreign corporation was not obliged to ascertain whether California Commissioner of corporations had issued permit for sale of stock, and failure to ascertain whether permit had been secured by corporation did not place buyer in pari delicto so as to preclude him from recovering purchase price from corporation. Gen.Laws, Act 3814, §§ 2(a) 3, 3.

6. Licenses ⇨39.15

Buyer of stock of foreign corporation was entitled to recover purchase price where stock was sold by corporation in California without securing a permit from California Commissioner of Corporations. Gen.Laws, Act 3814, §§ 2(a) 3, 3.

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Demetriou & Viney, John F. Reed, Los Angeles, for appellants.

A. E. Coppleman and Allan J. Greenberg, Los Angeles, for respondent.

WILSON, Justice.

Appeal by plaintiffs from a judgment in favor of defendant in an action for money had and received wherein plaintiffs seek to recover the amount paid by them for shares of stock in Jefferson-Travis Corporation, predecessor of defendant Musicraft Records, Inc., the stock having been issued, sold and transferred to plaintiffs without a permit therefor from the Commissioner of Corporations of the state of California.

The transaction began with the receipt by plaintiff Kenneth C. Hardy at his residence in Los Angeles of a letter from Jefferson-Travis Corporation forwarded from New York dated June 26, 1946, reading as follows:

"At the request of Mr. Arthur Hatz, I am herewith enclosing form of purchase commitment letter to be executed by yourself and Mrs. Myrtle W. Hardy in connection with your purchase of 5,000 shares of common stock of Jefferson-Travis Corporation. Arrangements are being made for the issuance of the 5,000 shares and these will be delivered, draft attached, to the California Bank in accordance with your instructions.

"Will you please return the signed letter to the writer as soon as possible. A self-addressed stamped envelope is enclosed for your convenience."

Enclosed with the foregoing communication was the "form of purchase commitment letter" referred to therein prepared by representatives of the corporation which plaintiffs were requested to sign and return. The purchase commitment letter is addressed to Jefferson-Travis Corporation in New York. The portions pertaining to this decision read as follows:

"This will confirm our agreement to purchase from you five thousand (5,000) shares of the authorized Common Stock of your Corporation at $3.50 per share.

"We hereby confirm that the purchase of these shares is being made by us without representations or warranties of any kind made by you or by anybody on your behalf. * * *

"It is requested that delivery of said certificates be made, $17,500 draft attached, to California Bank, 625 South Spring Street, Los Angeles, California, Attention: Mr. Geyer."

Within a few days after receipt of the letter of June 26 with its enclosure, plaintiffs signed the purchase commitment letter in the form requested by the corporation and sent it by mail from Los Angeles to the corporation in New York.

Under date of July 8, 1946, certificates representing 5,000 shares in the corporation were forwarded from New York to the California Bank in Los Angeles with a sight draft attached for $17,500. On July 15, 1946, plaintiffs paid the draft at the California Bank and received the two certificates of stock.

The corporation at no time had a permit from the Commissioner of Corporations of California to sell offer for sale or transfer its shares or securities.

In April, 1947, plaintiffs discovered that no permit had been procured by the corporation for the sale of its shares and thereupon demanded return of the amount paid for the stock and offered to return the certificates. The corporation having refused to refund the money plaintiffs brought this action.

The questions to be determined are whether the shares were sold by the corporation to plaintiffs in New York or in California, and in which state title to the certificates and the shares passed to plaintiffs—if in New York the sale was valid and the judgment must be affirmed; if in California it was void for want of a permit and plaintiffs are entitled to recover the amount paid.

Among the applicable provisions of the statutes in force at the time of the transaction in question are the following portions of the Corporate Securities Act, Gen. Laws, Act 3814: "The word 'company' includes all domestic and foreign private corporations." Section 2(a) 3, as amended Stats.1945, ch. 399, p. 853. "No company shall sell any security, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner [of Corporations] a permit authorizing it so to do." Section 3, as amended Stats.1941, ch. 615, p. 2064. "Every security issued by any company without a permit of the commissioner authorizing the same then in effect, shall be void * * *." Section 16, as amended Stats. 1933, ch. 898, pp. 2308, 2316.

Also applicable are the following provisions of the Civil Code[1] which were in effect at the time the transaction took place: "Title to a certificate and to the shares represented thereby can be transferred only * * *. By delivery of the certificate * * *." Section 330.1. "'Delivery' means voluntary transfer of possession from one peron to another." Section 330.21. These provisions apply "to certificates for shares * * * and to transfers made in this state whether of certificates for shares of domestic or foreign corporations, * * *." Section 330.22.

[1] Without exception it has been held that shares of stock, certificates of beneficial interest and other securities issued by a corporation without a permit of the Commissioner of Corporations therefor are void. Miller v. California Roofing Co., 55 Cal.App.2d 136, 141, 130 P.2d 740; Herkner v. Rubin, 126 Cal.App. 677, 681, 14 P.2d 1043; Mary Pickford Co. v. Bayly Brothers, Inc., 12 Cal.2d 501, 512, 513, 86 P.2d 102; MacDonald v. Reich & Lievre, Inc., 100 Cal.App. 736, 738, 281 P. 106. This rule is applicable to shares of a foreign as well as of a domestic private corporation. Corporate Securities Act, Sec. 2(a) 3, supra; Pollak v. Staunton, 210 Cal. 656, 662, 293 P.26; Boteler v. Conway, 23 Cal.App.2d 35, 39, 72 P.2d 208.

Applying the law to the facts above stated, it is clear that the shares were sold in California and that the certificates were delivered in California. The transaction was initiated by the letter mailed by the corporation in New York to plaintiff Kenneth C. Hardy at his residence in Los Angeles. There was no enforceable contract of sale until plaintiffs signed and placed in the United States mail the purchase commitment letter which had been drafted in New York and forwarded with the corporation's letter to Mr. Hardy. The letter from the corporation of June 26, 1946, was an offer to sell and the signed and mailed acceptance constituted the only consummated or enforceable contract between the parties.

[2] Since the offer was received and accepted in California by plaintiffs and the certificates were delivered in this state to them by defendant's agent, which accepted payment at the time of delivery, the contract was in all respects completed here. There is no pretense that the certificates were delivered in New York since there was no delivery until the purchase price of the stock had been paid. The corporation requested plaintiffs to sign the purchase commitment letter and plaintiffs did so. That letter expressly required delivery of the certificates, with draft attached, at the California Bank. The sight draft accompanying the certificates required payment of the purchase price to the California Bank as a condition precedent to the delivery of the certificates of stock to plaintiffs. Title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate. Civ.Code, sec. 330.1, supra, in effect in July, 1946, now Corporations Code, sec. 2466.

[3] The agreement by plaintiffs to purchase the shares having been made in California and the certificates representing the shares having been delivered to them in California the transaction is governed by the law of this state. Civ.Code, sec. 1646; Hayter v. Fulmor, 66 Cal.App.2d 554, 558, 152 P.2d 746.

Defendant relies on People v. Twedt, 1 Cal.2d 392, 35 P.2d 324, and Miller v. California Roofing Co., 55 Cal.App.2d 136, 130

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[1] The sections of the Civil Code referred to were adopted in 1931 as a part of the statute revising the corporation law of California, Stats.1931, ch. 862, p. 1762 et seq., and were in effect at the time of the transaction in question in this action. Sections 330.1, 330.21 and 330.22 were repealed in 1947, Corporations Code, sec. 100001, and the provisions of those sections were re-enacted respectively in sections 2466, 2453 and 2463 of the Corporations Code. Stats.1947, ch. 1038, p. 2309.

P.2d 740. There is nothing in the Twedt case favorable to defendant. The statute of limitations was the principal question involved. The agreement of sale had been made two or three days before payment was transmitted through the mail. The court held that the sending of the purchase price by the buyer was not a necessary part of the contract. In the Miller case the purchase price was paid and a receipt obtained for the shares of stock before the permit was obtained but the stock was not issued until after the corporation had received its permit. The sale was held to be in violation of the statute but plaintiff was denied relief because the parties were in pari delicto. In the instant case plaintiffs were blameless. The evidence is uncontradicted that they did not know a permit had not been procured until several months after they had purchased the stock.

[4, 5] The provisions of the Corporate Securites Act are levelled against the seller and not against the buyer. Eberhard v. Pacific Southwest Loan & Mortg. Corp., 215 Cal. 226, 228, 9 P.2d 302; Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733, 744, 24 P.2d 971, 88 A.L.R. 1271; Security-First National Bank v. J. G. Ruddle Properties, Inc., 218 Cal. 435, 441, 23 P. 2d 1016. It was the duty of the corporation to procure a permit. No obligation rested on the buyers to ascertain whether or not a permit had been issued. They had a right to assume that the corporation had complied with the law before offering its securities for sale.

Defendant also relies on Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42. This case involved the exchange of stock of one corporation for that of another. The court held, 8 Cal.2d 241, page 272 et seq., 65 P.2d 42, that since the construction of the contract requiring New York delivery was equally reasonable with the construction requiring California delivery it should be given such interpretation as would make it lawful rather than unlawful. The contract in the instant case came into existence in California when plaintiffs placed their acceptance of the corporation's offer in the mail. There is no ambiguity in the contract and nothing which can be interpreted as requiring delivery of the certificate in New York. On the contrary the purchase commitment letter signed by plaintiffs expressly required that both delivery of the certificates and payment therefor be made in California. The contract was fulfilled according to its terms.

[6] Since the sale of the shares and the transfer and delivery of the certificates conveying title were made in violation of the statute the transaction is void and plaintiffs are entitled to recover the amount paid.

Judgment reversed with the following directions to the trial court:

1. To strike paragraphs I, II, III and IV of the findings of fact and to insert in lieu thereof the following: "The court finds that all allegations of plaintiffs' complaint are true and the allegations contained in defendant's answer are untrue."

2. To strike paragraphs I, II and III of the conclusions of law and to insert in lieu thereof the following: "That plaintiffs are entitled to recover from defendant the sum of $17,500.00, together with interest thereon from July 15, 1946, at the rate of 7 per cent per annum, together with plaintiffs' costs of suit."

3. To strike the last paragraph of the judgment and to insert in lieu thereof the following: "It is ordered adjudged and decreed that plaintiffs have and recover of and from defendant Musicraft Records, Inc., alias Jefferson-Travis Corporation, the sum of $17,500.00, together with interest thereon from July 15, 1946, at the rate of 7 per cent per annum, together with their costs herein expended in the sum of $———."

4. Upon proof of plaintiffs' costs to insert the amount thereof in the judgment.

MOORE, P. J., and McCOMB, J., concur.

93 Cal.App.2d 706

PEASE v. CITY OF SAN DIEGO.

Civ. 3943.

District Court of Appeal, Fourth District, California.

Sept. 21, 1949.

Hearing Denied Nov. 17, 1949.

C. C. Pease sued to quiet title to realty against the City of San Diego, a municipal corporation.

From a judgment and order of the Superior Court of San Diego County, L. N. Turrentine, J., dismissing the action because of plaintiff's failure to comply with statute requiring that summons be returned to the court within three years after commencement of the action, the plaintiff appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment and order, holding that the requirement of the statute was mandatory, that defendant did not enter a "general appearance", and that Superior Court had no jurisdiction of the action.

1. Dismissal and nonsuit 🔑57

Where summons in action to quiet title to realty was not returned to court until more than three years after the action was commenced, defendant was entitled to a dismissal of the action. Code Civ.Proc. § 581a.

2. Dismissal and nonsuit 🔑45

Statutory provisions that an action must be dismissed unless summons shall have issued within one year and unless summons shall be served and return thereon be made within three years after commencement of the action, are mandatory. Code Civ.Proc. § 581a.

3. Appearance 🔑24(5)

Where one voluntarily appears generally, he will be held to have waived objection that no personal service was made on him.

4. Appearance 🔑9(3), 24(11)

Where defendant's motion to dismiss action was made on sole ground that summons had not been returned within three years after commencement of action as required by statute, appearance was a "special appearance" rather than a "general appearance", and there was no waiver of right of defendant to dismissal because of plaintiff's failure to comply with the statute. Code Civ.Proc. § 581a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Appearance" and "Special Appearance".

5. Appearance 🔑9(2)

Whether an appearance is general or special is determined by the relief sought, and if a defendant, by his appearance, insists only on objection that he is not in court for want of jurisdiction over his person, and confines his appearance for that purpose only, then he has made a "special appearance," but if he raises any other question or asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a "general appearance".

6. Judgment 🔑570(5)

Denial of motion of defendant to dismiss action because of failure of plaintiff to have summons returned to court within three years as required by statute, was not res judicata, since it was not a final judgment on the merits. Code Civ.Proc. § 581a.

7. Appearance 🔑9(8), 26

The filing by defendant of answer by order of court in application to set aside default judgment, was not a "general appearance" or a waiver of the objection to jurisdiction of court because of failure of plaintiff to have summons returned to court within three years as required by statute, where defendant did not demand that action proceed to trial or consent to the trial thereof, but denied that court had jurisdiction. Code Civ.Proc. §§ 473, 581a.

8. Judgment 🔑552

The denials, without opinions, of writs of prohibition by Supreme Court and by District Court of Appeal, though superior court had no jurisdiction, did not constitute res judicata, since even though a trial court may have entered interlocutory orders in excess of its jurisdiction, an appellate court may assume that the error will be corrected before entry of a final order and may refuse to interfere by prohibition.

C. C. Pease, San Diego, for appellant.

J. F. DuPaul, City Attorney, Thomas J. Fanning, Deputy City Attorney, San Diego, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment and order dismissing an action under the provisions of Section 581a of the Code of Civil Procedure.

Plaintiff brought this action on October 1, 1941, to quiet his title to real property in San Diego. Summons in the action was served on the defendant city of San Diego on September 19, 1944, but it was not returned to the Court until October 17, 1944.

On October 13, 1944, the city filed a motion to dismiss the action pursuant to the provisions of Section 581a of the Code of Civil Procedure upon the ground that the summons had not been returned within three years after the commencement of the action. This motion was denied by the trial court and on December 11, 1944, the city filed in this court a petition for a writ of prohibition, based on the contention that the Superior Court had lost jurisdiction to proceed with the case since summons had not been returned within three years. That petition was denied, without opinion, on December 19, 1944. The city then filed a petition for hearing in the Supreme Court which was denied on February 15, 1945. In the meantime, and on December 21, 1944, on application of the plaintiff, the clerk of the trial court entered the default of the city.

On February 26, 1945, the city served on plaintiff, and filed in the clerk's office, a notice of motion to set aside its default together with its answer in which the city, among other matters, alleged that the court was without jurisdiction to proceed with or try any of the issues contained in the complaint. On March 13th, 1945, the trial court entered an order granting the motion to set aside the default of the city and the judgment which had been entered thereon, but reserved for future consideration the question as to the jurisdiction of the court to proceed with the action. The court further ordered the city's answer filed, and that the action be consolidated with one which had been filed by the city against plaintiff to quiet title to the same property. On appeal to this court the order of the trial court setting aside the default was affirmed. Pease v. City of San Diego, 74 Cal.App.2d 929, 169 P.2d 973.

The instant action, and that filed by the city against plaintiff, were set for trial on June 24th, 1947, at which time the city repeated its motion to dismiss the instant action on the same grounds stated in its motion of October 13, 1944. The trial court granted the motion and on June 3, 1948, signed a judgment of dismissal in which the court found that the summons had not been served, and return thereon made within three years after the commencement of the action; that defendant city had not been absent from the State or secreted itself within the State to prevent service of summons upon itself within said three years, and that no appearance was made in said action by said defendant city within said three years. It was ordered that the action be dismissed and it is from this judgment and order that plaintiff appeals.

[1] The question presented is whether the city was entitled to a dismissal of plaintiff's action under the provisions of Section 581a of the Code of Civil Procedure. We conclude that the question must be answered in the affirmative.

Section 581a, as far as applicable here, is as follows: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, or its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the State, or while he has secreted himself within the State to prevent the service of summons on him."

[2] The provisions of this Section are mandatory and the court has no power other than to order a dismissal of the action. Gonsalves v. Bank of America, 16 Cal.2d 169, 172, 105 P.2d 118; People v. Southern Pac. R. Co., 17 Cal.App.2d 257, 260, 61 P.2d 1184; City of San Jose v. Wilcox, 62 Cal.App.2d 224, 226, 227, 144 P.2d 636; Frohman v. Bonelli, 91 Cal.App.2d 285, 204 P.2d 890. As was said in Gonsalves v. Bank of America, supra [16 Cal.2d 169, 105 P.2d 120]:

"The dismissal statute gives a remedy for delay in prosecution of an action, and makes it *mandatory* upon the court to dismiss it after three years, unless the defendant is absent or has concealed himself. The statute is 'jurisdictional' in the sense that the court has no power to excuse the delay, nor can it refuse to act merely because the party fails to make a motion for dismissal. It has power to act only in a certain way, that is, by ordering a dismissal. (Citing cases.)"

[3, 4] The summons was not returned in the instant case as required by section 581a. No answer, demurrer, or other pleading was filed, and no appearance was made by the city within three years after commencement of the action. It is not contended that the defendant was absent from the State or had secreted itself within the State to prevent service of summons. Under these circumstances the trial court had no jurisdiction to proceed with the case unless it can be said that the City voluntarily appeared generally, and thereby waived the objection. The general, rule in this connection as stated in Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755, is that personal service of process may be waived, and that when a person voluntarily appears generally, he will be held to have waived the objection even though there was no service upon him. From the record before us we conclude that the motion to dismiss, being made upon the sole ground that the summons had not been returned within three years after the commencement of the action, was a special rather than a general appearance, within the meaning of the rule announced in the Lacey case, supra, and that there was no waiver of the city's right to a dismissal.

Section 581a provides that the action "must be dismissed by the court * * * on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not." This language clearly indicates that unless the court took action on its own motion, the city, being an interested party, had the right to move the court to dismiss the action on the ground that it was not properly before the court. It should be noted in this connection that it was not necessary that the city be a party to the action to make such a motion. An examination of the contents of the motion filed shows that it was made and based on the sole ground that return of the summons was not made within three years after the commencement of the action and that the moving defendant has made no appearance in the action. The ground stated was that the defendant city was not properly before the court and obviously the city did not intend thereby to appear generally.

[5] Whether an appearance is general or special is determined by the relief sought and if a defendant, by his appearance, insists only upon the objection that he is not in court for want of jurisdiction over his person, and confines his appearance for that purpose only, then he has made a special appearance, but if he raises any other question or asks any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, then he has made a general appearance. Judson v. Superior Court, 21 Cal.2d 11, 13, 129 P.2d 361. As was said in Brock v. Fouchy, 76 Cal.App.2d 363, 370, 172 P.2d 945, 950, in affirming a judgment of dismis-

sal based on a motion made pursuant to Section 581a, Code of Civil Procedure: "The rule with respect to appearance, whether general or special, may be decided when the filed documents are analyzed to determine if any affirmative relief may be granted on the merits as distinguished from a mere request for a dismissal based on a statutory provision."

In that case, as here, the motion to dismiss was based solely upon Section 581a without reference to additional relief on the merits.

In Frohman v. Bonelli, supra, it was held that an appearance made only for the purpose of moving to dismiss an action on any one of the grounds specified in Section 581a is made only on the hypothesis that the party is not properly before the court and is a special appearance and that to hold otherwise would emasculate the statute.

[6] The city's motion under Section 581a should have been granted at the time of the hearing thereon, however, the denial of the motion was not res judicata as it was not a final judgment on the merits. Gonsalves v. Bank of America, supra, 16 Cal.2d 169, page 173, 105 P.2d 118. The issue raised thereby was not finally determined and the principle of res judicata was not applicable. Dillard v. McKnight, 34 Cal.2d 209, 209 P.2d 387; Goddard v. Security Title Insurance & Guarantee Co., 14 Cal.2d 47, 52, 92 P.2d 804.

[7] In its motion to set aside the default judgment and order, one of the grounds stated in the motion was that the default was entered prematurely and without authority of law, and in the answer which the court ordered filed the city set up as its first defense that the court was without jurisdiction to proceed with or try any of the issues in the complaint. We do not consider the filing of the answer by order of the court in the application to set aside the default a voluntary general appearance or a waiver of the objection to the jurisdiction of the court. Section 473 of the Code of Civil Procedure requires that the application must be accompanied by a copy of the answer or other pleading proposed to be filed and at the time the default was set aside by the trial court the question of jurisdiction of the court to proceed with the action was specifically reserved for its further consideration. The record discloses that the city at no time waived its right to a judgment of dismissal based on noncompliance with the provisions of the Code section involved. The city did not demand that the action proceed to trial or consent to the trial thereof, but on the contrary has at all times denied that the court had jurisdiction of the person of the defendant. Under such circumstances the court had no jurisdiction and properly dismissed the action at the time of trial. People v. Southern Pac. R. Co., supra, 17 Cal.App.2d 257, pages 261, 262, 61 P.2d 1184.

[8] The contention of plaintiff that the denials, without opinions, of the writs of prohibition by the Supreme Court and this court were res judicata is without merit. State Board of Equalization v. Superior Court, 20 Cal.2d 467, 471, 127 P.2d 4. As was said in McDonough v. Garrison, 68 Cal.App.2d 318, 327, 156 P.2d 983, 988: "Even though a trial court may have entered interlocutory orders in excess of its jurisdiction, an appellate court may assume the error will be corrected before the entry of a final order, and may refuse to interfere by prohibition. This possibility prevents such a denial of the writ without opinion from operating as res judicata in future proceedings."

Judgment and order affirmed.

GRIFFIN, Acting P. J., concurs.

Hearing denied; CARTER, J., dissenting.

PERRY v. PERRY.

Civ. 3945.

District Court of Appeal, Fourth District, California.

Sept. 22, 1949.

Rehearing Denied Oct. 20, 1949.

Hearing Denied Nov. 17, 1949.

Elisa Padilla Perry sued Frederick E. Perry in San Diego County for separate maintenance on ground of cruelty. The action was transferred to Imperial County, on application of defendant, who by answer and cross-complaint alleged desertion and extreme cruelty by plaintiff, and also sought annulment of marriage.

The Superior Court of Imperial County, Elmer W. Heald, J., rendered an interlocutory decree of divorce in favor of defendant, and plaintiff appealed from the decree and from the order denying plaintiff's motion for additional attorney's fees and costs on appeal.

The District Court of Appeal, Griffin, Acting P. J., affirmed, holding that trial court had jurisdiction to grant husband a divorce under the evidence and that other findings were justified under the evidence.

1. Divorce ⚿124

Evidence sustained finding that husband who cross-complained for divorce after transfer of wife's separate maintenance action from county in which separate maintenance action was brought, was a resident of county to which action was transferred and in which cross-complaint was filed for required statutory time to give court jurisdiction to grant husband a divorce on his cross-complaint. Civ.Code, § 130.

2. Appeal and error ⚿1008(1)

Finding on question of whether wife is entitled to separate maintenance on ground of extreme cruelty will not be disturbed on appeal unless trial court abused its discretion in determining whether the involved acts constituted extreme cruelty or made an error in examining the evidence.

3. Husband and wife ⚿297

Trial court under the evidence properly denied wife separate maintenance on ground of extreme cruelty.

4. Husband and wife ⚿283(2)

If place or mode of living selected by husband is unreasonable or grossly unfit, and wife does not conform thereto, it is "desertion" on part of husband from time reasonable objections of wife are made known to husband. Civ.Code, §§ 103, 104, 156.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Desertion".

5. Divorce ⚿133(1)

Evidence justified granting husband a divorce on ground that his wife deserted him and that desertion existed for one year prior to filing of husband's cross-complaint for divorce in wife's action for separate maintenance. Civ.Code, §§ 103, 104, 156.

6. Divorce ⚿182

Generally the granting of attorney's fees on appeal of wife from decree granting husband a divorce is in sound discretion of trial court, and wife has no absolute right to prosecute appeal at expense of husband where record satisfies trial court that proposed appeal is not undertaken in good faith or with reasonable belief that appeal has merit.

7. Divorce ⚿181, 222
Husband and wife ⚿295

Trial court did not abuse its discretion in denying application of wife for costs and attorney's fees in connection with her motion for new trial in action wherein husband was granted a divorce and wife was denied separate maintenance, and to prosecute appeal, in addition to costs and attorney's fees already allowed wife.

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Hunter M. Muir, San Diego, for appellant.

Clarence B. Smith, C. W. Dickenson, El Centra, H. L. Welch, Los Angeles, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff instituted a separate maintenance action on the ground of extreme cruelty against defendant in San Diego

County. She sought $2,000 per month as support money, and claimed community interest in considerable described property. On application of the defendant husband the action was transferred to Imperial County because it was claimed he was a resident of that county at the time. Defendant there appeared, on January 12, 1948, and by answer and cross-complaint, alleged desertion and extreme cruelty on the part of plaintiff, and also sought an annulment of the marriage. He admitted that plaintiff had been a resident of San Diego County for more than one year but alleged that he had been a resident of Imperial County for more than one year prior to the filing of the cross-complaint. This allegation is not denied by the plaintiff and the trial court so found. Defendant then alleged that plaintiff and defendant were married in July, 1942, and separated on January 3, 1947; that the only community property consisted of an automobile and house furnishings located in San Diego. He denied that the remaining property was community property. During the course of the trial defendant sought permission of the court to file an amended cross-complaint setting forth all of the provisions of the original cross-complaint due to the fact that the original cross-complaint was not personally verified by the defendant. Accordingly, on March 23, 1948, the amended cross-complaint was, by order of court, thus filed and the trial continued. The trial court specifically found that plaintiff had been a resident of San Diego County for more than one year; that defendant and cross-complainant was a bona fide resident of Imperial County for the time alleged; that defendant was not guilty of extreme cruelty and denied plaintiff relief on her separate maintenance complaint. It then found that plaintiff, without cause or reason, deserted defendant for more than one year and granted the defendant a divorce on that ground only. It found that all of the property owned by defendant was his separate property which was acquired by him before his marriage to plaintiff, excepting the furnishings in the house in San Diego which were found to have been owned by plaintiff and that defendant's contribution toward the payment therefor was a gift to her, and accordingly awarded such furnishings to her. The court also found that the automobile purchased by her (on which payments were subsequently made by defendant) was her property. It then found that all of the earnings of defendant during their married life was expended in support of plaintiff and defendant.

Plaintiff appeals from the interlocutory decree of divorce, the order denying a motion to amend the finding, and the order denying her motion to allow additional attorney's fees and costs on appeal.

The first complaint on appeal is that the trial court's finding that defendant and cross-complainant had been a resident of Imperial County for one year prior to the filing of the cross-complaint is not supported by the evidence and that there was no sufficient corroboration of such fact, citing Bullard v. Bullard, 189 Cal. 502, 209 P. 361; Coulthurst v. Coulthurst, 58 Cal. 239; Bragg v. Bragg, 32 Cal.App.2d 611, 612, 90 P.2d 329; Flynn v. Flynn, 171 Cal. 746, 154 P. 837, in which cases it was held that it was not only necessary to plead the necessary residence required by statute in a cross-complaint for divorce, but such allegation must be established by proper evidence and corroborated, as required by section 130 of the Civil Code, and the question whether the required residence essential to jurisdiction exists was a factual question for the trial court, but such finding may not rest solely on the uncorroborated testimony of the parties and the burden of proof of such allegation rested on the party claiming such residence.

Defendant lived in Winterhaven, Imperial County, over 15 years prior to his marriage to plaintiff. Plaintiff then owned a home in San Diego, mortgaged in the sum of $2,000, and an automobile on which there was money due. After the marriage defendant paid off the mortgage and cleared the car payments for her. Plaintiff's two children and her mother lived with her in San Diego. Prior to defendant's marriage he owned acreage in Winterhaven, a liquor store, gas stations and other property on which was located a house. He rented four rooms to his employee's family and continually retained one room for his own use and occupancy after the marriage. He also spent much of his time in San Diego, staying at the home of plaintiff and with her family. Defendant testified that before they were married he "figured we could live at both places, just like we planned"; that plaintiff went to the valley on week-ends to be with him when he was staying over there but that she never came over there again after the separation and that he never stayed at her house in San Diego after that time.

Plaintiff testified that defendant resided in San Diego with her up to the time of the separation and that he had relinquished his residence in the valley. There is no direct statement by the defendant, due to the oversight of counsel in propounding the questions, that defendant maintained his residence in the Imperial Valley during the time of his marriage to plaintiff or for the period prescribed. It is, however, alleged that he was a resident of that county for the required time and the court so found, and there is some evidence indicating that there is support for the court's finding in this respect. For some time before the separation defendant was remodeling the house in Winterhaven for occupancy by plaintiff and defendant. Plaintiff testified that as to her week-end trips "All my trips was to live with him in Winterhaven and fix that house"; that every week or two defendant "got mad at her" and "he pack and go to Winterhaven during the last two years" she lived with him; that she lived "here in Winterhaven with him and there, too (San Diego), two houses"; that she started to live with him over at Winterhaven three years after she married him because he was going to remodel the house.

Plaintiff's brother testified that when the parties were first married they lived in San Diego for about three years, and for the last two years they "have been on and off at Winterhaven, going back and forth" but their "residence is in San Diego * * * they have been there most of the time"; that he was their guest in Winterhaven when Mr. Perry bought his wife a new electric stove.

Defendant testified that he finished remodeling the house about one and a half years prior to March 22, 1948, and that plaintiff ordered drapes and bought "stuff" for the house and was going to live there with him but she never came over to live with him permanently.

An employee of defendant testified that she worked in the liquor store for defendant for over four years; that plaintiff came over there the week-ends; that she said she did not like it there but after her son and daughter were married she might consider living there; that defendant had been remodeling the house for some time; that Mr. Perry personally spent about "three hours every day" in and out of the liquor store "taking care of" the stock and helping the clerks out during the time she worked there; that defendant maintained a room in his house in Winterhaven during this period.

A deposition of defendant's former wife was read into evidence and she stated she had known defendant since 1926 and that he "lives at Winterhaven, California".

In Chambers v. Hathaway, 187 Cal. 104, 200 P. 931, it is said (quoting from the syllabus): "Where a person has two dwellings in different places and resides a part of his time in one place and a part of the time in another alternately, the question which of the two places is his legal residence is almost altogether a question of his intent." And quoting from 9 R.C.L. 558, it was said: "If a party has two residences, that will be esteemed his domicile which he himself selects or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and duties of a citizen." See, also, Petition of Oganesoff, D.C., 20 F.2d 978, 980; Smilie v. Smilie, 24 Cal.App. 420, 141 P. 829; De Tolna v. De Tolna, 135 Cal. 575, 67 P. 1045; Sec. 129, Civ.Code; 28 C.J.S., Domicile, § 13, page 32.

There was evidence showing that defendant never intended to become a resident of

San Diego County and that he maintained Winterhaven as his residence for more than the required time.

[1] As a precautionary measure, counsel for defendant filed a motion in this court to take additional testimony on that subject in case we believed that the evidence produced was not sufficient, and in support thereof filed defendant's affidavit stating that for a number of years last past he maintained his home at Winterhaven and voted there since 1936; and that it was never his intention to become a resident of San Diego County. He accompanied this affidavit by a certificate of registration and by his voting record in that county from 1936 to 1948 inclusive. Since the evidence produced was sufficient to support the finding, the motion should be denied.

[2, 3] It is next contended that the finding against plaintiff's claim of extreme cruelty of defendant is not supported by the evidence. There were mutual charges of cruelty. Plaintiff stated that she was very happy for three years until defendant started to drink too much. She said: "I didn't like it, but I never tell him, and then he start to be very cruel with me on account of my kids". Other charges were that she liked to be with her Mexican friends and talk Spanish and that he did not enjoy their company because he did not understand it. Defendant denied many of her claims and the trial court found against her. The habits and dispositions of different named persons vary so much that it is impossible to lay down any universal rule as to what acts constitute extreme cruelty sufficient to furnish grounds for divorce. The legislature has necessarily employed that general term and left each case, where contested, to be determined according to its own peculiar circumstances in the sound judgment of the court. Its findings will not ordinarily be disturbed unless it clearly appears that the trial court has abused its discretion or made an error in examining the evidence. Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am.St.Rep. 124.

The next charge is that there was not sufficient evidence to support the finding that plaintiff was guilty of desertion and that such desertion existed for a period of one year prior to the filing of the cross-complaint. There was evidence that defendant previously lived in Winterhaven and continued to maintain that place as his residence thereafter; that plaintiff agreed to come there to live with him when he remodeled the house; and that the house was remodeled prior to the date of the separation. The evidence as to the exact date of separation is confusing and in conflict. Defendant testified that it was "about the first of February, sometime around there, January, or the first of February" and that they did not live together after January, 1947.

[4, 5] It is provided in Section 103 of the Civil Code that "The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion." (See, also, sec. 156, Civil Code.) Section 104 of the Civil Code provides that if the place or mode of living selected by the husband is unreasonable or grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him. See, also, Kessler v. Kessler, 2 Cal.App. 509, 83 P. 257; 9 Cal.Jur. 664, sec. 36; Hardenbergh v. Hardenbergh, 14 Cal. 654. According to plaintiff's testimony defendant asked her in the fall of 1945 to come over there and live with him and that she then told him she would. Some time prior to the separation defendant took over the entire house in Winterhaven, remodeled it, installed linoleum, rugs, a Frigidaire, electric stove, and other equipment. Plaintiff's testimony is that she decided not to come to the defendant because she felt obligated to live with her children in San Diego. She did not return to Winterhaven, even for week-ends, after their separation, which was alleged and found to have occurred on or about January 3, 1947. The trial court specifically found that defendant "provided a suitable home for her at Winterhaven, where his business properties were located; that she preferred to live in San Diego in her own home with her daughter". The intention of plaintiff to remain in San Diego

with her daughter and not to come to Winterhaven was clearly expressed in her conversation with a Mrs. McBride, in the fall of 1946. Plaintiff failed to establish her allegations of cruelty, and consequently her withdrawal from or refusal to live with defendant at Winterhaven cannot be predicated upon defendant's claimed cruelty. The evidence is conflicting and the findings made by the trial judge, who had the parties before him and the opportunity to question them, will not be disturbed on appeal. Considering all of the evidence produced on this subject, there was sufficient evidentiary support for the court's findings. Kusel v. Kusel, 147 Cal. 52, 56, 81 P. 297; McLachlan v. McLachlan, 101 Cal.App. 106, 281 P. 512.

Lastly, plaintiff complains because the trial court denied her application for additional costs and attorney's fees in connection with her motion for a new trial and to prosecute this appeal, citing such cases as Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119; Norris v. Norris, 50 Cal.App.2d 726, 123 P.2d 847; and Kyne v. Kyne, 74 Cal.App.2d 563, 169 P.2d 272. The motion was based upon "the record" and her affidavit. Defendant filed no counteraffidavits.

Originally, the trial court granted plaintiff's application for costs and attorney's fees and support pendente lite in a generous amount, apparently based upon plaintiff's claim that defendant had a "financial worth of approximately one million dollars". After trial, the judge found that this allegation was not true and that defendant owned about $75,000 worth of property prior to his marriage to plaintiff and that much of this property was held in joint tenancy with defendant's former wife; that defendant was entitled to keep his automobile and plaintiff entitled to keep hers as well as the San Diego home and its furnishings and to retain the money paid thereon by defendant as a gift from defendant, and further found that there was no other community property.

[6,7] The general rule is that the granting of attorney's fees on appeal is clearly in the sound discretion of the trial court and there is no absolute right in the defeated wife to prosecute an appeal at the expense of the husband where the trial court is satisfied, from the record before it, that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has merit. The trial court was justified in denying the application. Gay v. Gay, 146 Cal. 237, 79 P. 885; Kellett v. Kellett, 2 Cal.2d 45, 39 P.2d 203. From an examination of the entire record, it appears that all of these matters were fully considered and were questions for the trial court, in its sound discretion, to determine. No abuse of discretion appears. Argabrite v. Argabrite, 56 Cal.App. 650, 206 P. 81.

The questions presented on the appeal from the several orders have been reviewed and no reversible error has been found.

Motion to take additional testimony denied. Order denying additional attorney's fees and costs affirmed. Judgment affirmed.

MUSSELL, J., concur.

93 Cal.App.2d 684

LOWE v. LOYD et al.

Civ. 3788.

District Court of Appeal, Fourth District, California.

Sept. 20, 1949.

Hearing Denied Nov. 17, 1949.

K. K. Lowe sued George Loyd and Florence Loyd to recover a real estate broker's commission after defendants had exchanged the property while plaintiff held an unrevoked exclusive listing.

The Superior Court of Fresno County, Dan F. Conway, J., granted judgment to plaintiff and defendants appealed.

The District Court of Appeal, Mussell, J., affirmed the judgment and held that plaintiff could recover where performance of the contract was prevented by the owner.

1. Brokers 🔑11

A real estate broker may recover damages for breach of an exclusive agency contract by the principal even though he had not procured a purchaser ready, willing and able to purchase, when breach by principal consists of preventing broker from selling property by selling it himself before agency contract has expired.

2. Brokers 🔑11, 56(1)

Where owner gave broker an exclusive listing for 90 days with provision that agency should thereafter continue unless revoked in writing and to terminate automatically six months after end of listing period, and owner, after expiration of 90 day period but before listing had been otherwise terminated, exchanged the property, broker was entitled to sue on the contract either for agreed commission or for damages for wrongful prevention of performance.

3. Brokers 🔑7

Real estate listing contract providing a 90 day exclusive listing, a continuance of listing until terminated by notice in writing with an automatic termination six months from end of listing period was not violative of statute authorizing revocation of real estate broker's license for the claiming of a commission under an exclusive agreement which does not contain a specified date of termination. Business and Professions Code, § 10176.

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David E. Peckinpah, L. N. Barber, Fresno, for appellants.

L. Kenneth Say, Fresno, for respondent.

MUSSELL, Justice.

This is an action by a real estate broker to recover commission.

Plaintiff and defendants executed a written contact on August 24, 1946, by the terms of which plaintiff was given an exclusive agency to sell the premises known as the "Adobe Motel" near Madera, in Madera County, for the sum of $185,000, cash and terms to be arranged. The contract contained the following provisions:

"Should said agent or their authorized agent or agents be instrumental in procuring a person or persons ready, able and willing to ~~exchange~~ for or purchase the property described herein, in accordance with this agreement, I agree to pay said undersigned agent 5% of the selling price or exchange value as commission.

"This Authorization to Sell is to continue in full force and effect for a period of 90 days from date hereof, and thereafter until revoked by me in writing, but to terminate automatically six months after end of listing period."

It is conceded that plaintiff did not procure a buyer for the premises in accordance with the terms of the contract. After the expiration of the 90 day period mentioned in the agreement, but within six months immediately following this period, defendants consummated an exchange of the property through another broker and did not pay plaintiff any commission. The escrow instructions on the exchange were dated March 17, 1947, and the deed by defendants conveying the property in the exchange was recorded on April 11, 1947. No written notice of the termination of the exclusive agency was given to plaintiff by defendants. It was stipulated that plaintiff was not in any way instrumental in procuring the exchange and there was no evidence that plaintiff or his agent or agents ever showed or submitted the property to the parties who acquired it in the exchange.

The complaint contains two causes of action, one for damages in the sum of $9,250 occasioned by defendants' breach of contract in exchanging the property, and the other in the form of a common count for the same amount.

The court found all of the allegations of the amended complaint to be true and judgment was entered in favor of plaintiff for the amount claimed.

Defendants contend that the evidence is insufficient to support the findings and judgment, and that the provisions of the contract by which the exclusive agency is continued for six months after the expiration of the 90 day period, unless defendants gave notice of revocation in writing, is contrary to public policy and void.

[1, 2] In connection with the first point urged, defendants assert that since plaintiff did not procure a purchaser ready, able and willing to purchase defendants' property upon the authorized terms, or any other terms agreed to by defendants, and since plaintiff did not show or submit the property to the persons who acquired it in the exchange, that under these circumstances plaintiff cannot recover for services performed as real estate broker. While this may be true as to recovery on the theory of implied contract for the value of services rendered, an agent may recover damages for the breach of an exclusive agency contract by the principal, even though he has not procured a purchaser ready, willing and able to purchase, when the breach by the principal consists of preventing the agent from selling the property by selling it himself before the agency contract has expired. Fitzpatrick v. Underwood, 17 Cal.2d 722, 733, 112 P.2d 3. Plaintiff, in the instant case, was entitled to the exclusive right to contract for the sale of the property during the period specified, and the exchange by the defendants before the expiration of the agency destroyed that right and made performance by plaintiff impossible. Upon this breach by defendants, plaintiff was entitled to sue for the agreed commission, namely, $9,250. Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585. It is immaterial whether the recovery was for the damages for wrongful prevention of performance, or for payment of commissions under the contract, since in either case the action is on the contract.

Walter v. Libby, 72 Cal.App.2d 138, 142, 164 P.2d 21.

[3] Defendants' contention that the contract is void and against public policy is based on the assumption that it violates the provisions of Section 10176 of the Business and Professions Code, which provides, among other things, that the Commissioner may temporarily suspend or permanently revoke a real estate license where the licensee has been guilty of "the practice of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement authorizing or employing a licensee to sell, buy or exchange real estate for compensation or commission where such agreement does not contain a definite, specified date of final and complete termination."

The contract before us has a definite date of final and complete termination in the provision that it terminates automatically six months after the end of the listing period, a situation factually different from that in Castleman v. Scudder, 81 Cal.App.2d 737, 185 P.2d 35, 36, relied upon by defendants. In that case the proceedings were in connection with the revocation of a real estate broker's license and the provisions for termination were as follows: "This agency shall continue 30 days from date hereof and thereafter until three days have elapsed after receipt of written notice from the Owner, terminating this agency, sent by registered mail, or delivered in person to said agent." Obviously such a provision fails to set forth a definite date, and the contract continued indefinitely subject to a notice or revocation, a situation which does not exist in the contract in the present case. Moreover, it is conceivable that the regulation of "practices" by real estate brokers may be the subject of regulation without affecting the validity of contracts made by them, and we are not here considering what may or may not be sufficient cause to revoke or suspend the broker's license.

From what we have here said as to the right of plaintiff to recover the amount of the agreed commission, it follows that defendants' contention that the damages are excessive and are not supported by the evidence, is without merit.

Judgment affirmed.

GRIFFIN, Acting P. J., concurs.

Hearing denied; SCHAUER, J., dissenting.

93 Cal.App.2d 713

OAKLAND CALIFORNIA TOWEL CO., Inc., v. ROLAND.

Civ. 14087.

District Court of Appeal, First District, Division 1, California.

Sept. 22, 1949.

Rehearing Denied Oct. 22, 1949.

Hearing Denied Nov. 17, 1949.

The Oakland California Towel Company, Inc., a corporation, sued John Roland, doing business as Windsor Hotel, and also doing business as Windsor Hotel Restaurant, for breach of contract whereunder plaintiff was to rent sheets and other articles to defendant, and thereafter to launder them and keep defendant supplied with specified number of the articles.

The Superior Court, Alameda County, Jas. G. Quinn, J., rendered judgment adverse to defendant and defendant appealed.

The District Court of Appeal, Ward, J., affirmed the judgment, holding that no rescission by plaintiff was shown so as to preclude action for damages based on contract, that loss of prospective damages was properly included as damages, and that attorney's fees for services of plaintiff's attorney in trial court were properly allowed.

1. Appeal and error ⚷1010(1)

Findings of trial court supported by substantial evidence must be upheld on appeal.

2. Replevin ⚷70

In action of claim and delivery, plaintiffs must establish their right of immediate and exclusive possession of the property at commencement of action.

3. Appeal and error ⚷1071(6)

In action for possession of articles rented to defendant hotel under contract requiring plaintiff to launder and keep defendant supplied with a specified number of each of the articles, failure to find that at time of demand and refusal, plaintiff was entitled to immediate possession of the articles, did not render erroneous a finding that defendant repudiated contract in that defendant failed to deliver to plaintiff upon demand certain articles, where other findings inferentially showed, and evidence established, that plaintiff was entitled to possession.

4. Appeal and error ⚷1122(2)

On appeal from judgment in action tried without jury, District Court of Appeal could make a finding on the evidence in addition to findings of trial judge. Code Civ.Proc. § 956a.

5. Contracts ⚷274

After rescission a party may not make contract a basis for an action for damages.

6. Bailment ⚷22

Where plaintiff which had contracted to rent sheets and similar articles to defendant hotel, and to launder and keep defendant supplied with specified number of each of the articles, called to defendant's attention by letter that defendant refused to deliver to plaintiffs certain soiled items and that plaintiff demanded them, and plaintiff by letter threatened to take means to obtain the soiled articles, plaintiff did not rescind the contract so as to preclude plaintiff from recovering for loss of profits due to defendant's breach.

7. Bailment ⚷32

In action for breach of contract whereunder plaintiff was to rent sheets and similar items to defendant hotel, and to launder them and to keep defendant supplied with specified number of each item, finding of an indebtedness for four week period prior to breach was sufficient.

8. Bailment ⚷32

In action for breach of contract whereunder plaintiff was to rent sheets and similar items to defendant hotel, and to launder them and keep defendant supplied with specified number of each item, trial court under the contract properly included in amount due plaintiff seven per cent of the value of all articles claimed by plaintiff and retained by defendant.

9. Bailment ⚷32

In action for breach of contract whereunder plaintiff was to rent sheets and similar items to defendant hotel, and to launder them and keep defendant supplied with specified number of each item, trial court properly included lost prospective profits as damages.

10. Damages ⚷71

Ordinarily attorney's fees are not within the rule of awarding damages, but may be allowed in payment of services in pursuit of personal property based upon contractual agreement. Civ.Code, § 3336.

11. Damages ⚷71½

Attorney's fees may be provided for by statutory provision.

12. Bailment ⚷32

In action for possession of articles rented by plaintiff to defendant hotel under contract requiring plaintiff to launder and keep defendant supplied with a specified number of each item, trial court properly allowed attorney's fees to successful plaintiff. Civ.Code, § 3336; Code Civ.Proc. § 1021.

13. Costs ⚷264

Upon defendant's appeal from judgment for plaintiff in action for breach of agreement providing for reasonable attorney's fees, District Court of Appeal would not make an allowance to plaintiff for an additional attorney's fee incurred on appeal, but trial court could allow reasonable fee for services of plaintiff's attorney on appeal. Civ.Code, § 3336; Code Civ.Proc. § 1021.

◆

Morgan V. Spicer, San Francisco, H. R. Whiting, San Francisco, for appellant.

Ernest J. Livengood, Oakland, for respondent.

WARD, Justice.

Defendant appeals from a judgment based upon a written contract, by which plaintiff agreed to rent to defendant a certain number of sheets, towels and similar articles and thereafter launder the same and keep defendant supplied with a specified number of each of the articles. Defendant contracted to rent from plaintiff exclusively all articles so specified, to pay for such rental and laundry service, and also for any damages or shortages based on plaintiff's service records at rates listed in the contract agreement. Plaintiff claims that after it had fully performed the agreed terms and conditions for a period of approximately six months defendant repudiated the contract and prevented further performance. As stated in defendant's opening brief, the judgment included the value of goods not returned, damages for breach of contract, a balance due for services, and attorney's fees.

Difficulty arose when plaintiff was unable to obtain the soiled linen from defendant's place of business. Plaintiff requested the right to make an inventory of the rented linen which defendant had on hand. This request was refused. Defendant insisted that plaintiff supply an equal amount of clean linen in exchange for the soiled articles. Plaintiff's position, substantially supported by the evidence which was adopted by the court as the basis for the findings of fact and conclusions of law, appears in the following testimony: "The Court: I might ask in furnishing linen did you furnish the exact number of articles that are required or do you furnish a greater number? A. Well, I might answer it this way and clarify what was brought up, if I may. At the time the contract was negotiated they have 100 beds and we gave them 400 sheets the first time because there are two sheets to the bed and there are two more sheets to make up beds with and the next delivery you complete the rest of the contract and from that time on that contract calls for the turning over of at least 200 sheets for the capital investment involved in the contract. In other words, there are certain charges in which they must turn in that amount of linen to pay for them; otherwise the company would have no return on their capital investment. That is the reason I told Mr. Roland in the end when he was asking us to bring back clean for soiled that wasn't what we arranged under the contract because if he only turned in 50 sheets and we only brought 50 sheets the company would be loser because they are entitled to have the return on the capital of 100."

[1] Plaintiff's and defendant's briefs present certain points solely covering the *number* of articles delivered by plaintiff or

returned by defendant. The evidence in some instances in this respect is inharmonious. However, the trial court determined these factual questions and it is not necessary to prolong this opinion by narrations of the contradictory statements, as the trial court's findings in this connection must be upheld inasmuch as there is substantial evidence to sustain the findings.

Plaintiff presented a summary of deliveries and pickups made at defendant's hotel. This summary was corrected subject to certain laundry items, the property of plaintiff recovered through the sheriff in a claim and delivery action. Further adjustment was made relating to shortages and errors due to plaintiff's failure to supply clean linens while the contract was in effect. Plaintiff made up certain "shortages" representing discrepancies between the number of articles listed on the delivery tag to defendant and those counted by defendant's housekeeper.

[2-4] It is claimed that the court erred in finding "That defendant repudiated and breached said contracts in that defendant failed and refused to deliver to plaintiff upon demand certain articles of merchandise * * *" because of the failure to find that at the time of demand and refusal plaintiff was entitled to the immediate possession of the articles. Defendant is correct in this criticism, so far as it is the rule that a claimant in the present form of action must be entitled to immediate possession of the property at the time of the commencement of the action. Paganucci v. Kalpouzos, 78 Cal.App.2d 714, 178 P.2d 62. However, in the present case other findings inferentially show, and the evidence proves, that plaintiff was entitled to possession. There is no dispute that the respective parties entered into the contract set forth in the pleadings. The contract provided that the lessee pay rental for the articles and also pay for any articles damaged, lost or for any cause not returned to the lessor. The court found that the goods were delivered pursuant to the contract and that the defendant's allegation that he had returned all of plaintiff's property in defendant's possession was untrue. The evidence shows that all of the property to which plaintiff was entitled had not been returned. If necessary this court could make such a finding on the evidence presented. Code Civ.Proc. § 956a. However, it is not essential that this court insert a separate finding. The findings when read as a whole indicate that if a specific finding had been made it would have been adverse to defendant. "But under the rule that the findings are to receive such a construction as will uphold rather than defeat the judgment thereon, they will be upheld where, as a whole and considered and construed in connection with the pleadings and the issues, they sufficiently show or warrant the inference that the plaintiff was the owner and entitled to the possession of the property described in the complaint." 5 Cal. Jur. 198; see also Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 53 P.2d 929; Chamberlain v. Abeles, 88 Cal.App.2d 291, 198 P.2d 927.

[5, 6] The finding next attacked by defendant refers to loss of profits due to the breach of the contract. Defendant contends that it was erroneous to allow any damages inasmuch as plaintiff rescinded the contract. Defendant's theory of the alleged rescission is that plaintiff wrote to defendant calling attention to the fact that defendant refused to deliver to plaintiff certain soiled linens, which constituted a breach of the contract, and that plaintiff demanded such linens. The rule that after rescission a party may not make the contract a basis for an action for damages, Lemle v. Barry, 181 Cal. 1, 183 P. 150; House v. Piercy, 181 Cal. 247, 183 P. 807, is not applicable in the present case for the simple reason that the facts herein do not constitute a rescission. There was no declaration of rescission by plaintiff that effectually terminated the contract. On the contrary plaintiff demanded the return of soiled linen and defendant refused to comply, which resulted in the present action for breach of the contract. Plaintiff threatened to take means to obtain the missing articles, but in each of two letters addressed to defendant on this subject the following statement appears: "We wish you to understand that in removing the goods we are in no way agreeing to cancellation of the agreement."

[7, 8] The findings list the various articles, the quantity, the value of each item and the total value delivered pursuant to the contract; the portions of goods recovered by a claim and delivery action and from another laundry; the period of time remaining under the terms of the contract; the amount plaintiff would have received for the unexpired period had defendant fulfilled his obligation; the cost of performance from the date of the breach; the amount of resultant loss of profits, and a separate amount due plaintiff for services performed before the breach. From this total a credit was allowed for a sum deposited by defendant as security for plaintiff's performance, together with a further credit for overpayment on certain laundry work performed by plaintiff. From these amounts the balance due plaintiff was fixed and judgment entered accordingly. The computation is not seriously attacked, but the measure used by the trial court in awarding the amount of judgment is claimed to be incorrect. One particular item is challenged. The finding of an indebtedness of $117.36 for the period prior to repudiation covers four weeks at $29.34 a week, which is the equivalent of $117.36. The evidence is definite and the findings sufficient on this subject. Another alleged error is that the court added 7 per cent to the agreed value of the articles claimed by plaintiff. The defendant was given credit for the articles recovered but the court in computing the amount due plaintiff included the sum of $98.06 representing 7 per cent of the value of all the articles. The agreement provided: "The Total Charges For All Service Rendered By Lessor Are To Bear An Additional Percentage Of 7%." *All* service under the agreement reasonably includes not only laundering, delivering and collecting but the *use* of the articles, which is the main purpose of the contract.

[9] Defendant claims that the measure of damages adopted by the trial court is incorrect. One of the witnesses appearing for plaintiff testified that 3½ per cent on the gross value of business constituted profit. From the figures presented, this percentage would amount to $25.67, which defendant claims represents the total loss of profits due to defendant's breach of contract, instead of the sum of $425.43 as found by the court. Damages in the present case are for the detriment caused to plaintiff's business, or benefit lost, as result of the breach. A computation of damages in a matter similar to the present case includes prospective profits based upon an essential element of service. "Whether a particular charge is an essential element and therefore to be considered, or whether it is not affected as a consequence of the nonperformance of the contract, are questions of fact." Oakland California Towel Co. v. Sivils, 52 Cal.App.2d 517, at page 520, 126 P.2d 651, at page 652.

[10-12] The court allowed attorney's fees in the sum of $300.00. Ordinarily attorney's fees are not within the rule of awarding damages, Civ.Code, § 3336, but may be allowed in payment of services in pursuit of personal property based upon contractual agreement. Attorney's fees may be provided for by statutory provision. Code Civ.Proc. § 1021; see Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3. Attorney's fees also may be allowed under circumstances not pertinent to the present case. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714. One of defendant's objections to the attorney's fees allowed by the court is that plaintiff did not fully perform its agreement and therefore is not entitled to compensation for a subsequent breach by defendant. The question of breach of the contract, a question primarily of fact, has already been determined.

[13] In plaintiff's brief a request is made that this court make an allowance to plaintiff for additional counsel fees incurred on appeal. Plaintiff cites Painter v. Estate of Painter, 78 Cal. 625, 21 P. 433. The attorney's fee in that case was a statutory fee. See Prob.Code § 703, formerly Code Civ.Proc. § 1510. In the Painter case it was held that a reasonable attorney's fee to resist a claim against an estate was as just and proper for services in the upper

as in the lower court. The lower court had previously allowed a fee for services in the trial court. In the present case the parties contracted for reasonable counsel fees incurred by the lessor in enforcement of the terms of the agreement. That language does not appear to be ambiguous. The enforcement of the terms of the agreement required that on appeal there should be a defense of the judgment. Whether the amount of the fee allowed by the trial judge contemplated services on appeal is a question which an appellate court is unable to determine. In any event an appellate court could not fix a fee until the judgment becomes final. In the Painter case the court stated, 78 Cal. at page 628, 21 P. at page 434: "If the supreme court had in all cases the burden thrown upon it of determining such matters, where oral testimony would often have to be heard as to the proper fee to be fixed, including such facts as the value of the estate, its condition, and the amount of service performed, it would be very inconvenient, and perhaps not so easy of ascertainment as in the court where the estate is held in charge and the proceedings are first begun. It is therefore reasonable to suppose that the legislature intended to leave as a matter of original jurisdiction the fixing of all fees contemplated by the section, supra [Code Civ. Proc. § 1510], to the superior court." In Adams v. California Mutual Building & Loan Association, 18 Cal.2d 487, 116 P.2d 75, it was also held that the reasonableness of the award is for the determination of the trial court. It was further stated in the Painter case, 78 Cal. at page 627, 21 P. at page 443: "This authority given the court could only be exercised when the fee now in dispute was to be allowed by an order made after final judgment, and the allowance is necessarily an incident to such judgment when given against the claimant as plaintiff in the action." In accordance with the above, the trial court, if it be so inclined, may allow a *reasonable* fee for services on appeal.

The judgment is affirmed. The motion for counsel fees on appeal may be filed within thirty days from the date of the filing of the remittitur.

PETERS, P. J., and BRAY, J. concur.

REEVES v. REEVES.

L. A. 20895.

Supreme Court of California, in Bank.

Sept. 30, 1949.

Rehearing Denied Oct. 27, 1949.

Richard Edward Reeves sued Annabelle Reeves for divorce.

The Superior Court, Los Angeles County, Vernon W. Hunt, J. pro tem., entered orders and an interlocutory decree of divorce in favor of the husband, and the wife appealed.

The Supreme Court, Carter, J., affirmed the orders and dismissed the appeal from the decree and order denying a new trial holding that the showing made did not justify granting relief from the default judgment, that the wife's motion for a new trial did not extend the time for appeal, and that she was not entitled to attorneys' fees and costs to prosecute the appeals.

Prior opinion 202 P.2d 319.

1. Appeal and error 🔑110

No appeal lies from an order denying a motion for a new trial.

2. Divorce 🔑181

Appeal from interlocutory divorce decree filed 60 days after entry of decree and more than 30 days after denial of motion to vacate decree was not timely. Rules on Appeal, rule 2(a), 3(a, b); Code Civ.Proc. § 473.

3. New trial 🔑4

A motion for a new trial is not an appropriate proceeding to review action of trial court in giving judgment in a case where there has been no trial upon issues of fact.

4. Appeal and error 🔑345(1)

In order for a motion for a new trial to extend time for appeal, it must be valid.

5. Appeal and error 🔑345(1)

Where new trial proceedings are unauthorized they do not toll the running of appeal time. Rules on Appeal, rule 3(a).

6. Divorce 🔑181

Motion for new trial by wife in husband's divorce action which went by default did not toll time to appeal from an interlocutory divorce decree in favor of husband. Rules on Appeal, rule 3(a).

7. Judgment 🔑143(16)

Ignorance of law as to expiration of time to appear in an action standing alone is ordinarily insufficient to justify granting of relief from default.

8. Divorce 🔑161

Ignorance of law as to expiration of time to appear in divorce action was not such "accident" or "mistake" as would justify granting relief from default judgment in divorce action. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accident" and "Mistake".

9. Divorce 🔑209, 221

There must be marriage before temporary alimony, attorneys' fees and costs may be awarded.

10. Divorce 🔑182

Where wife obtained Nevada divorce and remarried after abandoning husband without justifiable excuse during pendency of husband's divorce action in California, wife was estopped from demanding expenses for conducting appeal from California decree.

◆

Edward Raiden, Los Angeles, for appellant.

Melanie Dynner, Hawthorne, for respondent.

CARTER, Justice.

Plaintiff husband commenced an action for a divorce from his 19 year old wife in May, 1948, and personal service was had upon her in Nevada. She having failed to appear, default was entered and an interlocutory decree of divorce for plaintiff was entered on July 16, 1948, in which the custody of the minor children was awarded to plaintiff. No notice of such entry was served. On July 23, 1948, defendant filed a notice of motion to vacate the interlocutory decree under section 473 of the Code of Civil Procedure on the ground that the default was due to accident and mistake. That motion was denied by order dated July 29, 1948, and entered August 12, 1948, hereinafter referred to as first order. On August 21, 1948, defendant filed a notice of appeal from that order, hereinafter referred to as first appeal. On August 30, 1948, defendant filed a notice of intention to move for a new trial. That motion was denied by minute order (referred to as second order), entered on October 29, 1948. It is not clear, but the clerk's supplemental record recites that a motion to vacate the decree was filed on August 30, 1948, and denied on September 30, 1948, but no papers showing such motion or order appear in the record. It is also there recited that a memorandum decision and order was filed on October 4, 1948, (referred to as third order), denying defendant's motion for attorney's fees and costs on appeal, and that a notice of appeal therefrom was filed on November 19, 1948, referred to as second appeal. On November 5, 1948, defendant filed a notice of appeal from the decree and the order denying a new trial, referred to as third appeal.

While the foregoing proceedings were pending, defendant went to Nevada, taking the children with her, and obtained, on July 23, 1948, a final decree of divorce there, and has remarried.

Motions were made by plaintiff in the District Court of Appeal when this case was ending there to dismiss the appeals for failure to make timely arrangements for the preparation of the records on appeal, and time to prepare the records was granted. It appears that the records on the respective appeals are now before this Court.

[1] Turning first to that part of the third appeal which embraces an appeal from the order denying a new trial, such appeal must be dismissed inasmuch as no appeal lies from an order denying a motion for a new trial. 2 Cal.Jur. 174.

[2, 3] Further considering the third appeal, that part of it which is from the decree, we find that such appeal must be dismissed for it was not timely filed. It will be recalled that the decree was entered on July 16, 1948, and the notice of appeal was filed on November 5, 1948. Under the Rules on Appeal, the time to appeal therefrom would expire 60 days after entry of the decree, or on September 14, 1948 (Rules on Appeal, Rule 2(a)), unless that time was extended by either a valid motion for a new trial or a motion to vacate the decree. Rules on Appeal, Rules 2(a), 3(a), and 3 (b). First, we have the motion to vacate under section 473 of the Code of Civil Procedure which was timely made, but the order (first order) denying it was entered on August 12, 1948. Rule 3(b) reads, in part: "When a motion to vacate a judgment or to vacate a judgment and enter another and different judgment is made by any party on any ground within 60 days after entry of judgment, (1) if the motion is denied or not decided by the superior court within 120 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after entry of the order denying the motion to vacate or 120 days after entry of the judgment, whichever shall be less; * * *." Hence that motion to vacate would not extend the time to appeal beyond September 11, 1948, or 30 days after the entry of the order denying the motion to vacate. The motion to vacate that was apparently made in August, 1948, does not save the appeal for it was denied on September 8, 1948, and would not extend the time to appeal beyond October 8, 1948. Assuming that the denial of the new trial was timely, and, therefore, would extend the time beyond November 5, 1948, Rules on Appeal, Rule 3(a); Mellin v. Trousdell, 33 Cal.2d 858, 205 P.2d 1036, there still remains the question whether such motion in this case could operate to extend the time for appeal. It has been held that: "A motion for a new trial is not an appropriate proceeding to review the action of the court in giving judgment in a case where there has been no trial upon issues of fact. Hayne, New Trial & App. § 443; Savings & Loan Soc. v. Meeks, 66 Cal. 371, 5 P. 624; Gregory v. Gregory, 102 Cal. 50, 36 P. 364; In re Heldt's Estate, 98 Cal. 553, 33 P. 549.

"In this case there was no such trial, the judgment being by default against both defendants * * *. In such a case there is no office to be subserved by a new trial. A new trial is 'a re-examination of an issue of fact' (Code Civ.Proc. § 656), and, unless such an issue has been raised and tried, there is nothing which can be reviewed by this method.

"While appellants concede this to be the law in actions other than for divorce, they contend that in the latter class of cases there is always of necessity a trial of issues of fact; that the law raises such issues whether the defendant answers or not. But this is a misapprehension of the effect of the statute. The Code does provide that no divorce can be granted upon the mere default of the defendant, but that the court shall in all cases 'require proof of the facts alleged' before granting the relief. Civ. Code, § 130. But the effect of that provision is not to raise 'issues of fact,' nor to constitute the taking of proof submitted by the plaintiff in cases where the defendant has not answered a 'trial,' as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side and is controverted upon the other (Code Civ.Proc. §§ 588, 590), and the 're-examination' provided for in section 656 is where there has been a trial of such an issue.

"The provision of the Civil Code merely declares the policy of the law to be that in divorce cases, whether the defendant suffer default or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere ex parte showing, his remedy in seeking relief from the judgment is under section 473 of the Code of Civil Procedure, and not by motion for a new trial. Hayne, New Trial & App. § 9, and cases above cited.

[4-6] "The attempted proceedings for a new trial were therefore wholly nugatory, and cannot be reviewed." Foley v. Foley, 120 Cal. 33, 36–37, 52 P. 122, 65 Am. St.Rep. 147; see also, Abbey Land & Improvement Co. v. San Mateo, 167 Cal. 434, 139 P. 1068, 52 L.R.A.,N.S., 408, Ann.Cas. 1915C, 804; Younger v. Moore, 8 Cal.App. 237; Crackel v. Crackel, 17 Cal.App. 600, 121 P. 295; Rinaldo v. Superior Court, 15 Cal.App.2d 585, 59 P.2d 868; Rehfuss, v. Rehfuss, 169 Cal. 86, 91, 145 P. 1020. Perkins v. Perkins, 29 Cal.App. 68, and Nelson v. Nelson, 18 Cal.App. 602, 123 P. 1099, seemingly to the contrary, were disapproved in Waldecker v. Waldecker, 178 Cal. 566, 174 P. 36. See Bilger v. Bilger, 54 Cal.App.2d 739, 129 P.2d 752. As above seen, in order for a motion for a new trial to extend the time for appeal, it must be valid. Rules on Appeal, Rule 3(a). And where new trial proceedings are unauthorized, they do not toll the running of the appeal time. Appeal from judgment of dismissal of action without trial on facts, Confar v. Whelan, 8 Cal. App.2d 101, 46 P.2d 991; Hotel Park Central v. Security-First Nat. Bank, 15 Cal.App.2d 293, 59 P.2d 606; Lynch v. Watson, 69 Cal.App.2d 51, 158 P.2d 250: City of Pasadena v. Grace, 114 Cal.App. 24, 299 P. 565. See Gray v. Cotton, 174 Cal. 256, 162 P.2d 1019; City of Pasadena v. Superior Court, 212 Cal. 309, 298 P. 968. It follows, therefore, that the attempted new trial proceedings did not toll the time to appeal from the decree.

Considering the first appeal, it appears that defendant by the affidavit of Edward Raiden, her attorney, in support of the motion to vacate and set aside the decree under section 473 of the Code of Civil Procedure, stated that there was a discussion between him and Melanie Dynner, counsel for plaintiff, concerning the pending action in California, and the action of defendant in Nevada; that he intended to appear in the California action for defendant and to rely on the Nevada divorce decree, to which Miss Dynner replied that she would get a California decree first, followed by a discussion as to the time she could obtain it, in view of substituted service of process; that thereafter default was entered due to his mistake as to a 1947 change in the law shortening the time within which a default could be entered. In opposition to such showing are affidavits of Miss Dynner and plaintiff and exhibits from which it appears that no request was made by Raiden for additional time to plead in the action; that she (Miss Dynner) refused his request for a waiver of service in the Nevada action; that Raiden did not say he intended to appear in the California action; that "she (Miss Dynner) informed Edward Raiden that she fully intended to proceed in accordance with the present law and that she was convinced the California Interlocutory decree could lawfully and properly be entered before the Nevada time would elapse, and that she put Edward Raiden on definite notice thereof; and affidavit further alleges she asked Edward Raiden if he represented defendant to file an appearance or submit to the jurisdiction by a property settlement agreement referring particularly to the children being in California and not being removed therefrom without plaintiff's consent, but that he refused to do so;

* * *

"Affiant denies that the default occurred only as a result of Edward Raiden's alleged mistake as to the time defendant had to answer; in this connection alleging that at all times he knew affiant would proceed with whatever diligence the law would allow for the protection and preservation of plaintiff's case, and that the default occurred because defendant failed and refused to make any appearance therein, in the fond expectation that the Nevada decree could be obtained first and then attempt to debar the California action; that there was no mistake as to fact or law to justify the motion to set aside the valid decree of the Court herein or the granting thereof."

[7, 8] In denying the motion for relief from default, the court could accept plaintiff's version of the circumstances and reject that of defendant. The resultant facts are that neither defendant nor her attorney were misled in any particular and that counsel was advised that a default would be taken as soon as the law would permit. We have left, therefore, nothing more than Raiden's professed ignorance of the law as to the expiration of the time to appear. Such ignorance of the law, standing alone, is ordinarily insufficient to justify granting of relief from default. Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385. The matter rested in the discretion of the trial court, and under all the circumstances, we can find no abuse of discretion. The order (first order) denying relief under section 473 of the Code of Civil Procedure must, therefore, be affirmed.

[9, 10] Defendant was not in a position to demand attorneys' fees and costs to prosecute her appeals, and, therefore, the denial of her request for them must be affirmed. All through her participation in the proceedings, she has maintained that she acquired a bona fide residence in Nevada and obtained an absolute decree of divorce there. It has been held that there must be a marriage before temporary alimony, attorneys' fees, and costs may be awarded. Colbert v. Colbert, 28 Cal.2d 276, 169 P.2d 633. Whether or not the Nevada decree is valid, she is not in a position to question it for it was of her own doing and she has relied upon it by remarrying.

What may be the effect of the two decrees (California and Nevada), and their relation to each other, and which, if either, is controlling over the other, are not matters presented in the proceedings here involved, inasmuch as such matters are not before this Court. The issue is solely whether the trial court abused its discretion in refusing to set aside the default decree on the grounds stated and the right to suit money on the appeals.

The first order (denying relief under section 473 of the Code of Civil Procedure) is affirmed; the appeals from the decree and order denying a new trial are dismissed; and the third order (denying suit money on appeals) is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

In re STANLEY'S ESTATE.

S. F. 17704.

Supreme Court of California, in Bank.

Sept. 28, 1949.

Rehearing Denied Oct. 27, 1949.

In a proceeding in the matter of the estate of Mattie G. Stanley, deceased, the Superior Court of Alameda County, James G. Quinn, J., entered a decree of distribution dividing certain personal property between Milledge F. Stanley, administrator and surviving husband of deceased, and Juanita G. Clarke, daughter of deceased by prior marriage, and distributed certain realty together with furnishings in a house thereon to Juanita G. Clarke subject to a life estate in Milledge F. Stanley, and the latter appealed.

The Supreme Court, Carter, J., held that a consent to distribution agreement between the parties was properly found to be valid and enforceable, and affirmed the judgment.

Prior opinion, 202 P.2d 115.

1. Executors and administrators 🔑314(8)

Finding that consent to distribution between heirs of decedent was valid and enforceable was sustained by the evidence.

2. Courts 🔑202(5)

On appeal the evidence must be viewed most favorably to support the Probate Court's finding.

3. Descent and distribution 🔑82

Under the statute the Superior Court sitting in probate could determine the validity of consent to distribution agreement between heirs. Probate Code, §§ 530.1, 1020.1.

4. Executors and administrators 🔑314(2)

Where consent to distribution agreement between heirs embraced both property that was a part of the estate and property that was not a part of the estate, particularly community property, the Probate Court had jurisdiction to determine the validity of the entire agreement. Probate Code, §§ 530.1, 1020.1.

5. Courts 🔑201

A Probate Court has jurisdiction to determine rights under contracts ancillary to the exercise of its probate jurisdiction.

6. Courts 🔑201

The Superior Court while sitting in matters of probate is the same as it is while sitting in equity, in cases of law, or in a special proceeding; and when it has jurisdiction of the subject matter of a case falling within either of such classes it has power to hear and determine in the mode provided by law all questions of law and fact the determination of which is ancillary to a proper judgment in such case.

Edward D. Mabson, San Francisco, for appellant.

Richard M. Lyman, Jr., Leo A. Sullivan and Andrew P. Costello, Oakland, for respondent.

CARTER, Justice.

This is an appeal by Milledge Stanley from a decree of distribution in the estate of Mattie G Stanley, the deceased wife of Milledge Stanley, in which certain personal property was divided equally between Stanley and Juanita Clarke, the daughter of Mattie by a previous marriage. A parcel of real property in Oakland, together with the furnishings in the house thereon, was ordered distributed to Juanita, subject to a life estate in Stanley.

[1] The main dispute concerns a written agreement designated a "Consent to Distribution" between appellant, Stanley, and Juanita, in which it is provided that the property be divided as was done in the decree of distribution, the court finding the agreement valid and enforceable. Stanley contends that he was induced to sign it by reason of the failure on the part of Mr. Lyman, the attorney drafting the instrument, to enlighten him properly as to his rights in his wife's estate and misrepresentations by Mr. Lyman. It is also urged that the real property was the community property of Stanley and Mattie, or that it was held in trust by her for him, as a resulting trustee, on the basis that he supplied the purchase money. The last mentioned contentions become unimportant in view of the result reached herein that the court was

justified in finding the agreement valid and enforceable, because that agreement settled and determined all of the rights of Stanley and Juanita to the estate property regardless of its character.

[2] Though there is a conflict in the evidence on some points, viewing it most favorably to support the Probate Court's finding, the following appears: Mattie, whose maiden name was Gibbons, married Columbus Mariner in 1915 and they lived together as husband and wife until shortly before 1927 when Mariner obtained a divorce from Mattie in Arizona. In 1922, Mattie purchased the real property in question on a time payment basis, taking a deed to it in her maiden name. Stanley claims he supplied the purchase price to Mattie and that it was agreed between them that they would be married and the property would be community. There is a conflict in the evidence on this point due to the fact that in 1935, in a divorce complaint by Stanley against Mattie, he alleged that the parties had no community property, and in a property settlement agreement executed by him, it is recited that there was no community property and that he waived any claim to the real property and furniture here in question. An interlocutory decree of divorce was granted to Mattie on her cross-complaint, and the settlement agreement was made a part of it. No final decree was entered and it appears the parties resumed marital relations. However, those matters are not of particular importance. Mattie died in 1943. Stanley and Juanita visited the office of Mr. Lyman intending to see Mr. Sullivan, who was in the same office, but as he was absent, they consulted Lyman. Although Juanita knew Sullivan, she did not know Lyman It is at that conference that the arrangements were made for the "Consent to Distribution" agreement, and Lyman was retained to represent the estate with Stanley acting as the administrator. It is at this conference that it is claimed that Stanley was improperly induced to execute the agreement. Accepting Lyman's version of the events, as it is evident was done by the trial court, we find he testified: "Mr. Stanley, * * * came into my office with Juanita Clarke, * * * Mr Stanley asked me to represent him in the matter of the probate of the estate of his wife, Mattie G. Stanley, * * * I was then given a deed to this place of property, the main subject of this controversy * * * and several bank books. It appeared that * * * Mattie G. Stanley had in her lifetime used several aliases, * * * as being Mattie G. Stanley, Mattie Gibbons, Mattie Gibbons Mariner and Mattie G. Stanley. This deed, when shown to me, I showed Mr Stanley and called his attention to the fact that the deed was made in 1922 and asked him if it were separate or community property. *He stated to me that it was separate property, that he had no interest in it.* I thereupon told him and Mrs. Clarke that under Section 221 of the Probate Code of the State of California, it being separate property and there being a surviving husband and one child, *that they had an equal interest in the property.* Mr. Stanley had told me he had lived there for a number of years. Mrs. Clarke said, 'I have no desire to take the home from this man.' I thereupon told them the best way to work out the proposition was that Mrs. Clarke was to be given the property on distribution with a life estate reserved to Mr. Stanley so he might live there the remainder of his life, without the necessity of paying any rent to anybody. *That, Mr. Stanley felt, was what he wanted, and so expressed himself.* The alternative way was also discussed, that these two people, having an undivided equal right to this property, it should be sold before distribution. Neither Mr. Stanley or Mrs. Clarke wanted that to happen. Mr. Stanley stated to me on not only one but many occasions he was well satisfied in being permitted to remain in this property during the rest of his lifetime, * * *. On this occasion, in addition to the manner in which these two people, Mrs. Clarke and Mr. Stanley, expressing their desires that the property should be distributed in the manner I have stated, it was felt that there should be an agreement drawn up between them, providing for such distribution and further a discussion arose as to the right of Mr. Stanley to use the furniture and furnishings in this property which were left by

Mrs. Stanley. It was discussed at that time, but no notation was made in the agreement until they came to my office on the second occasion. They thereupon discussed it further and it was agreed between them that in addition to Mrs. Clarke being distributed the estate and reserving a life estate in the real property, that Mr. Stanley should have a life estate in the furniture and furnishings. Interlineations made above line 28 'and furniture an furnishings thereon' were made in my handwriting as also the interlineations made above line 6 on the second page thereof and above line 18 on the second page thereof—and by 'thereof' I refer to the consent of distribution. * * * After these interlineations were made at my request and in my presence and likewise in the presence of each other, Mr. Stanley and Mrs. Clarke initialed the interlineations. * * * A further discussion was had as to how certain of the moneys standing in the bank account, the War Bonds—three War Bonds in the estate—were to be distributed to Mr. Stanley, that was agreed upon, the $100 War Bond to be distributed share and share alike to Milledge F. Stanley and Juanita Garcia Clarke. Then there was a question of $100 which was owed, or agreed to be paid, as my memory recalls, to a man by the name of Albert Gibbons, and both Mrs. Clarke and Mr. Stanley agreed to contribute $50 each to establish a savings account for this man who, I believe, lived out of the State of California. Milledge F. Stanley, the administrator to be appointed, it being understood he was by this instrument waiving any right to any fees as administrator of the estate. When these two people came into my office on the 2nd occasion, which was on or about Columbus Day, they were shown this 'consent to distribution' to which I have referred. Each was given a copy. Each was given an opportunity to read the instrument presented to them. I asked both Mrs. Clarke and Mr. Stanley to ask me any questions, if there was any doubt in their minds what was meant. It is true several questions arose, and the interlineations were made by me to take care of these matters over which there was any question or dispute as between the parties before they signed. Mr. Stanley did sign this agreement on or about the 12th or 13th of October, 1945, expressed his satisfaction with it, and it was not until sometime in the latter part of January, that he expressed any dissatisfaction with the agreement or with me as his attorney. * * * the following January after this agreement was signed, I prepared a will for Mr. Stanley which he has presently in his possession, unless he has destroyed it. After Mrs. Clarke's return to California, Mr. Stanley again came into my office with Mrs. Clarke and he expressed some dissatisfaction as to this agreement that he had made, and Mrs. Clarke said 'All right, I will do this: we will divide the furniture, and I will give you $1000 for your interest in the property.' Mr. Stanley verbally agreed to do that, and an inventory was taken by Mrs. Clarke and brought to my office, but that agreement was never at any time consummated * * *." [Emphasis added.]

[On cross-examination]: "Q. Now, Mr. Lyman, did you make any inquiry with respect to the household furniture, as to when and under what circumstances it was to be purchased? * * * A. Only to this extent: *both* Mrs. Clarke and *Mr. Stanley* informed me *Mrs. Stanley had lived there and purchased furniture long before she married Mr. Stanley,* and when it came to the confirmation of this agreement, Mrs. Clarke said, 'I dont want to raise any dispute as to your right to use that furniture, and we will leave it this way: you will have a life interest in it, and you may have the use of it as long as you live.' [Emphasis added.]

"Q. Now, did you there and then ask Mr. Stanley whether it was community or separate property—did you make any inquiry of him, as to the manner of its acquisition or the circumstances under which it was acquired? A. The only conversation I can recall that might relate to the purchase or acquisition, I showed Mr. Stanley this deed dated 1922. Mr. Stanley said, 'I don't claim any interest in that property.'

"Q. That was the extent of the conversation with respect to that? A. He never made any claim.

"Q. Was that the extent of the conversation? A. That is as far as I can recall anything about this acquisition by either party at any time.

"Q. I believe you testified on your direct examination that you stated to these people at the time of this conversation that the property, the real property, upon distribution would have to be sold? A. No, I said unless they could agree upon a division of the property or upon some other method of distribution it would have to be sold and equally divided between them.

"Q. Mr. Lyman, isn't it correct that if it were separate property and there were two heirs upon distribution the Court would distribute an undivided one half interest to each of the two heirs? A. That is true, but they understood that would not get them anywhere.

"Q. The fact of the matter is, it could be distributed in that manner without being sold or divided in any other manner —A. (Interrupting) I even went further, but—

"Q. Isn't that true? A. That is true —as I went on and told these people, in the event it were distributed in the fashion, an action in partition might be necessary, which would involve additional expense, and it was better to arrive at an arrangement between them as to what would best be done.

"Q. Did you explain to Mr. Stanley as to what constitutes community property and the various circumstances under which community interest may be created? A. Yes, Mr. Dayton, I called the attention of Mr. Stanley to the date of this deed in 1922, and asked the date of his marriage. I said, 'This property was acquired by your wife a long time before the marriage,' and he said 'yes'. I asked, 'Have you any interest in the property, Mr. Stanley?', and he said 'No'. I said, 'That being the case, it is separate property, and you and Mrs. Stanley's daughter are entitled to an undivided one-half interest in that property each inasmuch as there are no other heirs.'"

Juanita corroborated the foregoing in substantial particulars. On the other hand, Stanley testified that he did not understand the agreement, that he did not read it, that the interlineations were not initialed by him, that he was instructed by Lyman to sign although he did not want to, that he did not understand the meaning of community property rights, and the like. Particular point is made to testimony that he signed the agreement against his will, induced by Lyman's promise that another one would be made out, but that, as we have seen, is contradicted by Lyman's testimony, and the other purported agreement was made much later at a time when Stanley became dissatisfied, and it was oral and was never consummated. We have nothing more than a conflict in the evidence which was resolved in favor of Juanita that there was no basis for invalidating the agreement.

Stanley argues at length that Lyman was his attorney when the consent agreement was drawn (he acted as attorney for Stanley as administrator of the estate until he was substituted out in 1945); that as such, Lyman was derelict in his duty in not inquiring more fully into the character of the property of the estate; and that thus Stanley was trapped into signing the agreement in ignorance of his rights. Even assuming that to be so, he cites no authority for the proposition that a person may avoid a contract with a third person where he is induced to enter into it by reason of the failure on the part of his attorney to fully disclose the extent and character of his rights and the effect of the agreement, and we find none. But it is not necessary to decide that question because the trial court had adequate basis for its implied conclusion that there was no such misconduct on Lyman's part. Juanita did not know Lyman and had never seen him before. The situation was a common one where two persons consult counsel. They were both Mattie's heirs and, she having died, the estate had to be probated and that undoubtedly was the main purpose of the call at Lyman's office. From his testimony it is clear that he had no reason to probe further into the character of the property. The parties brought a deed to the property with them that was dated over six years prior to the marriage of Stanley and Mattie. Stanley said he had no interest in the property, which did not involve any ascertainment on his part as to the intricacies of community property law. That is substantially the same position he took in the divorce action in 1935 where he had the aid of his own attorney (not Lyman). He there said the property was not community and presumably had been fully advised concerning his rights. He executed the settlement agreement waiving any claim he might have to the property. Juanita and Stanley were in full agreement as to the real property and the furniture was taken care of separately. He was fully satisfied with the consent to distribution agreement when it was made.

It is suggested that Lyman should not have represented Juanita in this proceeding since he had acted in the drafting of the agreement and as attorney for the estate; that thereby he used information obtained from Stanley while he was his attorney. We express no opinion on that subject for it is manifestly immaterial in this case.

[3] The determination of the validity and enforceability of the agreement was made by the superior court sitting as a probate court, and it is asserted that as such it lacked jurisdiction of the matter. Prior to the enactment of section 1021.1 of the Probate Code, and its predecessor section 530.1 of the same code, it had been repeatedly held that a probate court had no jurisdiction to pass upon the validity and effectiveness of an assignment or transfer of an interest in an estate made between heirs or legatees, or between heirs or legatees and strangers. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; see cases cited 11B Cal.Jur. 799-801, and 10-Yr. Supp.; 11A Cal.Jur. 99, and 10-Yr. Supp. Section 1020.1 provides in part: "The court [a superior court sitting in probate] before making distribution of any property of a decedent to any assignee or transferee of any heir, devisee or legatee or before making distribution to any person other than an heir, devisee, or legatee pursuant to any agreement, request or instructions of any heir, devisee or legatee or of any attorney-in-fact of any heir, devisee or legatee may on the motion of any person interested in the estate or on the motion of the public administrator or on its own motion inquire into the consideration for such assignment, transfer, agreement, request or instructions and into the amount of any fees, charges, or consideration paid or agreed to be paid by the heir, devisee or legatee and into the circumstances surrounding the execution of such assignment, transfer, agreement, request or instructions and if it finds that the fees, charges or consideration paid by any such heir, devisee or legatee is grossly unreasonable or that any such assignment, transfer, agreement, request or instructions was obtained by duress, fraud, or undue influence it may refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable. * * *" Under that statute it is clear that the validity of the consent to distribution agreement between heirs could be tested by the probate court and if it was found invalid, a distribution would not be ordered in accordance with its terms. It is said in Re Estate of Butler, 29 Cal.2d 644, 648, 177 P.2d 16, 18, 171 A.L.R. 343: "* * * the section [1020.1] indicates simply the purpose of the Legislature to give to the probate court, having but special and restricted jurisdiction as prescribed by law, 'some control, at least for the purpose of distribution, over agreements providing compensation for services of so-called "heir-hunters."' * * * *Prior* to the enactment of section 1021.1 and its forerunner, section 530.1 of the Probate Code, the probate court did not have the power to determine the issue of the validity of an assignment upon the distribution of an estate (In re Estate of Howe, 161 Cal. 152, 118 P. 515,) upon inquiry 'into the circumstances surrounding the execution of such' agreement and any accompanying instrument procured from the prospective beneficiary." [Emphasis added.] The clear implication from the foregoing is that a

probate court may determine the validity of an agreement that property shall be distributed in a certain manner. See In re Estate of Henshaw, 68 Cal.App.2d 627, 157 P.2d 390; In re Estate of Cazaurang, 75 Cal.App.2d 217, 170 P.2d 694; Cf. In re Estate of McPherson, 90 Cal.App.2d 17, 202 P.2d 565; In re Estate of Ettlinger, 87 Cal.App.2d 494, 197 P.2d 163.

[4-6] It is claimed, however, that while the probate court may determine the validity of such an agreement, it is limited in doing so to that part of the property which is a part of the estate; that although the court found the real property not to be community property, such finding lacked evidentiary support, and the furnishings were found to be community property; and that Stanley's, the surviving husband's, interest in community property is no part of Hattie's estate. We do not believe the probate court's jurisdiction is so limited. Where an agreement embraces both property that is a part of the estate and property which is not a part of the estate, especially community property, the probate court has jurisdiction to decide the validity of the entire agreement. It must be remembered that a probate court has jurisdiction to determine rights under contracts ancillary to the exercise of its probate jurisdiction. Bennett v. Forrest, 24 Cal.2d 485, 150 P.2d 416; Dobbins v. Title Guarantee & Trust Co., 22 Cal.2d 64, 136 P.2d 572. And, as is said in Re Estate of Cover, 188 Cal. 133, 139, 204 P. 583, 586, quoting from In re Estate of Warner, 6 Cal.App. 361, 92 P. 191: "The superior court, while sitting in matters of probate, is the same as it is while sitting in equity, in cases at law, or in a special proceeding; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining 'to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.'" If the jurisdiction is denied, confusion, delay and uncertainty follow. The probate court might determine the part of the agreement addressed to it as valid, and a superior court might reach a contrary result on the remainder of the contract, or vice versa. Not only would the result be making a new contract for the parties, but the litigation would be piecemeal. Such conditions should be avoided. Garson v. Division of Labor Enforcement, 33 Cal.2d 861, 206 P.2d 368.

The decree is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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94 Cal.App.2d 81

Ex parte ZITTERMAN.

Cr. 4385.

District Court of Appeal, Second District, Division 3, California.

Oct. 7, 1949.

Habeas corpus proceeding by Nathaniel O. Zitterman to secure release from custody under commitment based on sentence to jail for contempt.

The District Court of Appeal, Shinn, P. J., held that provision of commitment that defendant be confined until he paid a fine of $500 to be satisfied at the rate of $2 per day was void, and ordered petitioner discharged from custody after satisfaction of valid portion of commitment.

1. Divorce 🔑269(13), 311

Where commitment was based on sentence to jail for contempt for failure to comply with orders made in pending divorce action for support of defendant's wife and children, provision of commitment that defendant be confined until he paid a fine of $500 to be satisfied at the rate of $2 per day of confinement was void.

2. Habeas corpus ⚷25(1)

Where valid portion of commitment to jail for contempt had been satisfied, prisoner was entitled to release from custody on writ of habeas corpus.

3. Habeas corpus ⚷85(1)

Record did not disclose that proceedings by which defendant was adjudged in contempt for failure to comply with orders made in pending divorce action for support of his wife and children and sentenced to serve five days in jail and pay a fine of $500 to be satisfied at the rate of $2 per day of confinement were invalid or in excess of court's jurisdiction.

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Walter M. Rheinschild, Los Angeles, for petitioner.

W. E. Simpson, Dist. Atty., Los Angeles County, Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent Sheriff of Los Angeles County.

SHINN, Presiding Justice.

A writ of habeas corpus was heretofore issued upon a petition asserting invalidity of petitioner's confinement under a commitment following two adjudications of contempt for failure to comply with certain orders for the payment of money made in a pending action for divorce in which he is the defendant. When the matter came on for hearing it was submitted upon the petition and the return, the petition, upon stipulation being deemed a traverse to the return. The only questions for decision are whether the commitment is legally sufficient and whether, in the prior proceedings, the court acted within its jurisdiction. The following is a summary of the proceedings. On September 14, 1948, petitioner was ordered to pay $15 per week for the support of his wife, beginning September 20, 1948; $150 attorney's fees and $15 court costs payable at $15 per month beginning October 15, 1948. By stipulation any further award of attorney's fees and court costs was to be fixed at the time of trial. On December 29th the order was changed to $25 per week for the wife and children, payments to commence January 1, 1949; defendant was also ordered to forthwith surrender possession of the home to plaintiff. On February 24, 1949, the court found defendant not in default with respect to the payments ordered on September 14th but in default in the sum of $150 under the order of December 29th. He was adjudged in contempt for failure to make such payments and his refusal to vacate the premises. He was sentenced to five days in the county jail and was ordered to pay a fine of $500, $2 of which was suspended, the fine or the unpaid portion thereof to be satisfied by confinement in the county jail at the rate of $2 per day. Defendant was ordered to pay an additional $50 as attorney's fees and execution of sentence was stayed until February 25th. On February 25th the court granted a further stay of execution to March 25th but ordered defendant to keep up the payments for support and to pay $5 per week on the arrearage of $150. On March 25th execution of sentence was stayed until June 27th "on condition that defendant comply with all orders in this matter." Thereafter petitioner was cited to show cause why he should not be adjudged in contempt for failure to comply with the order of March 25th which, indirectly ordered him to keep up his payments. On May 31st defendant was found to be in arrears in the amount of $67.50 as of May 9th and $117.50 as of May 31st. It was ordered that the "contempt matter be continued to June 24th." The divorce trial commenced on June 24th and on June 29th the court made a further order that defendant pay plaintiff the sum of $100 per month for the support of the children "payable as in the former order of court"; also $150 attorney's fees at the rate of $15 per month. It was ordered that plaintiff have a judgment of divorce and temporary custody of the children but the matter was continued to July 8th for the purpose of making an investigation with respect to the matter of custody. The contempt matter that had been heard on May 31st was continued to June 24th and again to the 29th for further hearing. On the latter date the court found defendant to be in arrears $117.50 on May 31st, 1949, and that he had knowledge of the order and the ability to comply therewith. He was adjudged in contempt and sentenced to serve five days in the county jail. Sentence was suspended "on condition that all arrearage as of this date be paid to plaintiff and plaintiff's attorney on or before July 8, 1949." This conviction appears to have been based upon petitioner's failure to meet the arrearage of $117.50. It will be noted that on February 24th he had been adjudged guilty of contempt for failure to meet the arrearage of $150 under the order of December 29th and had been sentenced to serve five days in jail and pay a fine of $500. With respect to this conviction the court, on June 29th stayed execution of the jail sentence with respect to two days and also the $500 fine until July 8, 1949, on condition that "the present arrearage to plaintiff and plaintiff's attorney, payments on the home and furniture to date are paid by July 8, 1949." There was a stay also of three days of the sentence until July 2, 1949. On July 8, 1949, the court made and entered an order which reads as follows: 'Commitment to County Jail. It appearing to the Court that a judgment was entered on the 29th day of June, 1929, in Department 56 of the above entitled Court, finding the defendant, Nathaniel O. Zitterman guilty of contempt of Court and suspending sentence upon condition of defendant pay to the plaintiff all arrearage on or before July 8, 1949 and it further appearing that the defendant was present at the time of trial and heard said order pronounced, and that he had knowledge of the order, and has had ability to comply with the same, but has willfully refused to do so, and that the same has not been complied with, and the Court having ordered the defendant to appear and show cause on July 8th, 1949, in Department 8 why sentence should not be executed for contempt of court in willfully failing to comply with the said order of Court, and the defendant now appearing in Court, the Court finds that the defendant has had the ability to comply with the said order of court, and has not complied with the order of Judge Raycraft on June 29th, 1949: and he has heretofore been found guilty of contempt and sentenced. Therefore, it is ordered that the said defendant, Nathaniel O. Zitterman be and he is now remanded forthwith [to] the County Jail, for five days and to pay a $500 fine or to pay said find [sic] at the rate of $2.00 per day of confinement in the County Jail. Dated July 8th, 1949."

[1, 2] It thus appears that petitioner has been committed for an offense of which he was found guilty on June 29, 1949, namely, failure to pay the arrearage of $117.50 as ordered on May 31st. It also appears from the petition and the return that petitioner was confined in the county jail from July 8th to July 16th, inclusive, under that commitment. He has therefore served more than the five days for which he was sentenced on June 29th. So far as that sentence is concerned it has been satisfied. The further provision of the commitment that petitioner be confined until he pays a fine of $500 and that any unpaid portion be satisfied at the rate of $2 per day of confinement is void, since the sentence upon which the commitment was founded did not impose a fine or the alternative of confinement. Under the present commitment petitioner may not be held and he is entitled to be discharged.

[3] However, no proceedings have been had to carry into execution the sentence imposed upon the judgment of contempt of February 24, 1949. This matter was continued to July 8th but has not been acted upon. There is nothing in the present record to indicate that the proceedings of February 24, 1949 were in any way invalid or in excess of the court's jurisdiction.

The petitioner is ordered discharged from custody. Our order is without prejudice to further proceedings in the trial court which may be deemed appropriate in the matter of the conviction and sentence of February 24, 1949.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 777

PEOPLE v. WILLIAMS.

Cr. 2609.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1949.

Hearing Denied Oct. 27, 1949.

Garrett A. Williams pleaded guilty of burglary, and from an order of the Superior Court of San Francisco County, Edw. P. Murphy, J., denying defendant's motion to annul a judgment, denying defendant probation and sentencing him to the state penitentiary, he appealed.

The District Court of Appeal, Goodell, J., affirmed the order, holding that the judgment was not void as a second judgment, placing defendant in double jeopardy, because of the court's earlier pronouncement respecting a suspended sentence.

1. Criminal law ⚿189

A pronouncement by Superior Court that defendant, pleading guilty of burglary, be confined to county jail for one year, but that sentence be suspended on condition that he be turned over to state authorities as parole violator, was nullified by granting of continuance at same hearing, with direction that probation officer ascertain defendant's exact status at state penitentiary, so that later judgment, denying probation and sentencing defendant to state penitentiary, was only judgment in case and hence not void as placing defendant in double jeopardy. Pen.Code, §§ 1191, 1203.

2. Criminal law ⚿163

A pronouncement by Superior Court that defendant, pleading guilty of burglary, be confined to county jail for one year, but that sentence be suspended on condition that he be turned over to state authorities as parole violator, was not a judgment, so that later judgment, denying probation and sentencing defendant to state penitentiary, was only judgment in case and not void as placing defendant in double jeopardy.

3. Criminal law ⚿982

An order suspending sentence is, in legal effect, equivalent of order granting probation, as court has no power to suspend execution of sentence except as incident to granting probation.

4. Criminal law ⚿982

"Probation" is not a judgment, but act of grace and clemency, which court may grant seemingly deserving defendant to enable him to escape extreme rigors of legal penalty for offense of which he stands convicted, while "judgment" imposes such rigors.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Judgment" and "Probation".

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Garrett A. Williams, in pro. per.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

This appeal is from an order of May 31, 1949 denying appellant's motion to annul a judgment entered on November 28, 1947.

The ground of the motion was that the court rendered judgment at a hearing on October 31, 1947, and then, on November 28, 1947, rendered a second judgment which was void and in excess of jurisdiction, and which placed defendant in double jeopardy.

Appellant was charged with burglary and pleaded guilty in the Municipal Court. On October 31, 1947, on arraignment in the Superior Court for judgment, when his counsel urged "a suspended county jail sentence", a discussion ensued between court, counsel and defendant respecting prior convictions, wherein counsel further urged that if his client "could be saved from going back on an additional felony sentence it would at least cut down some of the time." A police inspector testified that defendant had admitted "to us that he had been over there three or four times", whereupon defendant conceded three priors. The inspector gave the details of this burglary—the entry of a store at night, unarmed, and nothing taken. The court then rules it to be second degree burglary and made the following statement which appellant claims was the pronouncement of judgment: "It will be the judgment of the law and the sentence of the Court that the defendant be confined to the county jail for a period of one year, said sentence to be suspended on condition he be turned over to the state authorities as a parole violator".

After disposing of other matters the court returned to this case. The inspector was recalled (without further oath) and defendant was confronted with five felonies from the record which the inspector had produced. When the assistant district attorney stated there had not been time to check on the complete record defense counsel said "Well, we will be glad to have a continuance * * * except the statutory period insists on five days." Defendant then admitted four priors.

After further discussion of the current offense (including defendant's grudge against the owner of the store) and the time served on his last conviction, the court said "We are not going to take any chances. The matter will be referred on the order of Court, the Court entering, for the purposes of a proper judgment, a motion for probation, directing the probation office to furnish this Court * * * Let us find a little more about this other party that he is supposed to have had this fight with." Defense counsel responded "Very well, your Honor." The court then continued the matter to November 28 and directed the probation officer to ascertain defendant's "exact status at San Quentin now".

On November 28 the court denied probation and sentenced appellant to San Quentin for the time prescribed by law, "to run concurrently with the sentence to be imposed as a parole violator."

[1] The first answer to appellant's contention is that on October 31 there was but one hearing, interrupted only while the inspector went to get defendant's record. Defendant was "glad to have a continuance". It was granted by the court under Penal Code, sec. 1191 which extends the time for judgment "until any proceedings under section 1203 * * * have been disposed of." By this action the earlier pronouncement respecting a suspended sentence was effectively superseded and nullified and the question of probation was set at large. All this was done with defendant's express consent. People v. Kersten, 60 Cal.App.2d 624, 627, 141 P.2d 512. No entry of the suspended sentence was made in the minutes, and defendant was never under restraint by virtue of it. See People v. McAllister, 15 Cal.2d 519, 526, 102 P.2d 1072.

[2, 3] The second answer is that the court's pronouncement respecting a suspended sentence could not have been a judgment in any sense of the word. A suspended sentence is nothing but probation called by a different name. An order suspending sentence is, in legal effect, "the equivalent of an order granting probation." In re Herron, 217 Cal. 400, 404, 19 P.2d 4, 6. A court has "no power to suspend execution of sentence except as an incident to granting probation". People v. Sidwell, 27 Cal.2d 121, 129, 162 P.2d 913, 917; People v. Wallach, 8 Cal.App.2d 129, 132, 47 P.2d 1071.

[4] The courts have repeatedly held that "Probation is not a judgment." In re Marquez, 3 Cal.2d 625, 627, 45 P.2d 342, 343; People v. Guerrero, 22 Cal.2d 183, 184, 137 P.2d 21; People v. Wallach, 8 Cal.App.2d 129, 133, 47 P.2d 1071; In re Goetz, 46 Cal.App.2d 848, 851, 117 P.2d 47; People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253; In re Martin, 82 Cal.App.2d 16, 22, 185 P.2d 645. "'Probation' is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16, 17, citing People v. Payne, 106 Cal.App. 609, 289 P. 909. A judgment, on the other hand, imposes the "rigors of the penalty."

It follows that the judgment of November 28, 1947, was the only judgment in the case.

In re Fontino, 135 Cal.App. 466, 27 P.2d 413 and In re Garrity, 97 Cal.App. 372, 275 P. 480, relied on by appellant, are not in point for the reasons already stated.

There is serious doubt whether appellant's point could be raised otherwise than by an appeal from the judgment. See People v. Carkeek, 35 Cal.App.2d 499, 96 P. 2d 132; People v. Erickson, 74 Cal.App.2d 339, 168 P.2d 417, but that question need not be decided.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

NATIONAL AUTOMOBILE & CASUALTY INS. CO. v. AINGE et al.

Civ. 17109.

District Court of Appeal, Second District, Division 1, California.

Sept. 29, 1949.

Hearing Granted Nov. 21, 1949.*

National Automobile & Casualty Insurance Company, as a workmen's compensation insurance carrier, sued Fannie S. Ainge and others for its subrogation rights and for damages suffered by an injured employee.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., dismissed the action, and plaintiff appealed.

The District Court of Appeal, White, P. J., reversed the judgment in part holding that the insurer's claim was not one which had to be filed against the decedent's estate before action thereon could be maintained, and that although the action was barred by limitations as to the individual defendants, it could be maintained against the estate.

1. Executors and administrators 🔑443(7)

Complaint against an executor which does not allege that claim was filed against a decedent's estate in compliance with statute does not state a cause of action against an executor.

2. Executors and administrators 🔑431(2)

A claim is required to be presented against a decedent's estate as a condition precedent to maintenance of an action thereon only when person presenting it is making some contractual claim against the funds or property of the estate.

3. Executors and administrators 🔑431(2)

The phrase "arising upon contract" within meaning of the statute requiring that claims against a decedent's estate be filed against the estate before an action can be maintained thereon refers to contracts to which the decedent was a party. Probate Code, § 707.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Upon Contract".

4. Executors and administrators 🔑431(2)

Where employee was injured in automobile accident, claim of workmen's compensation insurance carrier as subrogee against tort-feasor's estate was not one "arising upon contract" within meaning of statute requiring such claims to be filed against an estate before action can be maintained thereon. Labor Code, §§ 3850–3862; Probate Code, § 707.

5. Workmen's compensation 🔑2188

Right to commence an action against a third party tort-feasor arises immediately when employer or insurance carrier pays or becomes obligated to pay workmen's compensation benefits to injured employee.

6. Workmen's compensation 🔑1207

Obligation of employer to pay compensation benefits arises on receipt of compensable injury by employee, and statute of limitations prescribing time within which application for compensation must be made to Industrial Accident Commission commences to run from time of accident.

7. Workmen's compensation 🔑2197

It is not essential that employer or insurance carrier should actually have made any payments of compensation benefits to employee in order to maintain an action against alleged tort-feasor.

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* Subsequent opinion 215 P.2d 13.

8. Limitation of actions ⚷58(1)

Three year statute of limitations against workmen's compensation insurance carrier commenced to run at time employee was injured so as to bar action by insurer as subrogee against third party tort-feasor. Code Civ.Proc. § 338, subd. 1; Labor Code, §§ 3850–3862.

9. Limitation of actions ⚷43

When suit may be maintained, a cause of action has accrued and statute of limitations commences to run at date of accrual.

10. Limitation of actions ⚷43

Statute of limitation runs from time cause of action accrues, and action accrues when there is a remedy available.

11. Executors and administrators ⚷437(3)

Action by workmen's compensation insurance carrier as subrogee against tort-feasor's estate could be commenced within one year after issuance of letters testamentary. Code Civ.Proc. §§ 338, subd. 1, 353; Labor Code, § 3851.

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Robert McWilliams, Los Angeles, for appellant.

Reginald I. Bauder, W. I. Gilbert, Jr., Roger E. Kelly, Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for respondents.

WHITE, Presiding Justice.

Plaintiff instituted an action as workmen's compensation insurance carrier under the authority of Chapter 5 of the Labor Code of California for its subrogation rights and for other items of alleged damage suffered by the injured employee.

Defendants' demurrer to plaintiff's complaint was general and special, and raised several different provisions of the statute of limitations and Probate Code in bar of the action. The general demurrer was sustained with ten days to amend. Plaintiff declined to amend and a judgment of dismissal was entered. Code Civ.Proc. sec. 581, subd. 3. From such judgment plaintiff prosecutes this appeal.

This action was brought against defendant Fannie S. Ainge as an individual and as executrix of the will of Gilbert L. Ainge, deceased. The complaint alleged that plaintiff was a corporation entitled to transact workmen's compensation insurance business as an insurer in the state of California. That defendant is an individual residing in Los Angeles. That defendant Fannie S. Ainge was appointed executrix of the will of decedent, Gilbert L. Ainge, on or about September 24, 1947. That at the time of the accident hereinafter referred to decedent was the agent, servant and employee of the individual defendant, acting in the course of his employment; that at the time of said accident defendant individual and decedent were the owners of a Buick automobile which at said time was being operated by decedent with the consent, permission and authority of defendant individual. That on or about March 27, 1942, one Julia Hall was walking northerly across Wilshire Boulevard at or near its intersection with June Street in the City of Los Angeles, and that at said time and place decedent negligently drove and operated defendants' Buick automobile in a westerly direction on Wilshire so as to cause said automobile to run against, knock down and run over said pedestrian. That as a proximate result of decedent's negligence, said Julia Hall was severely and permanently injured, and incurred and will incur medical and other expenses in certain stated sums. That at the time of the accident Julia Hall was employed by one Mrs. Vic M. Moretta as a housekeeper, and for such services was receiving certain compensation. That prior to March 27, 1942, in consideration of certain premiums paid, plaintiff issued to Mrs. Moretta a policy of workmen's compensation insurance covering her employees, which policy was in force on said date. That at the time of the accident Julia Hall was acting in the scope of her employment and her injuries arose out of and in the course of such employment. That on or about June 27, 1942, Julia Hall filed application with the Industrial Accident Commission for workmen's compensation benefits because of the injuries and disabilities hereinbefore set forth. That a hearing was held and an award made in favor of said Julia Hall.

That as a result of the award and various other awards and orders made by the Industrial Accident Commission in the proceedings relating to Julia Hall, plaintiff became liable to and did pay workmen's compensation in certain amounts and will become liable for additional amounts, all allegedly proximately caused by the accident hereinbefore mentioned, to plaintiff's damage in a stated sum. That by reason of the payments alleged above plaintiff has acquired a right of action against defendants in accordance with sections 3850 to 3862 of the California Labor Code. That decedent, Gilbert L. Ainge, died in Los Angeles October 27, 1942, and no personal representative was appointed until as aforesaid on or about September 24, 1947. The foregoing allegations were followed by a prayer for judgment.

[1] The first question presented is whether the complaint as against respondent executrix filed herein was fatally defective because it failed to contain an allegation that a claim was filed against the decedent's estate. It is conceded by appellant that no such claim has been filed or presented and that if, under the facts of this case, a claim against the estate was essential, then the complaint fails to state a cause of action as against respondent executrix and as to her the action may not be maintained. Morrison v. Land, 169 Cal. 580, 585, 147 P. 259.

In contending that it was not necessary to allege the filing of a verified claim under Probate Code, section, 707, appellant urges that the section just referred to provides that "all claims arising upon contract" must be filed or presented within the time prescribed by the Probate Code; that the claim here in question does not arise upon contract, but is based solely on negligence. It is appellant's further contention that the phrase "arising upon contract" as used in Probate Code section 707 refers to a contractual relationship existing between the decedent and the claimant, and that there was no such contractual relationship in the case at bar.

Respondents first assert that regardless of whether or not the instant claim is one contingent upon or incidental to a contract, a claim was required to be filed because of the provisions of section 716 of the Probate Code, which reads as follows: "*No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator,* except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid." (Emphasis added.)

Respondents urge that the present case does not fall within the only exception created by the last quoted Probate Code section. That the section applies to all claims, with a single exception, is clear and unambiguous, does not permit of judicial interpretation or construction, specifies but one exception, and that no other may be added under the guise of judicial construction. In support of their position, respondents cite the case of George v. McManus, 27 Cal.App. 414, at pages 417 and 418, 150 P. 73, at page 75, wherein it was held, "* * * That the cause of action constituted 'a claim or demand' against the estate of Joseph McManus, deceased, in our opinion, admits of no controversy. * * * Had his death occurred before the commencement of the action, clearly, under section 1500, Code of Civil Procedure (now section 716 of the Probate Code), it would, as a condition of maintaining the suit, have been necessary to present the same for allowance against his estate; and unless waived by a failure to plead non-compliance with the statute (Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561), such presentation and proof thereof was likewise necessary as a condition of recovery, notwithstanding the fact that

McManus died after the commencement of the action."

[2] However, in the case just cited the stated conclusion—that by reason of section 716 of the Probate Code, claims must be filed in all cases as a condition of maintaining suit, was arrived at without reference to section 707. We are persuaded that to determine the character of claims that must be presented as a prerequisite to maintaining an action, it is necessary to look to section 716 as modified by section 707. The former section, when properly construed, refers only to actions upon such claims as are required to be presented to the executor or administrator for allowance under section 707. In other words, section 716 simply means that when a claim is one "arising upon contract" (section 707) a claimant is required to make such presentation in order to preserve its validity as a claim against the estate. See 12 So. Calif. Law Review, pp. 430–434. We therefore hold that a claim is required to be presented against the estate only when the person presenting it is making some contractual claim against the funds or property of the estate. Thompson v. Byers, 116 Cal.App. 214, 218, 2 P.2d 496; Hardin v. Sin Claire, 115 Cal. 460, 463, 464, 47 P. 363; Kagee v. Bencich, 27 Cal.App. 2d 469, 471, 81 P.2d 265; Millar v. Millar, 51 Cal.App. 718, 728, 197 P. 811.

It therefore now becomes necessary to determine whether appellant's claim here under consideration was one "arising upon contract." In Hays v. Bank of America, 71 Cal.App.2d 301, 306, 162 P.2d 679, 682 (hearing denied, certiorari denied 328 U.S. 834, 66 S.Ct. 979, 90 L.Ed. 1610), it was held that section 707 of the Probate Code does not limit the necessity of filing claims to those which are specifically and wholly covered by contract; that it applies to claims that are "contingent" "upon contract" or "* * * when the liability is merely incidental to the contract and not specifically included therein."

Respondents urge that the right of appellant in the instant case to bring an action against an alleged negligent third person to recoup amounts paid out by it because of an injury to an employee is based upon and flows from the existence of two contracts. First, the injured party must be employed, i. e., there must have been a contract of employment between the injured party as employee and his employer. Second the insurance carrier must have issued a valid policy of workmen's compensation insurance to the employer covering the rights of the injured employee, which policy must be in effect at the time of the injury. And further, that appellant insurance carrier's right to institute this action is dependent upon the foregoing two contracts. Respondents assert that the existence of the two foregoing contracts as essential requisites to the instant action was recognized by appellant when it made allegations concerning these matters in its complaint.

Appellant, on the other hand, contends that the phrase "arising upon contract," as used in section 707 of the Probate Code, refers to a contractual relationship existing between the deceased and the claimant. That there was no such contractual relationship in this case, and that there is no liability created by statute between appellant and respondent herein. That any liability arises out of and is based solely upon the fact of the original traffic accident.

[3, 4] We are convinced that the phrase "arising upon contract" used in section 707 of the Probate Code refers to contracts to which the decedent was a party. In the case of Hays v. Bank of America, supra, relied upon by respondents, the contract in question was one entered into by the decedent, while in the instant case any query as to how the claim in question arose would have to be answered by recourse to the alleged negligent tort of the decedent, and not to any contract entered into by him with any one else. While it is true the employer and appellant insurer had a contractual relationship to the injured third party, which relationship entitled appellant to sue decedent or his estate, nevertheless the right to maintain the action does not arise out of any contract made by the decedent, but is based solely upon an alleged tort committed by the latter, and not upon any contract to

which he was a party. We therefore hold that appellant's claim is not one "arising upon contract" within the contemplation of Probate Code section 707, but is based upon and arises solely out of the alleged commission of a tort—negligently driving an automobile with resultant injuries to a pedestrian—and that there was no contractual relationship to which decedent was a party that required appellant to file a claim with the executrix of the estate as an essential prerequisite to instituting the present action. While appellant's claim may be "contingent" and "incidental" to a contract, it bears no such relationship to any contract to which decedent was a party, and therefore need not be filed in the probate proceedings as a prerequisite to the maintenance of the instant action.

Finally, we are confronted with the question of whether the statute of limitations barred the maintenance of the action here in question. It is conceded that the applicable statute of limitations is subdivision 1 of section 338 of the Code of Civil Procedure, which provides for a three-year limitation period. Appellant contends that the three-year period starts on the date of each payment of compensation. We shall first give consideration to the applicability of the statute as to respondent Fannie S. Ainge as an individual.

Labor Code, Division 4, Part 1, Chapter 5, sections 3850 to 3862, provides for the rights of an employer and an employer's insurance carrier against a negligent third person who causes compensable injury to an employee, while the latter is within the scope of his employment. Section 3852 establishes the right of an employer to sue a third party tort-feasor, and among other provisions, states: "Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, may likewise make a claim or bring an action against such third person." Labor Code section 3850 defines "employer" as including the latter's insurance carrier.

[5-10] Manifestly, the right to commence an action against a third party tort-feasor arises immediately when the employer (or insurance carrier) "pays, or becomes obligated to pay" workmen's compensation benefits to the injured employee. The obligation of the employer arises on the receipt of compensable injury by the employee, and the statute of limitations prescribing the time within which application for compensation must be made to the Industrial Accident Commission commences to run from the time of the accident. Ehrhart v. Industrial Accident Comm., 172 Cal. 621, 624, 158 P. 193, Ann.Cas.1917E, 465. Commencement of proceedings before the commission does not create the obligation. It already exists, and the appropriate proceedings merely determine its existence. It is not essential that the employer or insurance carrier should actually have made any payments of compensation benefits to the employee in order to maintain an action against the alleged tort-feasor. Merino v. Pacific Coast Borax Co., 124 Cal. App. 336, 344, 12 P.2d 458. The complaint contains no allegations to toll the running of the statute against the defendant individual. Therefore as to her the action could "* * * only be commenced within the periods prescribed in this title, after the cause of action shall have accrued." Code Civ.Proc. sec. 312. When suit may be maintained thereon, a cause of action has accrued, and the statute of limitations commences to run at the date of accrual. Leahey v. Department of Water & Power, 76 Cal.App.2d 281, 286, 173 P.2d 69; Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 504, 506, 46 P.2d 242. In Irvine v. Bossen, 25 Cal.2d 652, 658, 155 P.2d 9, 13, it was said: "It is a fundamental principle in determining when the statute of limitation commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available."

In order to uphold appellant's contention that the statute of limitations would begin to run on the date of each payment of compensation, it would be necessary to ignore these fundamental rules. A perusal of sections 3850 to 3862 would indicate that the Labor Code contemplates but one action for recovery against a third party tort-feasor. In the case at bar the action accrued at the time of the accident, because at that time a remedy was available. Irvine

v. Bossen, supra, 25 Cal.2d page 658, 155 P.2d page 13. The right to bring a suit on the completely existing cause of action does not depend upon whether the insurance carrier has or has not made any payment to the injured employee under an award. Merino v. Pacific Coast Borax Co., supra, 124 Cal.App. page 344, 12 P.2d page 461.

In the case now engaging our attention the complaint alleges that the accident as the result of which the employee received compensable injury occurred on March 24, 1942, and that an award was made by the commission against the insurance carrier, under which it made payments to and on behalf of the employee, on August 12, 1942. The complaint was not filed until March 31, 1948, more than five years after the award and six years after the accident. Since the statute commenced to run "from the time a cause of action accrues and it invariably accrues when there is a remedy available," Irvine v. Bossen, supra, 25 Cal.2d page 658, 155 P.2d page 13, it is at once apparent that the instant action, as to the individual respondent, was commenced too late.

In so far as the cause of action against respondent executrix is concerned, a different situation is presented. The accident, as pointed out, occurred March 27, 1942. The alleged tort-feasor, Gilbert Lewis Ainge, died on October 27, 1942, and letters testamentary were issued on September 24, 1947. The instant action was commenced on March 31, 1948.

Section 3851 of the Labor Code provides: "The death of the employee *or of any other person,* does not abate any right of action established by this chapter." (Emphasis added.) And the statute of limitations is expressly suspended as to respondent executrix by section 353 of the Code of Civil Procedure, which states: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[11] The action against the executrix having been commenced within a year after the issuance of letters testamentary, the statute of limitations had not run as to her.

For the foregoing reasons, the judgment of dismissal as to the individual defendant Fannie S. Ainge is affirmed, and as to the defendant executrix the judgment is reversed and the cause remanded with directions to overrule the general demurrer of such defendant and allow her a reasonable time within which to answer plaintiff's complaint. Neither party to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

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93 Cal.App.2d 750

In re CARR'S ESTATE.

Civ. 14053.

District Court of Appeal, First District,
Division 2, California.

Sept. 26, 1949.

Hearing Denied Nov. 21, 1949.

Viola C. Carr died leaving two holographic wills bearing the same date, each of which had codicils of a later date, and a contest was filed by Adelina W. Kennedy and others, as heirs at law.

The Superior Court of San Benito County, Ranse R. Sischo, J., admitted the will bearing the latest codicil in favor of Elizabeth Carr Sullivan, and H. G. Jorgensen and others appealed.

The District Court of Appeal, Goodell, J., reversed the judgment and held that the will bearing the codicil of latest date was entitled to probate.

1. Wills 🔑98

Where testator left two holographic wills bearing the same date, a writing appended to one will making a disposition of the residuary estate which could not be connected with or identified with the first will applied only to the will on which the addition was written, and, if truly dated, established that will without further proof.

2. Wills ⚿130

The date which a holographic will or codicil bears is assumed to be its true date. Code Civ.Proc. §§ 1961, 1963, subd. 3.

3. Wills ⚿184

Where two holographic wills bore the same date, and first will had clause revoking all others and had later appended holographic codicils of dates later than that of second will, but second will had a holographic codicil of latest date making entirely different disposition of property than did first will or codicils, second will and codicil were entitled to probate as the last will. Code Civ.Proc. §§ 1961, 1963, subd. 3; Probate Code, § 161.

◆

Hudson, Martin, Ferrante & Street, Monterey, for appellants.

Mahaney, McDonald & Isenberg, San Francisco, for respondents.

GOODELL, Justice.

Viola C. Carr died in Monterey on August 4, 1943, aged over 90 years. She was a widow and had no children or grandchildren. Her heirs at law are two nieces, Adelina W. Kennedy and Alice Kennedy Shallberg, and a nephew, Phillip Sheridan Kennedy. The respondent Elizabeth Carr Sullivan was her husband's sister.

Mrs. Carr had lived in Monterey for many years. Carmel Martin had been a close family friend and legal adviser.

Decedent left two wills, both dated January 16, 1935 and both entirely written, dated and signed by her. In one the respondent Elizabeth Carr Sullivan is named as residuary legatee and devisee and in the other Carmel Martin and family are named as residuary legatees and devisees.

To the Sullivan will there are two codicils, dated June 18 and 19, 1935; to the Martin will there is a codicil dated September 18, 1937. All three codicils are entirely written, dated and signed by the decedent.

Both wills and their codicils were laid before the court by an amended petition wherein the executor alleged that he believed the Martin will and codicil to be, and the Sullivan will and codicils not to be, the last will and testament. The three heirs at law filed a contest to the Martin will on the ground of undue influence. The court, with both wills before it, admitted the Martin will and rejected the Sullivan will, but on appeal that order was reversed on the ground that no will could be admitted while a contest thereof was pending. In re Estate of Carr, 82 Cal.App.2d 780, 187 P.2d 912.

When the contest came on for trial there was submitted to the jury, in addition to the issue of undue influence, the issue as to which of the two sets of testamentary documents was the last will and testament. By one verdict the jury upheld the Martin will as against the charge of undue influence and by another verdict it determined that the Sullivan will and its two codicils constituted the last will and testament.

No appeal was taken on the undue influence issue. On the verdict in favor of Elizabeth Carr Sullivan a judgment was entered and this appeal followed.

Both wills and all three codicils were written on letter paper apparently taken from ordinary writing tablets.

In each of the wills of January 16 there are six provisions in substantially the same language but they are not material here. They are followed by the disposition of the residue, in one will to respondent, in the other to Carmel Martin and family.

The Sullivan will contains the following clause not found in the Martin will: "I hereby revoke all wills and codicils to wills heretofore made by me."

The Sullivan will, written on two sheets, is followed by a third sheet reading:

"Monterey California
"June 18-1935

"I, Viola C. Carr do hereby make this codicil to my last will dated January 16, 1935, and hereby confirm my said last will in all respects, save and except that all money or cash that may be in my safe or on my person at the time of my death, shall be used by my executors named in my said last will to pay my funeral and burial expenses, the expenses of my last illness and my just debts and the costs of the administration of my estate. Should there be any balance remaining after said disbursements, then I give to my friend Carmel Martin all of the remainder of said cash or money

"Viola C. Carr"

"I also give to Carmel Martin all moneys remaining unpaid on the contract of sale of my property to T. A. Work

"Viola C. Carr

"June 19-1935"

On the lower part of the second page of the Martin will immediately beneath the testatrix' signature thereto is the following: "September 18th 1937 I will all my personal belongings to Carmel Martin and family Viola C. Carr".

Carmel Martin testified that Mrs. Carr sent for him, and at her home he wrote out and she later copied the form which became the Sullivan will. The next day it was left at his office. Again she sent for him and said she desired to make the changes found in the codicil of June 18. To his statement that "Just because I am your friend and your attorney it doesn't mean you should make any provisions for me" she replied "That is the way I want it", and he wrote out that form, which she copied. The next day she added the provision respecting the contract. The Sullivan will with its two codicils remained in the safe in his office from the time they were made until after decedent's death.

Albert Elashio, a close friend of Mrs. Carr, testified that about a year before her death she told him that a strongbox in her home contained "a will paper and some deeds" and requested him to take the box immediately on her death to Carmel Martin. He did so, and Carmel Martin testified that he first saw the Martin will on the day of decedent's death. It was in the box, in an envelope marked "My will Viola C. Carr".

The question for decision is whether there is any evidence on which the jury could have found the Sullivan documents to constitute the last will and testament.

In re Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am.St.Rep. 100, presented the interesting situation where an abortive holographic will written on one side of a piece of paper was held to have been incorporated by a codicil written on the other side of the paper. In so holding the court, 151 Cal. at page 80, 90 P. at page 193, said: "In Jarman on Wills (p. 153) it is said: 'It seems to have been considered, in the ecclesiastical courts at least, that the fact of the codicil being written on the same piece of paper as the prior will (though it does not in terms refer to such will) sufficiently indicates an intention to treat that as the subsisting will.' In Hobart v. Hobart, 154 Ill. 610, 39 N.E. 581, 45 Am.St.Rep. 151, the court said 'Where the codicil is written on the same paper as the will, or clearly and unmistakably refers to the will, so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof, except such portions thereof as are revoked or altered by the codicil.'"

In re Estate of Cazaurang, 42 Cal.App.2d 796, 110 P.2d 138, followed the same rule. There an holographic codicil was written in 1929 on the bottom of an holographic will made in 1927, which latter will had been revoked by an intervening witnessed will made in 1928. It was held that the 1929 codicil republished and reexecuted the 1927 will as the last will. The court said, 42 Cal.App.2d at page 800, 110 P.2d at page 140, that the testator "could hardly have intended it merely as a change in his 1928 will because he made no reference to that instrument *by attachment or otherwise.*" (Emphasis added.) A hearing by the Supreme Court was denied.

The fact that the codicil dated September 18, 1937, is written upon the Martin will brings this case squarely within the rule of the Plumel and Cazaurang cases.

It is true there are two factors in the Plumel case which are not found herein.

(1st) There the second writing was labeled "codicil", while here the writing of September 18, 1937 was not. The same factor was likewise absent from the Cazaurang case. Such absence, however, is not important. In re Estate of Atkinson, 110 Cal.App. 499, 502-503, 294 P. 425. (2nd) In the Plumel case no other will was produced; here there was another will but it antedated the codicil of September 18, 1937 just as in the Cazaurang case, but there was *no later will* and in the latter opinion it was pointed out that the 1929 codicil could not have related to the earlier (1928) will because it made no reference to it "by attachment or otherwise". The same comment applies here with equal force. There is no evidence in this record from which the jury could have found that the writing of September 18, 1937, was connected or identified with the Sullivan will.

The Plumel case has been repeatedly followed, In re Estate of Cross, 163 Cal. 778, 781, 127 P. 70; Simon v. Grayson, 15 Cal.2d 531, 533, 534, 102 P.2d 1081; In re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874; In re Estate of Smith, 31 Cal.2d 563, 568, 191 P.2d 413; In re Estate of Sullivan, 94 Cal.App. 674, 678, 679, 271 P. 753; In re Estate of Cazaurang, supra, and stands as unquestioned authority in this state.

[1] Under the rule of that case the codicil of September 18, 1937, must be held on this record to relate and apply only to the will on which it is written. If truly dated, it "establishes [that] will without further proof", Hobart v. Hobart, supra [154 Id. 610, 39 N.E. 582], as of its date, 26 Cal.Jur. p. 829, namely, September 18, 1937.

As that date is two years and three months later than the Sullivan codicils it is difficult to see how the jury could have found the Sullivan documents to be the last will unless it concluded that the codicil written on the Martin will was incorrectly dated, of which there is no evidence whatever.

[2] The date which an holographic will or codicil bears is presumed to be its true date. In re Estate of Fay, 145 Cal. 82, 84, 85, 78 P. 340, 104 Am.St.Rep. 17; In re Estate of Wilkinson, 113 Cal.App. 645, 648, 298 P. 1037.

The statute itself creates a disputable presumption "That a writing is truly dated", Code Civ.Proc. sec. 1963, subd. 23, and section 1961 provides that "unless * * * controverted the jury are bound to find according to the presumption." See, also, Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919.

With respect to the Sullivan documents, Carmel Martin's testimony is undisputed that they were written on the dates they bear. With respect to the Martin will, there is no evidence whatever to dispel the presumption that the codicil was written on September 18, 1937.

[3] It follows that there was no issue of fact for the jury. The motion for a directed verdict should have been granted and the jury instructed that the codicil of September 18, 1937, established the Martin will (as of the latter date) as the last will and testament. The motion for judgment notwithstanding the verdict, made on the same ground, should likewise have been granted.

Respondent contends that the revocation clause, contained in the Sullivan will but not in the Martin will, left a question of fact for the jury. It could not have done so since under the reasoning of the Cazaurang case the later codicil republished the earlier will to which it was physically attached.

Respondent also claims that the codicil of September 18, 1937, modifies the Sullivan will instead of republishing the Martin will. The argument is that the language "I will all my personal belongings to Carmel Martin and family" has no meaning or effect if applied to the Martin will. That language created a distinct bequest of chattels, "personal belongings", susceptible of identification and manual delivery whereas the residuary clause "embraces only that which remains after all the bequests of the will are discharged". Sec. 161, Probate Code. The two testamentary dispositions are quite distinct; each has a decidedly different legal meaning and effect.

Other points raised by both sides need not be discussed in view of the conclusion already reached herein.

The judgment appealed from is reversed with the direction to the trial court to admit to probate as the last will and testament the document dated January 16, 1935 of which the writing of September 18, 1937 is a part, and to deny probate to the document dated January 16, 1935 of which the writings of June 18, 1935 and June 19, 1935 are parts.

NOURSE, P. J., concurs.

DOOLING J., having heard and denied a motion to dismiss the contest herein while sitting in the Superior Court, refrains from participating in this decision.

Hearing denied; CARTER, J., dissenting.

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93 Cal.App.2d 834

PEOPLE v. MEARSE.

Cr. 4371.

District Court of Appeal, Second District,
Division 3, California.
Sept. 30, 1949.

Benjamin Mearse was convicted in the Superior Court of Los Angeles County, Frederick F. Houser, J., of assault with a deadly weapon and he appealed.

The District Court of Appeal, Wood, J., held that the evidence sustained the conviction and affirmed the judgment and order denying a motion for new trial and dismissed the appeal from the sentence.

1. Assault and battery 🔑92

Acts and language used while carrying a gun may constitute an admission by conduct that gun was loaded so as to sustain conviction of assault with a deadly weapon.

2. Assault and battery 🔑92

In prosecution for assault with a deadly weapon, defendant's statement immediately after firing gun that he was going to give it to alleged victim and his repeated warnings, while pursuing victim, to halt or he would shoot were sufficient in connection with the other circumstances to support a finding that gun was loaded.

3. Assault and battery 🔑92

Evidence that defendant with a loaded gun pursued another sustained conviction of assault with a deadly weapon, in that it showed an attempt to commit a violent injury on person pursued and present ability to do so, though no attempt to discharge gun while pursuing alleged victim was shown. Pen.Code, § 240.

4. Criminal law 🔑1023(10)

A sentence is not an appealable order. Pen.Code, § 1237.

Philip M. Schwabacher, Lancaster, for appellant.

Fred N. Howser, Attorney General, Elizabeth Miller, Deputy Attorney General, for respondent.

WOOD, Justice.

Defendant was charged in count one of an information with assault with a deadly weapon with intent to commit murder, and in count two thereof with assault with a deadly weapon. Trial by jury was waived. Defendant was found not guilty as charged in count one, and guilty as charged in count two. He appeals from the judgment and sentence and from the order denying his motion for a new trial.

Appellant contends that the verdict is contrary to law and the evidence.

On August 2, 1948, while Leon Jefferson was lying on a bed in his trailer home in Lancaster he was shot by an unknown assailant. Defendant herein was charged with that crime in count one of this case and, as above stated, was found not guilty. Count two herein relates to an incident which occurred in the early morning of

September 15, 1948 (soon after midnight), at which time defendant allegedly assaulted Jefferson with a shotgun. The defendant resided with Mr. and Mrs. Barker in a tent about six miles from Lancaster. On September 14, 1948, about 7:30 p. m. Jefferson and one Ramsey went in Ramsey's automobile to the Barker tent. Mr. and Mrs. Barker and defendant got into the automobile with Jefferson and Ramsey, and they all remained in the parked automobile for some time and drank beer. Later in the evening Mr. Barker left the automobile and went into the tent. About 11:30 p. m. Jefferson got out of the automobile (leaving Mrs. Barker, Ramsey, and the defendant in the automobile) and went into the tent where he talked to Mr. Barker. Later Mrs. Barker left the automobile, entered the tent, and went through it to its opposite entrance. Then she said, "What you doing around here, Ben? [apparently addressing the defendant, Benjamin Mearse]." Jefferson then said, "What is this setup?—I can't forget I got plugged about a month ago," and thereupon he left the tent and went back to the automobile. About five minutes later he saw the defendant come out of the tent and walk in the direction of the house where defendant's father lived, which house was about 600 feet from the Barker tent. Jefferson then returned to the tent. Defendant went into his father's house and took therefrom an unloaded single barrel .16 gauge shotgun and two .16 gauge shotgun shells. He then returned to a place near the Barker tent and fired the gun. Defendant testified that he fired toward the ground. Jefferson testified that he heard a shot, and then heard the defendant say: "You said I plugged you a month ago. You better come out because I am going to give it to you tonight." Jefferson ran out of the tent and in the direction of the house of defendant's father. Defendant chased him, and while doing so the defendant carried the shotgun. Jefferson testified that while running he did not look back, but several times defendant said "Halt or I'll shoot," and that it seemed, "from his voice," the defendant was running right behind him; that the witness ran directly to the house of defendant's father, but the defendant "stopped somewhere between [the tent and the house]." The defendant testified that he chased Jefferson about 30 feet, and told him to "halt there" but he did not tell him he would shoot "because I didn't have nothing in the gun"; that he knew there was nothing in the gun "because I looked in it." Thereafter Mrs. Barker ran to the house of defendant's father and the father then went to the Barker tent. The father testified that when he arrived at the tent, he saw defendant standing behind Ramsey's automobile with the gun in his hand; that he asked defendant for the gun, and defendant handed it to him. Defendant, at his father's request, then went to the father's house. The father also returned to his house, put the shot gun in his bedroom, and went in his automobile to the sheriff's office in Lancaster. After talking to deputy sheriffs there he returned home, and about 20 minutes later two officers arrived. They asked for the gun and he gave it to them. At that time an unexploded shell was in the gun.

Appellant asserts that there was no adequate proof that the gun was loaded at the time he was running after Jefferson. He testified that while he was near the tent he fired the gun toward the ground, and that he then ejected the empty shell but he did not reload the gun. On the evening the gun was fired an empty shell was found by an officer about 35 feet from the tent, and that shell was one of the two shells taken by defendant from his father's house. When defendant's father gave the gun to the officers it was loaded with the other shell which defendant had taken from the house. Defendant testified that he reloaded the gun, but said that he did it after he had chased Jefferson. He gave contradictory testimony, however, as to when (after chasing Jefferson) he reloaded the gun. He testified that he placed the second shell in the gun when he "went back away from him [Jefferson]." He later testified that he put the shell in the gun while his father was walking "over there [to the tent]." It also appears that his testimony, regarding the reloading of the gun, was inconsistent with his statement to the deputy sheriff prior to the trial. A deputy sheriff testified that, in a conversation with defendant prior to the trial, the defendant said (regarding the reloading of the gun): "Well, I must have done it, but I don't remember doing it." The evidence that defendant told Jefferson to halt or "I'll shoot" indicates that the gun was loaded when defendant made that command and threat. A further indication that the gun was loaded was defendant's statement to Jefferson after he had fired the first shell, that "You said I plugged you a month ago. * * * I am going to give it to you tonight." Defendant testified that he got the gun because he was mad at Jefferson. A deputy sheriff testified that defendant told him that one reason he did not like Jefferson was that Jefferson "was messing around" Mrs. Barker. In order to get the gun and ammunition and return to the tent defendant walked about 1200 feet. According to defendant's testimony, above referred to, he reloaded the gun after he had given up his pursuit of Jefferson. It is to be noted, however, that he offered no explanation for reloading the gun at that time. Defendant, after chasing Jefferson, returned to Ramsey's automobile and demanded that Ramsey open the automobile trunk, and Ramsey opened it. Defendant testified that he looked in the automobile trunk because he thought Jefferson might be there. As above shown, defendant was standing by the automobile, with the loaded gun in his hand, when his father arrived.

[1, 2] The acts and language used by an accused person while carrying a gun may constitute an admission by conduct that the gun is loaded. See People v. Hall, 87 Cal.App. 634, 636, 262 P. 50. In People v. Montgomery, 15 Cal.App. 315, 114 P. 792, the charge was assault with a deadly weapon. The defendant therein had leveled a rifle at one Freehardt and said "I have got you now." There was no direct evidence that the rifle was loaded. It was held therein that whether the gun was loaded was a question of fact for the jury to be determined from the circumstances. It was stated therein, 15 Cal.App. at page 319, 114 P. at page 794, "We think there were facts and circumstances sufficient to justify the implied finding that the gun was loaded when defendant said to Freehardt, 'I have got you now.'" In the present case the statement of defendant, "I am going to give it to you tonight," made immediately after the firing of the gun, and the several statements of defendant, "Halt or I'll shoot," made while pursuing Jefferson, when considered in connection with all the other circumstances, were sufficient to support a finding that the gun was loaded.

[3] Appellant also asserts, in effect, there was no evidence that he made an attempt to discharge the gun while pursuing Jefferson. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Penal Code, sec. 240. The evidence was sufficient to support the implied finding that defendant attempted to commit a violent injury on the person of Jefferson and that he had the present ability to do so. Cf. People v. McCoy, 25 Cal.2d 177, 189, 153 P.2d 315; People v. Womble, 67 Cal.App.2d 885, 889, 155 P.2d 838; People v. Hunter, 71 Cal.App. 315, 319, 235 P. 67.

[4] The purported appeal from the sentence is dismissed. Penal Code, sec. 1237; see, People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857. The judgment and order are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

93 Cal.App.2d 827

ROTEA v. ROTEA.

Civ. 16828.

District Court of Appeal, Second District, Division 3, California.

Sept. 30, 1949.

Ireneo Rotea, claiming under a quitclaim deed from defendant's husband, sued Teresa Rotea to quiet title to property claimed by defendant under a divorce decree.

The Superior Court of Los Angeles County, Ingall W. Bull, J., entered judgment for plaintiff, and defendant appealed.

The District Court of Appeal, Wood, J., reversed the judgment holding that plaintiff was not a bona fide purchaser and therefore took the deed subject to any decree which would be made in the divorce action.

1. Vendor and purchaser 🔑242

Party claiming undivided one-half interest in realty had burden of establishing his status of bona fide purchaser from grantor without notice of claim of grantor's wife that realty should be awarded to her in divorce proceeding.

2. Quieting title 🔑47(2)

Finding of trial court that it was not true that plaintiff received deed to realty with full knowledge of claim of grantor's wife in divorce action that realty was community property, would not establish that plaintiff was a bona fide purchaser.

3. Trial 🔑396(4)

If there is evidence upon question of constructive notice, it is not sufficient to find merely that a defendant had no actual notice of existence of an unrecorded instrument, but court must also find upon question of constructive notice.

4. Lis pendens 🔑24(1)

Grantee of interest in realty who was not a bona fide purchaser took deed subject to judgment thereafter to be rendered in divorce action by grantor's wife against grantor.

5. Divorce 🔑168

An interlocutory divorce decree cannot be attacked in another proceeding unless its invalidity is apparent on its face.

6. Evidence 🔑461(4)

Although title to realty is acquired under a joint tenancy deed, it may be shown by parol evidence that realty is in fact community property.

7. Divorce 🔑255

Where pleadings in divorce action by grantor's wife against grantor presented issue as to whether realty was community property and parties entered into stipulation that property might be awarded to wife on condition that she pay $1,500 to grantor, grantee who took deed with knowledge of claims of grantor's wife in realty could not attack power of court in divorce action to award realty to wife on ground that grantor and his wife held realty as joint tenants.

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Claude A. Watson, Edward P. Hart, Henry F. Walker, Los Angeles, for appellant.

Willedd Andrews, Los Angeles, for respondent.

WOOD, Justice.

Action to quiet title to an undivided one-half interest in a house and lot. Defendant appeals from the judgment in favor of plaintiff.

Ireneo Rotea, the plaintiff, who is a brother of Tiburcio Rotea, claimed title under a quitclaim deed executed by Tiburcio. Teresa Rotea, the defendant, who was formerly the wife of Tiburcio Rotea, claimed title under a divorce decree which awarded the property to her. Prior to the time Teresa and Tiburcio were married she had entered into a contract for the purchase of the property here involved, and at the time of the marriage she had paid about $1100 on the purchase price but at said time the payments under the contract were in default to the extent of approximately $300. After the marriage the said arrearage under the contract, and also certain improvements on the property, were paid from the earnings of Tiburcio. Thereafter, in 1934, the property was conveyed by grant deed to Teresa and Tiburcio as joint tenants. In September, 1946, she commenced a divorce action, upon the ground of extreme cruelty, and alleged that the property involved here was community property, and she asked that it be awarded to her. Tiburcio answered, denying that it was community property; and he filed a cross-complaint alleging that the property was held by them in joint tenancy, and he asked for an equal division of the property. She answered the cross-complaint and alleged that it was her separate property. This reference to those pleadings is for the purpose of indicating that the divorce action presented questions as to the character and ownership of the property involved here.

The plaintiff, Ireneo, lived at the home of Tiburcio and Teresa (the property involved here) during 1945 and 1946, and he lived in said house thereafter until the trial of this quiet title action was commenced (March 24, 1948). On August 30, 1947, Tiburcio delivered to Ireneo a quitclaim deed, whereby Tiburcio quitclaimed to Ireneo an undivided one-half interest in said property. The deed recited that the consideration for it was $1500. Ireneo testified that he paid medical bills, alimony payments, attorney's fees and costs for Tiburcio amounting to $997, and that he had paid other bills for his brother amounting to approximately $700; and that these payments were the consideration for the deed. The divorce case was tried on December 9, 1947, and on said day an interlocutory judgment of divorce was awarded to Teresa. That judgment became final before the commencement of this quiet title action on January 23, 1948. The judgment in the divorce action recited, in part, as follows: "* * * the defendant having stipulated and consented in open court to a partition of the real property hereinafter described, and said defendant having stipulated and consented to the award by the court of said real property, upon the condition that the plaintiff pay to the defendant the sum of $1500.00, the court having received and approved said stipulation and consent. It is therefore * * * decreed that the real property [property involved here] * * * is hereby awarded to the plaintiff, Teresa Rotea, upon the condition that the plaintiff pay to the defendant, Tiburcio Rotea, the sum of $1500.00 on or before February 9, 1948. It is further * * * decreed that upon the payment of said $1500.00 by the plaintiff to the defendant, the defendant shall cause to be delivered to the plaintiff any * * * documents which may be necessary to vest title of said real property in the name of the plaintiff. * * * It is further * * * decreed that the defendant vacate said real property on or before February 9, 1948, and surrender to the plaintiff possession of said real property together with the keys thereto on or before February 9, 1948."

The time for payment of the $1500 was extended by the court, permission was granted to deposit said amount with the clerk of the court, and said amount was so deposited on March 25, 1948.

As above stated, respondent herein (Ireneo) relies upon his quitclaim deed as the basis for the judgment which was in his favor. He argues that, since the property had been conveyed to Tiburcio and Teresa in joint tenancy, the property was held by them in joint tenancy, and the court did not have power in the divorce action to make an award of such property; and that he is not bound by the judgment therein because he was not a party to that action.

Appellant contends that since the divorce decree had become final it was a determination of the matter of title as between her (Teresa) and Tiburcio; that since the divorce action involved issues as to whether the property was separate or community or joint tenancy property, and since findings in the divorce action were waived, and since all intendments are in favor of the judgment therein, it is to be assumed that the trial court in the divorce action found that it was community property. It is also contended that Ireneo took his deed with notice of the divorce action and subject to the judgment therein; that since no invalidity of the divorce decree appears upon its face, that decree cannot be attacked in this proceeding.

Ireneo testified that in September, 1946, after the divorce papers had been served on Tiburcio, he (Tiburcio) told him that if he would help Tiburcio pay all the expenses, the attorney's fees, and the costs, he (Tiburcio) would "sign his half interest in the place" to Ireneo in repayment of these amounts and other amounts which he had previously paid for him; that he (Ireneo) paid those bills; that he received the quitclaim deed on August 30, 1947, and he lived in the house from that time until the day the trial of the present action commenced (March 24, 1948); that he did not leave the place voluntarily, but the sheriff told him on that morning that he was taking possession of the property under a writ issued in the divorce case; that in 1946 he was in the business of helping Mexicans to become American citizens, and that he was paid by those whom he helped; that he was present in court at proceedings in the divorce case in November, 1946, in June, 1947, and in October, 1947; and that, in connection with proceedings in the divorce case, he was in the corridor outside the court room in September, 1947, and on the 8th and 9th days of December, 1947. He also testified that he retained and paid the attorney who represented Tiburcio in the divorce case.

Tiburcio corroborated Ireneo's testimony regarding the payments and the deed. He also testified that he had been sick and unable to work since September, 1947.

A representative of Tiburcio's employer testified that the employer paid Tiburcio as follows: $2,407.34 in 1945; $1,971.57 in 1946; and $2,646.28 in 1947 (to September 29th).

Teresa testified that Ireneo lived at the home of Teresa and Tiburcio during 1945 and 1946; and that during that time he was not employed and he was supported by Tiburcio.

[1-4] It is undisputed that for approximately a year before Ireneo received his quitclaim deed he had actual knowledge of the pendency of the divorce action. Before he received his deed he had employed the attorney for Tiburcio and had attended court proceedings in the divorce action. The burden was upon Ireneo to establish his status of bona fide purchaser without notice of Teresa's claim that the property should be awarded to her. See McLane v. Storr, 75 Cal.App.2d 459, 464, 171 P.2d 534. There was no finding that Ireneo was a bona fide purchaser without such notice. The court did find "that the claims referred to in the Answer of the defendant are not true." One of the allegations of the answer was that "plaintiff received a deed from said Tiburcio Rotea with full knowledge of defendant's claim that said property was community property and without the consent or permission or signature of defendant herein." It therefore appears that the court did find that it was not true that Ireneo received a deed from Tiburcio with full knowledge of defendant's claim that said property was community property. Such a finding is not an adequate finding as to whether Ireneo was a bona fide purchaser. In Olson v. Cornwell, 134 Cal.App. 419, it was said at page 429, 25 P.2d 879, at page 883: "[I]f there is evidence upon the question of constructive notice it is not sufficient to find merely that a defendant had no actual notice of the existence of an unrecorded instrument, but the court must also find upon the question of constructive notice; otherwise the judgment in favor of a defendant cannot be sustained." A finding that Ireneo was a bona fide purchaser would not have been sustained by the evidence. He did not testify that he did not have knowledge, before he received his deed, that she was claiming the property. He took his quitclaim deed from Tiburcio subject to the judgment thereafter to be rendered in the divorce action. The interlocutory decree of divorce states that Tiburcio stipulated and consented to a partition and award of the real property by the court upon the condition that Teresa pay Tiburcio $1500. By the decree therein, upon such stipulation and consent, the property was awarded to Teresa upon said condition. Although the condition was not complied with in the time stated in the decree, the time for compliance was extended and the $1500 was deposited in court. That decree became final before

this action was commenced. The title to the property here involved, as between Teresa and Tiburcio, was determined finally by that decree. Ireneo's quitclaim deed was subject to the final judgment therein that the property was awarded to Teresa. He was not a bona fide purchaser without notice of her claim that the property should be awarded to her.

[5] As stated in McGee v. Hoffman, 46 Cal.App. 508, at page 511, 189 P. 298, at page 300: "This interlocutory decree cannot be attacked in this proceeding unless its invalidity is apparent upon its face." It does not appear from the face of the divorce decree, or at all, that there is any invalidity therein.

[6, 7] Respondent asserts that the trial court in the divorce action did not have power to award the property, even to Teresa, because the property was in joint tenancy. Even though the title to real property is acquired under a joint tenancy deed, it may be shown by parol evidence that the property is in fact community property. Huber v. Huber, 27 Cal.2d 784, 788, 167 P.2d 708. As above stated, the pleadings in the divorce action presented the issue as to whether the property here involved was community property. As above shown, Tiburcio and Teresa stipulated in the divorce action that the court therein might award the property to plaintiff upon the condition that plaintiff pay $1500 to defendant.

Ireneo, by reason of his quitclaim deed from Tiburcio, stands in the same position with reference to the title to the property that Tiburcio would have stood in if he had not made the quitclaim deed. According to the provisions of the judgment in the divorce action, Tiburcio has a lien upon the property in the amount of $1500. That amount has been deposited by Teresa with the clerk of the superior court, but the record on appeal does not show upon what conditions it was deposited. The judgment in the present action, that Ireneo is now and since August 30, 1947, has been the owner of and entitled to the possession of an undivided one-half interest in said real property involved herein, should be reversed; and further proceedings should be had in the superior court, not inconsistent with the views expressed in this opinion, quieting the title to said property, and determining the issue as to whom the $1500 is payable if said amount has not been paid, and determining the issue as to who has a lien upon the property to secure the payment of said amount if said amount has not been paid.

The purported appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed, with the direction that further proceedings be had in the superior court, not inconsistent with the views expressed herein, determining the issues involved.

SHINN, P. J., and VALLÉE, J., concur.

93 Cal.App.2d 846

THOMAS v. JUAREZ.

Civ. 17068.

District Court of Appeal, Second District, Division 2, California.

Oct. 3, 1949.

John G. Thomas sued J. Juarez for an accounting under articles of copartnership for operation of an automobile parking station and dissolution of and a winding up of its affairs.

The Superior Court of Los Angeles County, William M. Byrne, J., rendered judgment for plaintiff and the defendant appeals.

The District Court of Appeal, Moore, P. J., affirmed, holding that the partnership had not been terminated by articles subsequently entered into after the original articles.

1. Partnership 🔑261

Modification of articles of copartnership for operating an automobile parking station did not effect a termination of the relationship established by the original articles where the modification provided that all agreements were to remain in full effect and the only substantial modification effected was the manner of payment and the sums to be paid to plaintiff. Civ.Code, § 2401(4).

2. Partnership ⚷17

Existence of a partnership depends primarily upon intention of the parties as ascertained from their writings and the surrounding circumstances.

3. Appeal and error ⚷1010(1)

A finding with respect to an ambiguous or disputed contract based upon subtantial evidence that is consistent with the parties' intention will not be upset on appeal even though the appellate court might opine that another finding could as wisely have been made.

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Theodore R. Coomber, Los Angeles, for appellant.

Haas & Home and John B. Haas, Los Angeles, for respondent.

MOORE, Presiding Justice.

On January 8, 1940, the parties to this action executed articles of copartnership for the purpose of operating an automobile parking station and thereafter transacted the partnership's business. On March 8, 1943, the articles were modified by a writing which provided that (1) at the close of the war respondent might check the business done for five months; (2) during such five months respondent should receive one fifth of the gross receipts less certain maintenance charges; (3) thereafter an amount equal to the monthly average sum paid respondent during the five months should be paid to him; (4) the latter should be relieved of all responsibility for the obligations of the "auto park."

By a third instrument executed October 25, 1945, the March writing was so modified as to substitute the following covenants for the first three above enumerated, as follows: (1) appellant would pay respondent $40 monthly for one year provided that within one month after the end of that year the monthly sum to be paid respondent would be agreed upon and if the parties could not agree within such month, respondent should be privileged to check the business for two months during which respondent should receive one sixth of the monthly gross receipts less specified maintenance charges; (2) upon the sale of the lot respondent should receive one half of the proceeds; (3) except as modified by this writing the articles and their March modification should remain in force. The parties never arrived at an agreement as to the moneys to be paid during the year following October, 1946. Appellant paid no sums to respondent and stated that no amount would be paid if the latter checked the business. In addition to the foregoing facts the court found that the parking lot is an asset of an existing partnership and that appellant has rendered no accounting thereof. Judgment followed dissolving the partnership and winding up its affairs.

[1] Appellant bases his demand for a reversal upon the novel proposition that the partnership was dissolved by the agreement of March 8, 1943. Such contention is confuted by the preamble of such agreement which declares: "It is the desire of the parties hereto to make and enter into a further modification of said articles of copartnership," and by the covenant "that as long as the terms and conditions herein set out are kept and performed" appellant shall have control of the business. In the writing of October, 1945, it is provided "that other than as herein modified all other agreements in connection with said auto park had between the parties hereto are and shall remain in full force and effect. * * * Upon the sale of said parking lot second party agrees to pay first party one half of the sale price thereof." Such provisions clearly establish the continuance of the copartnership. The only substantial modifications effected by the October writing were the manner of the payments and the sums to be paid respondent. Instead of the customary division of the net profits as at first pro-

vided, appellant agreed to pay respondent $40 monthly for a year after October, 1945. Thereafter he should pay one sixth of the profits to respondent as his share. Nothing in any or all of the agreements spelled a termination of the relationship established by the original articles, but a modification only. See Civil Code, sec. 2401, subd. 4; Fullam v. Peterson, Sup., 21 N.Y.S.2d 797. At the trial appellant stipulated that a partnership was created by the articles and that the parties modified it by the subsequent writings. Since it was not abolished by contract it continued until dissolved by the court.

The authorities cited by appellant are not pertinent. Smith v. Grove, 47 Cal. App.2d 456, 118 P.2d 324, was an action to have a partnership established and for accounting. No partnership had ever been formed. In Wheeler v. Farmer, 38 Cal. 203, the instrument relied upon was a power of attorney and not a contract of partnership. Prince v. Lamb, 128 Cal. 120, 60 P. 689, merely holds that the complaint was insufficient: its allegations were devoid of the substance of a partnership. Taylor v. Nelson, 26 Cal.App. 681, 147 P. 1189, involved an agreement to pay sums of money and did not create a partnership. Powell v. Mcguire, 43 Cal. 11, involved an agreement to form a partnership but it was not formed.

[2, 3] The existence of a partnership depends primarily upon the intention of the parties as ascertained from their writings and from surrounding circumstances. Denning v. Taber, 70 Cal.App.2d 253, 256, 160 P.2d 900. From the three several agreements of the parties hereto and the circumstances recited in the testimony the court was justified in finding the continued existence of the partnership after the execution of the March and October agreements. The finding with reference to an ambiguous or disputed contract based upon substantial evidence that is consistent with the parties' intention will not be upset on appeal even though the appellate court might opine that another finding could as wisely have been made. Kautz v. Zurich General Accident and Liability Insurance Company, 212 Cal. 576, 582, 300 P. 34; Davis v. Stulman, 72 Cal.App.2d 255, 269, 164 P.2d 787.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

93 Cal.App.2d 768

PARAMOUNT PICTURES, Inc. et al. v. CLARK, U. S. Atty. Gen., et al.

Civ. 13993.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1949.

Hearing Denied Nov. 21, 1949.

Paramount Pictures, Inc., Loew's Inc., the Bank of America National Trust & Savings Association and Universal Pictures Company, Inc., sued Maurice C. Sparling, Superintendent of Banks of the State of California, as liquidator of the Yokohama Specie Bank, Limited, for declaratory judgments that they were entitled to interest on their several claims. Tom C. Clark, Attorney General of the United States, as successor in interest to James E. Markham, as Alien Property Custodian, intervened.

The Superior Court of San Francisco County, James G. Conlan, J., rendered judgments for plaintiffs, and intervener and defendants appealed.

The District Court of Appeal, Dooling, J., affirmed the judgments and held that the evidence supported findings that there was nothing to prevent the bank's officers from applying for a special license under the Trading with the Enemy Act to pay the claims, and that the burden of proving the defense of impossibility of performance was not sustained.

1. Appeal and error 🔑996

Inferences and conclusions from evidence are for trial court to draw.

2. War and national defense 🔑10(1)

Evidence supported finding that there was nothing to prevent officers of bank dominated by Japanese nationals from applying for special license to operate outside freeze order upon outbreak of war to permit payment of creditors, and supported conclusion that failure to apply showed an absence of "good faith" within the Trading with the Enemy Act declaring that no person shall be held liable in court in respect to anything omitted in good faith in connection with administration of provisions of the statute. Executive Order No. 8389, 12 U.S.C.A. § 95a note; Trading with the Enemy Act, § 5(b)(2), as amended, 50 U.S.C.A.Appendix, § 5(b)(2).

3. War and national defense ⟹10(1)

In action by claimants against Japanese bank in liquidation, burden of defense of impossibility of performance of agreement to pay claimants as result of operation of the Trading with the Enemy Act under which license to operate outside freeze order was revoked upon outbreak of war, rested upon the Attorney General as successor in interest to the Alien Property Custodian. Executive Order No. 8389, 12 U.S.C.A. § 95a note; Trading with the Enemy Act, §§ 5(b)(2), 7(e), as amended, 50 U.S.C.A.Appendix, §§ 5(b)(2), 7(e).

4. Appeal and error ⟹1008(1)

Even if District Court of Appeal as trier of fact reaches an opposite conclusion on question of whether party to contract is excused from performance because of impossibility by operation of law, court cannot set its judgment against that of trial judge so long as his conclusion was a tenable one.

5. War and national defense ⟹10(1)

Japanese controlled bank which lost license to do business at outbreak of war could not escape liability to creditors for principal and interest on ground obligation was rendered impossible of performance because of policy of Secretary of Treasury not to license any Japanese bank in absence of actual application for limited license pressed to Secretary's personal attention. Executive Order No. 8389, 12 U.S.C.A. § 95a note; Trading with the Enemy Act, §§ 5(b)(2), 7(e), as amended, 50 U.S.C.A.Appendix, §§ 5(b)(2), 7(e).

Tom C. Clark, Atty. Gen., David L. Bazelon, Asst. Atty. Gen., Frank J. Hennessy, U. S. Atty., San Francisco, James L. Morrisson, J. Roger Wollenberg, Washington, D. C., for Dept. of Justice, for appellant Tom C. Clark.

S. M. Saroyan, Shirley, Saroyan, Shearer & Sullivan, San Francisco, for appellant Sparling.

O'Melveny & Myers, Louis W. Myers, John Whyte, Los Angeles, for respondent Paramount Pictures.

Loeb & Loeb, Los Angeles (Walter S. Hilborn, Los Angeles, of counsel), for respondents Bank of America Nat. Trust & Savings Ass'n, Loews Inc. and Universal Pictures, Inc.

DOOLING, Justice.

Four actions for declaratory relief were consolidated for trial and from the four declaratory judgments which followed appeals are prosecuted by the Attorney General of the United States, plaintiff in intervention in each action (hereinafter called intervener), and the Superintendent of Banks of the State of California, defendant. The four actions present common questions of law on facts in all material respects similar and it will suffice to state the facts in the action in which Paramount Pictures, Inc. (hereinafter called Paramount) is plaintiff and respondent.

Arising out of the exhibition of motion pictures in Japan Paramount had earnings which by agreement with the Japanese government were not to be paid to it until three years after remittance to Yokohama Specie Bank, Ltd. (hereinafter called the Bank) in San Francisco. Pursuant to this agreement there was due from the Bank to Paramount $45,078.99 on December 7, 1941 and $58,576.32 on January 31, 1942.

On July 26, 1941 by Executive Order No. 8389, 12 U.S.C.A. sec. 95a note, the Secretary of the Treasury of the United States amended freezing control regulations to add thereto Japan, the order requiring Japanese enterprises in the United States to obtain licenses from the Secretary for continuation of operations. The Bank was owned by Japanese nationals and so came within the scope of the order. On the same day the Bank obtained the required license to continue business in the United States. After the attack on Pearl Harbor by the armed forces of Japan this license was revoked on December 7, 1941, the Bank was ordered closed by the Treasury Department and the four resident officers of the Bank, all Japanese nationals, were immediately interned. Representatives of the U. S. Treasury Department at the same time took possession of the Bank's San Francisco branch.

On December 8, 1941 the Superintendent of Banks of the State of California purported to assume control of the Bank pursuant to State law, on December 27, 1941 the U. S. Treasury Department licensed the State Superintendent of Banks to liquidate the Bank and on March 19, 1942 licensed him as conservator. On April 20, 1943 the Alien Property Custodian issued a vesting order vesting in himself "The excess proceeds * * * of the business and property of the (Bank) * * * after payment of the claims of * * * creditors * * * together with interest on such claims * * *." The intervener, Attorney General, has succeeded to the rights of the Alien Property Custodian.

The several plaintiffs filed their actions for declaratory judgments seeking an adjudication that they were entitled to interest on their several claims from the date that each fell due and the judgments appealed from so declared.

On appeal the intervener urges 1. that timely payment of the plaintiffs' claims by the Bank was excused under sections 5(b)(2) and 7(e) of the Trading with the Enemy Act, 50 U.S.C.A.Appendix, §§ 5(b)(2), 7(e); and 2. that such payment was prevented by impossibility arising from the operation of law. The United States Circuit Court of Appeals for the Ninth Circuit had previously overruled similar contentions urged by the U. S. Attorney General in a case in which interest was allowed to the plaintiffs against a Honolulu bank owned by Japanese nationals in Kiyoichi Fujikawa v. Sunrise Soda Water Works Co., 158 F.2d 490, 492, certiorari denied 331 U.S. 832, 67 S.Ct. 1511, 91 L.Ed. 1846, rehearings denied 332 U.S. 785, 68 S.Ct. 31, 92 L.Ed. 368, and 332 U.S. 853, 68 S.Ct. 352, 92 L.Ed. 422. In that case dealing with similar arguments the court said (and we quote extensively from the opinion because it is apparently the only decision on the subject dealing specifically with a Japanese-owned bank as distinguished from other Japanese-owned businesses):

"We agree with the district court that appellants have not sustained their burden of proof of such impossibility of performance. There was an obligation of the officers of the bank to the depositors to attempt to obtain from the Secretary of the Treasury a license for a limited operation of the bank which would permit the deposit and withdrawal of moneys, as such action was permitted to the two finance companies and the insurance company which applied for and procured such licenses. The rule regarding impossibility of performance as an excuse for not discharging such an obligation is well stated in the case of Richards & Co. v. Wreschner, 174 App.Div. 484, 156 N.Y.S. 1054 [158 N.Y.S. 1129]. The court in that case involving a defendant's failure to provide antimony because of adverse war conditions held, quoting from Cameron-Hawn Realty Co. v. City of Albany, 207 N.Y. 377, 101 N.E. 162, 49 L.R.A.,N.S., 922.

"'It is a well-settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve from an expressed agreement, and an act of God or the law or the interfering or preventive act of the other party may free one from the performance of it; but if what is agreed to be done is possible and lawful the obligation or performance must be met. *Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other.* They will neither make nor modify contracts nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications.' (174 App.Div. 484, 156 N.Y.S. 1056 [158 N.Y.S. 1129]. (Emphasis supplied.)

"The rule applies as well to any obligation, the performance of which is sought to be excused. Dezsofi v. Jacoby, 178 Misc. 851, 36 N.Y.S.2d 672; Brown v. J. P. Morgan & Co., Inc., 177 Misc. 626, 31 N.Y.S.2d 323.

"Executive Order 8389 as material with relation to the question herein provides as follows:

"'Section 1. All of the following transactions are prohibited, *except as specifically authorized * * * by means of regulations, rulings, instructions, licenses, or otherwise * * *.'* (Emphasis supplied.)

"'Section 7. * * * the Secretary of the Treasury * * * is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application or license shall be final.'

"Appellants ask us to take judicial notice of a confidential circular of December 9, 1941, written by the Secretary of the Treasury to guide his subordinates, stating that *such subordinates* should not license any Japanese bank. Congress has limited executive orders so affecting banks and other non-official persons of which we may take judicial notice to those published in the Federal Register. 44 U.S.C.A. § 307. The circular was not introduced in evidence in the trial below nor is it shown that it was not there available to the Treasury Department receiver. To seek its probative value on appeal merits the comment of the Second Circuit in Nagle v. United States, 2 Cir., 145 F. 302, 306.

"However, assuming this appeal to be a trial de novo, we do not see that such instruction to his subordinates in any way relieves the bank officials from seeking a license from the Secretary *himself*. There is no more reason to assume a refusal to consider the situation of a particular bank, closed in the intense excitement of December 9, 1941, than of any other regulated enterprise. The Secretary provided a form of application to himself, as distinguished from his subordinates, for this very purpose. The form opens with the words 'To the Secretary of the Treasury, Washington, D. C.' It was upon application on this form that the licenses were granted to the two finance companies and the insurance company, each classified by the Secretary with the Pacific Bank as a 'banking institution' in Executive Order 8389.

"To approve of the officials' failure to apply for a license and then to hold the continued retention of the depositors' moneys as justified because of an impossibility to do otherwise would enable them to say to the stockholders, 'As your agents we have refrained from doing anything to enable the depositors to regain their funds and hence have made certain the saving of your surplus for any interest claims against it—and this although the surplus came in part from the use of the depositors' moneys on which the borrowers paid interest.'

"Failure of the bank's officials in the discharge of such an obligation to the depositors shows an absence of 'good faith' of Section 5 (b) (2) of the Trading With the Enemy Act, as amended by Sec. 301 of the First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C.A. Appendix § 5 (b) (2), providing that 'No person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.'

"We agree with the Supreme Court of Michigan that 'Good faith includes, not only personal upright mental attitude and clear conscience, but also intention to observe legal duties.' Bliss Petroleum Co. v. McNally, 254 Mich. 569, 237 N.W. 53, 55."

Faced with this adjudication the intervener in the cases before us produced an immigration officer who testified that the officers of the Bank in San Francisco were immediately on December 7, 1941 taken into custody and interned. However on cross-examination this witness stated that these officers would have been permitted to consult with an attorney if they had desired, that they would have been permitted to make application to the Secretary of the Treasury for a license to pay the creditors of the Bank and that they would have been permitted to go out with an armed guard if the authorities "felt there was a good reason." The trial court found that there was nothing to prevent these officers from applying for a special license to pay the creditors of the Bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of "good faith" of section 5(b) (2) of the Trading With the Enemy Act.

[1, 2] We are asked to hold that this finding and conclusion are not supported by the evidence, it being pointed out that in the Fujikawa case above quoted from there was no showing that the officers of the bank were interned. The inferences and conclusions from the evidence are for the trial court to draw and in view of the evidence produced on cross-examination establishing the power of the officers of the Bank after internment to make application for a license we cannot hold that the finding and conclusion of the trial court on this subject are not supported by the evidence.

On the subject of impossibility of performance by operation of law the intervener produced the following evidence not before the court in the Fujikawa case, in addition to the confidential circular of December 9, 1941, therein referred to (this testimony was given by a witness who at that time was "chief of one of the three main operating divisions of Foreign Funds Control * * * called the Domestic Division"):

Prior to the Japanese attack on Pearl Harbor since the operation of enemy banks in United States territory would, in the event of war, be a threat to this country's security the Treasury Department had reached a policy decision, in which the Secretary participated, to close all enemy banks in the United States and bring about their liquidation in the event that the United States became involved in hostilities. This policy was put into active operation with the outbreak of war. The Treasury Department's policy decision included a determination to close enemy banks, keep them closed, liquidate them, and permit no payments to any class of creditors except pursuant to liquidation. Under the procedure set up by the Treasury Department after December 7, 1941 any application for a license by a Japanese bank would go to the Federal Reserve Bank of the District and by it be automatically denied under specific instructions not to license the operation of any Japanese bank. If an appeal was taken to the Secretary from this denial it would have been referred to Foreign Funds Control and there denied pursuant to the established policy. Even if an application for a license had been mailed directly to the Secretary of the Treasury it would have been transferred from his mail room to the Foreign Funds Control mail room and from there either sent to the proper Federal Reserve Bank or to the applicant with instructions to file it with such Federal Reserve Bank. A general license issued by the Secretary personally after December 7, 1941 contained the following provision: "This general license shall not be deemed to license as a generally licensed national any bank * * *." On December 20, 1941, all licenses revoked on December 7, 1941 were, with the exception of banks and other designated classes of business, reinstated without application.

On cross-examination the witness stated that he knew of instances where "attorneys representing applicants for licenses have got in to see the Secretary of the Treasury" and that in case of a denial of an application for a license and of an appeal therefrom an applicant would be "entitled to attempt to seek" the granting of such an application by the Secretary himself. The record is silent as to whether the Secretary was ever called upon to act personally upon any application for a license to an enemy-owned bank.

The trial court found against the defense of impossibility by operation of law. The intervener insists that this finding is not supported by any evidence.

[3] The burden of the defense was on the intervener. That it was a heavy burden is shown by the language which the Circuit Court of Appeals quoted and italicized from Cameron-Hawn Realty Co. v. City of Albany, 207 N.Y. 377, 101 N.E. 162, 49 L.R.A.,N.S., 922 in the Fujikawa case, 158 F.2d page 493: "Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be affected. Nothing short of this will excuse nonperformance."

Substantially the same language was quoted by our own Supreme Court from the Harriman, 9 Wall. 161, 172, 19 L.Ed. 629, in Klauber v. San Diego Street-Car Co., 95 Cal. 353, 358, 30 P. 555.

In Dezsofi v. Jacoby, 178 Misc. 851, 36 N.Y.S. 672, at page 674, a case cited with approval in the Fujikawa case, 158 F.2d at page 493, the court said: "It is not enough, therefore, to merely assert impossibility of performance by reason of the executive order, but there should be an allegation of a bona fide attempt by defendant (to procure a license) and that such attempt failed." See also, Brown v. J. P. Morgan & Co., 177 Misc. 626, 31 N.Y.S. 323, 333-334; Meijer v. General Cigar Co., Sup., 73 N.Y.S. 576, 585; Id., Sup., 81 N.Y.S. 488, 490.

[4, 5] The intervener says in his brief: "The uncontradicted testimony of a Treasury official who participated in the policy decisions indicates the extreme improbability of any change in the fixed policy of permitting liquidation only." The cases hold that improbability is not enough. The final policy determination lay with the Secretary of the Treasury. Policy decisions can be changed or relaxed or exceptions allowed in special instances. The real difficulty that lies in the way of the intervener's contention that impossibility was proved as a matter of law is that the question whether or not the Secretary of the Treasury would or might have relaxed the policy to permit a solvent enemy bank to pay American creditors was never put to the only realistic test of an actual application for a license pressed to his personal attention. We are asked to conclusively presume in the absence of evidence that any such application was ever brought to his personal attention by any enemy-owned bank that under no circumstances would the Secretary have issued a license to such a bank to pay its American creditors. The trial court concluded that the burden of proof of impossibility was not sustained. The inference from the evidence if reasonable was its to draw. It needs no citation of authority that even if we, as triers of the fact, would have reached an opposite conclusion we cannot set our judgment against that of the trial judge so long as his conclusion is a tenable one.

The intervener also asserts that once the Bank was turned over to the State Bank Superintendent for liquidation impossibility of immediate payment became absolute. As we read the record the State Superintendent was acting under authority of the Secretary of the Treasury and nothing appears to show that his authority was exhausted by the first licensing order or that the Secretary might not at any time have modified it.

The Superintendent of Banks asserts his purported taking over of the Bank under State law. As against the Federal Government in time of war the paramount power of the Secretary of the Treasury seems to us not open to question and the Superintendent seems to have acquiesced in this view by accepting and acting under license from the Treasury Department.

The judgments are declaratory only. Hence matters occurring subsequent to the trial, and not in the record, which the Superintendent asks us to consider, if they may have stayed the running of interest for a period are still open if the respondents seek recovery of more than the Superintendent believes them entitled to pursuant to their declaratory judgments. There is no reason for us to consider these matters on this appeal.

The judgments provide that the several plaintiffs are entitled to interest on the several amounts from the date when each fell due "to the extent that said assets are available for this purpose." If all creditors cannot be paid in full with interest to those entitled thereto the judgments will permit a ratable distribution of interest.

Judgments affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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93 Cal.App.2d 838

WYLIE v. STATE PERSONNEL BOARD OF CALIFORNIA et al.

Civ. 14271.

District Court of Appeal, First District, Division 1, California.

Oct. 3, 1949.

As Corrected Oct. 14, 1949.

C. Ellsworth Wylie filed a petition for writ of mandate directing the State Personnel Board of the state of California and the members thereof to authorize payment of petitioner's salary as a civil service employee during portion of period of his suspension pending hearing of charges against him.

The District Court of Appeal, Bray, J., held that order of Board directing payment of such salary upon finding only one of several charges against petitioner to be true was a valid and final order which could not be thereafter set aside by Board and ordered that peremptory writ issue as prayed.

1. Officers ⚷72(1), 94

Where charges filed against a civil service employee are found to be false, State Personnel Board is required by statute to authorize payment of his salary during period of suspension, but such statute does not limit the power of Personnel Board, under statute directing it to render a decision that is just and proper, to determine the penalty to be inflicted for any charge found to be true. Government Code, §§ 19574, 19576, 19582, 19583, 19584.

2. Officers ⚷72(1), 94

Where State Personnel Board found only one of several charges filed by appointing power against suspended state civil service employee to be true, board had power under statute to fix period of suspension on such charge and order payment of employee's salary during remainder of period of actual suspension pending hearing of the charges, and such order was final and could not be thereafter set aside by board. Government Code, §§ 19500, 19574, 19576, 19582, 19583, 19584.

Robert W. Kenny & Morris, Los Angeles, for petitioner.

Fred N. Howser, Attorney General, Paul M. Joseph, Deputy Attorney General, for respondent.

BRAY, Justice.

Petition for writ of mandate directing respondent State Personnel Board to authorize payment of petitioner's salary for the period from December 4, 1948 to March 25, 1949.

The main question is: Under the State Civil Service Act where charges are filed against a state employee by the appointing power and he is suspended by such power from service pending the hearing of such charges and one of those charges is found true by the State Personnel Board, has the latter board any authority to restore to such employee salary for any portion of the period of suspension?

Facts.

The facts are not disputed. Petitioner, a civil service employee holding the position of special representative of the attorney general, on October 4, 1948, was suspended from his position by the attorney general and remained so suspended until March 25, 1949, the date of the State Personnel Board's first decision hereinafter mentioned. On October 7, 1948, the attorney general preferred formal charges against petitioner with the State Personnel Board charging that he had used a state-owned automobile on personal business and praying that he be suspended from his position for 60 days without pay. On November 2, 1948, the attorney general filed amended and supplemental charges against petitioner, praying that he be dismissed from his said position. These charges included the original charge of misuse of the state's automobile and other more serious charges. A hearing was had on the amended and supplemental charges. On March 25, the personnel board rendered its decision, finding the petitioner guilty of the charge of misuse of the state's automobile, but not guilty of all the other charges. It then ordered petitioner suspended from his position, without pay from October 4, the date of his original suspension by the attorney general, to December 3 (two months), and restored to his position as of December 4. It further ordered the return to him of his salary for the period December 4 to March 25, subject, however, to a further hearing to determine whether there were any deductions to be made from such salary. A hearing was had and on June 3, 1949, the board rendered its decision finding that there were no deductions to be made from petitioner's salary, but further finding that under section 19584 of the Government Code, inasmuch as it had found true one of the charges against petitioner, the board had no authority to authorize the payment to petitioner of salary for any portion of the period of his suspension. Petitioner sought a rehearing by the board on the matters contained in the June 3 decision. Being denied such, he brought this proceeding.

Statutes.

Charges were filed against petitioner under the authority of section 19574 of the Government Code: "The appointing power, the board, or any person with the consent of the board, the appointing power or the Attorney General, may file charges against any employee or any person on any employment list for punitive action for one or more causes for discipline defined in this article." He was suspended under the authority of section 19576 of the Government Code: "The appointing power or any person authorized by the appointing power so to do may immediately suspend any employee from service without pay pending the filing of charges or the hearing thereon by notifying him of the suspension. Such suspension is valid only if charges are filed with the board and served on the employee within 15 days of the date of the suspension. Such suspension is effective until a hearing has been held on the charges and a decision rendered by the board." Section 19500 provides the type of tenure a civil service employee has: "The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated from the State civil service through layoff, leave of absence, *or suspension,* permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement." (Emphasis added.) Section 19584 of the Government Code provides: "(a) If the board finds that the charges made were untrue or that the respondent was justified in the course of conduct upon which the charges were based, in rendering its decision it shall authorize the payment of salary for the period of suspension, but salary shall not be authorized or paid for any portion of a period of suspension that the employee was not ready, able, and willing to perform the duties of his position, whether such suspension is valid or not or the charges on which it is based state facts sufficient to constitute cause for disciplinary action." Then follows a provision for deductions from such salary under certain conditions not relevant here.

Petitioner contends that the March 25 order which awarded him back pay was a final order, and hence the board had no power to make its order of June 3. This contention is correct if the board had the power to make the back pay award. If it had no such power, its order was void and could be corrected by a subsequent order even though such order would not be necessary as the void order would be unenforceable.

Respondent contends that the board had no such power for the reason that the sections on suspension must be applied completely separate from those dealing with the charges filed; that the suspension of petitioner being legal under section 19576, the only situation in which the board had the power to return back pay is that provided by section 19584, namely, if the charges are found untrue or the conduct justified. To determine this question it is necessary to read the statute as a whole. Such a reading demonstrates an overall intent of leaving extent of penalty to the board. This overall intent is clearly expressed in section 19582 of the Government Code—"The board shall * * * render a decision which in its judgment is just and proper." The very next section—19583—provides that the punitive action, if any, may start from the date of suspension or service of charges. No terminal for such suspension is fixed, that being governed by the preceding section that the decision shall be "just and proper." Under these sections we would have no difficulty at all, if they stood alone, in holding that complete power over the penalty rests with the board, and if they think a limited period of penalty (deprivation of pay), less than the period of suspension, is proper, they have power to impose this lesser penalty.

The rule in California before the adoption of the present law was that if the employee was improperly suspended he was entitled to recover. Stockton v. Department of Employment, 25 Cal.2d 264, 153 P.2d 741; Ahlstedt v. Board of Education, 79 Cal.App.2d 845, 180 P.2d 949. This was the so-called common law rule of California. Ward v. Marshall, 96 Cal. 155, 30 P. 1113, 31 Am.St.Rep. 198; Pennycook v. Boyle, 26 Cal. App. 301, 146 P. 895; O'Neill v. Williams, 53 Cal.App. 1, 199 P. 870. If the employee was guilty of the charges he was, of course, not entitled to any back salary. What the rule might have been, in the absence of statute, where the employee was part guilty and part innocent, was not decided.

The question here involves the construction of the State Civil Service Act, Stats. 1937, ch. 753, p. 2085. The statements of law appearing in 37 American Jurisprudence, Municipal Corporations, section 258, Annotated Cases 1918B, 445, and in Nightingale v. Williams, 70 Cal.App. 424, 233, P. 807, to the effect that where the original suspension is legal, the public employee cannot recover back pay, unless specifically authorized by statute, are not in conflict with our ruling. To hold that section 19584 prohibits the board from allowing return of some back pay in cases where some charges are found true and others untrue, would completely deny the power given the board in section 19582 to make such decision as is "just and proper."

[1] Prior to 1937 the appointing power had the absolute right of suspension without pay for 30 days, without a right to a hearing. In 1937, Stats.1937, p. 2085, a new Civil Service Act was adopted. By section 171 the absolute power of suspension without review was abolished. But this meant too great a restraint on the appointing power. He could not get rid of a bad employee at once in an emergency. To meet this situation section 173 of the act (Stats.1939, p. 2506, at p. 2512) was amended to give the appointing power a qualified power of suspension. But formal charges had to be filed within 15 days and the board was ordered to authorize payment of salary if the charges were found to be false. In such a case no discretion exists—salary must be paid. But this statute did not purport to limit or control the provisions of section 19582, that in other cases the decision should be "just and proper." The conclusion is logical that that 1939 amendment to section 173 of the State Civil Service Act, Gen.Laws, Act 1404, Stats. 1939, ch. 898, p. 2514, § 173, subd. d., later embodied in section 19584, was intended to restore the former California rule that an innocent employee was entitled, as a matter of right, to back salary. It was not intended to limit the power of the board to render a decision that is "just and proper."

Any other construction of the provisions of the Civil Service Act would create the rather anomalous situation that the matter of suspension by an appointing power is divorced from the matter of trial and penalty by the personnel board. The personnel board is given the power to determine the penalty which shall be inflicted for the charge found to be true. It might be a reprimand, or, as the board (and the attorney general originally) intended here, a loss of salary for a period less than the period of suspension. Still, as the original suspension was legal the employee could not be restored any portion of his back salary. Therefore, in effect, the board would have no power, where it finds a charge to be true, or one charge true and another untrue, to fix a penalty less than loss of salary for such period of time as it takes the board to hear and determine the charge, or charges; and in case of two different employees, both charged with and found guilty of identical offenses, one might suffer a greater loss of salary than the other, dependent entirely upon whether the board took a greater amount of time to hear and determine the one case than the other.

Respondent argues that the history of the legislation ending in the enactment of section 19584 compels a different conclusion as to the meaning of the statute than the one we have drawn. This history follows: Statutes 1929, chapter 136, page 251, gave the Civil Service Commission the power to restore to the suspended employee such back pay as "may be equitable." (p. 252) In 1937 this provision was deleted entirely by the enactment of a new State Civil Service Act, Stats.1937, ch. 753, p. 2085, which made no mention of restoration of pay to suspended employees. Then in 1939 came the predecessor of the present section 19584, Government Code. However, it must be remembered that while these changes were being made the Legislature as shown above was also changing the situation as to the right of suspension by the appointing power. The changes and the history of the sections dealing with both matters must be considered together. It then clearly appears that the power of penalty rests finally in the board and that all that section 19584 does is to provide that in the event the charges are found untrue the board has no power to take back pay away. Any other interpretation makes sections 19582 and 19583 meaningless.

There is another factor here involved. When the attorney general suspended this employee and filed charges for the improper use of the automobile he fixed the maximum proposed penalty at 60 days suspension—the precise punishment imposed by the board in its first decision. This would rather conclusively demonstrate that the balance of the suspension was caused by the supplemental charges, and, as to them, the employee was found innocent.

[2] The order of March 25 restoring to petitioner his back salary from December 4 to March 25 was a valid and final order. Hence, that portion of the order of June 3, purporting to set aside the order of March 25, was void.

Let the peremptory writ issue as prayed.

PETERS, P. J., and WARD, J., concur.

94 Cal.App.2d 56

FIELDS v. FIELDS.

Civ. 16816.

District Court of Appeal, Second District,
Division 3, California.
Oct. 7, 1949.

Joan Williams Fields, also known as Joan Billerbeck Fields, sued Henry David Fields for divorce.

Defendant obtained an order to show cause why an order for payment of alimony should not be modified.

The Superior Court of Los Angeles County, Orlando H. Rhodes, J., modified the divorce decree by reducing the weekly payments, and plaintiff appealed.

The District Court of Appeal, Shinn, P. J., affirmed the order, holding that the interpretation of the divorce decree by the trial court that the award of weekly payments to the wife was wholly alimony and not in lieu of any further interest in the community property was reasonable and hence the decree was subject to modification.

1. Divorce ⇨252

It is accepted practice in the division of a community estate for the court to award support money in lieu of a share of property or in addition thereto.

2. Divorce ⇨245(1)

A decree awarding periodic payments for support and maintenance pursuant to statute is, subject to modification, but where such payments to wife are ordered solely as an integral feature in adjustment of property rights of parties and as a method for distributing her awarded share of property to her, final decree is conclusive in that regard and court is without jurisdiction to thereafter modify it in collateral proceedings without consent of parties. Civ.Code, § 139.

3. Divorce ⇨245(3)

Where wording of divorce decree was ambiguous as to whether weekly payments awarded to wife were wholly alimony pursuant to statute or related solely to an adjustment of property rights, trial court was required to make its own determination of that issue in subsequent proceedings to modify weekly payments. Civ.Code, § 139.

4. Divorce ⇨245(3)

Where divorce decree awarding wife weekly payments was ambiguous as to whether payments were wholly alimony pursuant to statute or related solely to adjustment of property rights, subsequent order reducing weekly payments would be construed as a finding that payments awarded by decree were alimony and hence subject to modification. Civ.Code, § 139.

5. Divorce ⇨245(1)

Divorce decree providing that husband pay wife as alimony and for support and maintenance of wife and in lieu of interest in community property of parties, a certain weekly amount, was interpreted as an award of alimony pursuant to statute and hence subject to modification. Civ.Code, § 139.

6. Divorce ⇨243

Provision in divorce decree that weekly payments to wife were to continue until death or remarriage of wife or until a specific sum had been paid does not preclude a holding that the payments are in lieu of specific property although such provisions, without more, are regarded as indicative of alimony.

7. Divorce ⇨255

Finding in divorce action that certain stock was of no value as an asset of community was res judicata in subsequent proceeding seeking modification of weekly payments awarded to wife. Civ.Code, § 139.

8. Divorce ⇨239

In a divorce action, clear and concise findings should be made as to character of periodical payments of money awarded to wife, whether or not a property settlement agreement is approved.

◆

Flint & MacKay, Los Angeles, for appellant.

Leo Shapiro, Los Angeles, for respondent.

SHINN, Presiding Justice.

On May 15, 1947, Mrs. Fields obtained an interlocutory decree of divorce on the grounds of extreme cruelty and adultery. The court made findings that there was community property of the marriage consisting of $9,385.60 in cash, 100 shares of common stock of Wilshire Music, Inc., such shares being one-half of the total stock issued and outstanding, and a Pontiac automobile worth $1,000; the 100 shares of stock were "of no value," and the reasonable value of all of the community property was $10,385.60; plaintiff was unable to support herself; her separate property produced no income and she had no other source of income; defendant was earning, as president and general manager of Wilshire Music, Inc., the sum of $200 a week, and was able to pay "for the support and maintenance of plaintiff *and in lieu of any further interest in the community property* the sum of $70.00 a week." By the decree, Mrs. Fields was awarded $8,577.26 and Mr. Fields was awarded $808.34 in cash, the 100 shares of stock, and the car. The decree further provided "that defendant pay to plaintiff as alimony and for the support and maintenance of plaintiff *and in lieu of any further interest in the community property of the parties* the sum of $70.00 each week * * * during the lifetime of plaintiff or until plaintiff shall remarry or until the further order of this Court." The words which we have italicized were added by the court to the findings and judgment, as prepared by counsel, under circumstances and for reasons which do not appear of record. Neither party challenged the decree by appeal or otherwise.

In January, 1948, upon an affidavit showing that his income had been reduced to $90 per week, plus an expense allowance of $50, defendant obtained an order to show cause why the "Order for Payment of Alimony" of May 15, 1947, should not be modified. Plaintiff's opposing affidavit, after stating that the weekly payments of $70 were "in lieu of any other award of community property," averred that "the only real item of community property referred to was stock in Wilshire Music, Inc., and all of this stock was assigned by the court to the defendant and, as aforesaid, to equalize any possible disproportionate division of the community property, defendant was ordered to pay $70.00 a week." Upon a hearing before a different judge from the one who presided at the divorce trial, plaintiff's objection that the court lacked jurisdiction to modify the decree was overruled. After hearing evidence, the court made the order from which plaintiff appeals, modifying the decree by reducing the weekly payments to $55 per week.

[1, 2] The order is challenged solely upon the ground of want of jurisdiction in the trial court to modify the prior decree. It is, of course, accepted practice in the division of a community estate, for the court to award support money in lieu of a share of the property, or in addition thereto. Marshall v. Marshall, 196 Cal. 761, 765, 239 P. 36; Wuest v. Wuest, 72 Cal.App.2d 101, 110, 164 P.2d 32. A decree awarding periodic payments for support and maintenance, pursuant to section 139 of the Civil Code, is, in appropriate cases, subject to modification; but where such payments to the wife are ordered solely as an integral feature in the adjustment of the property rights of the parties and as a method for distributing her awarded share of the property to her, the decree is final and conclusive in that regard and the court is without jurisdiction to thereafter modify it in collateral proceedings without the consent of the parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Leupe v. Leupe, 21 Cal.2d 145, 148-149, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 228, 48 P.2d 677; Cohen v. Cohen, 150 Cal. 99, 103, 88 P. 267, 11 Ann. Cas. 520. Appellant relies upon the last cited authorities as requiring a reversal of the modification order. We are constrained to hold to the contrary.

[3, 4] The interlocutory decree, and the findings upon which it was based, are ambiguous. Under the wording of the decree, as originally proposed by counsel, the weekly payments would unquestionably have been wholly alimony pursuant to section 139; whereas if they had been granted solely "in lieu of any further interest in the community property," as the court's insertion read, they would clearly have been related solely to an adjustment of property rights. As finally rendered, however, the decree contained language indicative of both purposes. In the absence of a definite specification as to the nature of the payments in the decree, the court below was required to make its own determination of that issue in the modification proceedings. Hough v. Hough, 26 Cal.2d 605, 615-616, 160 P.2d 15, and cases there cited. The order which was made must accordingly be construed as a finding that, at least to the extent of $15 per week, the payments awarded by the decree were for alimony, and hence subject to modification. See Atlass v. Atlass, 112 Cal.App. 514, 517, 297 P. 53. Although the testimony of five witnesses was taken at the hearing it has not been incorporated in the record on appeal. However, we do not assume that this testimony was intended to be, or that it was, considered by the court in reaching its conclusion as to the meaning of the decree.

[5-7] Analysis of the decree as a whole persuades us that the interpretation placed thereon by the court below was not only reasonable, but was more reasonable than that for which appellant contends. If, by the court's insertion, it had been intended to award the payments solely in settlement of property rights, such intention could have been readily manifested by simultaneously striking out the phrases, "as alimony and for the support and maintenance of plaintiff," and "or until the further order of this court." The latter phrases, while perhaps not decisive as to the nature of the payments, cf. Rich v. Rich, 44 Cal. App.2d 526, 530, 112 P.2d 780; Kohl v. Kohl, 66 Cal.App.2d 535, 542, 152 P.2d 494, are at least inconsistent with the theory that they are solely part of a property settlement. Similarly, the provision that the weekly payments were to continue until the death or remarriage of plaintiff rather than until a specific sum had been paid, does not preclude a holding that they are in lieu of specific property, see Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540, although such provisions, without more, are generally regarded as indicative of alimony. Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152; Weedon v. Weedon, 92 Cal. App.2d 367, 207 P.2d 78. That the failure to strike out the inconsistent terminology was not merely inadvertent appears to follow from the actual distribution made of the community assets. As previously noted, plaintiff was granted $8,577.26 out of total assets of $10,385.60. If, by the words inserted in the decree, the court had intended to indirectly award her the entire remaining community property through the medium of the weekly payments, the total difference of $1,808.34 would have been made up in six months. Manifestly, the sum of the required payments contemplated by the decree would in all probability greatly exceed the total value of the community assets awarded to defendant. It would seem that a substantial proportion of the weekly payments was intended to be in the nature of alimony. Plaintiff's contention that the payments were designed to offset a "disproportionate" distribution of assets arising out of the award to defendant of the shares of Wilshire Music, Inc. stock is unavailing. The mere fact that defendant's continued employment as an officer of the company may have been assured only through his ownership of the stock, is not necessarily inconsistent with the express finding that the stock was of no value as an asset of the community. That finding is now res judicata, and may not be challenged in the present proceedings. The court would have been clearly justified in concluding that the $70 per week payments were intended to be partly for alimony and partly in settlement of property rights. Modification of the alimony portion was within its reserved jurisdiction; and it cannot be said, upon the present record, that the order appealed from was not a permissible exercise of that jurisdiction. Appellant has not met the burden of making an affirmative showing of error.

[8] Although the validity or propriety of the divorce decree itself is not before us (see Bailey v. Bailey, 60 Cal.App.2d 291, 296, 140 P.2d 693, reversing as an abuse of discretion a decree awarding $100 per month without indicating what proportions were for community property and alimony respectively) we think it appropriate to emphasize the necessity for avoidance of ambiguous provisions of the type here involved. Counsel should insist, and the trial court in divorce actions should see to it, that clear and concise findings are made as to the character of periodical payments of money awarded to the wife, whether or not a property settlement agreement is approved. Puckett v. Puckett, supra, 21 Cal. 2d 833, 841, 136 P.2d 1; Adams v. Adams, 29 Cal.2d 621, 625, 177 P.2d 265; Henzgen v. Henzgen, 62 Cal.App.2d 214, 220-221, 144 P.2d 428. Needless confusion and uncertainty will thereby be avoided, and the courts will not be subsequently burdened by vexatious problems such as those presently involved.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

94 Cal.App.2d 20

PEOPLE v. MANUEL.

Cr. 2128.

District Court of Appeal, Third District, California.

Oct. 5, 1949.

Isaac Manuel was convicted in the Superior Court, Solano County, Joseph M. Raines, J., of committing lascivious acts upon a five year old child, and he appealed.

The District Court of Appeal, Thompson, J., affirmed the judgment, holding that the child was competent to testify, the evidence sustained the conviction, and that rulings on admissibility of evidence and instructions to the jury were proper.

1. Infants ⚷20

Evidence sustained conviction for commission of lascivious acts on a child of five years of age. Pen.Code, § 288.

2. Witnesses ⚷40(1), 45(2)

In prosecution for commission of lascivious acts on a child five years of age, child was a competent witness where she appeared to be intelligent and appreciated solemnity of an oath. Code Civ.Proc. § 1880; Pen.Code, § 288.

3. Criminal law ⚷1159(2)

A judgment of conviction will not be reversed on ground that evidence is inherently improbable unless statement of material facts is physically impossible or so clearly false and unbelievable that reasonable minds may not differ with respect thereto.

4. Witnesses ⚷39

No fixed standard of intelligence is required of a witness, but determination of that capacity is left almost wholly to the discretion of the trial court.

5. Witnesses ⚷40(1), 45(2)

Qualification of an infant child to become a witness is not determined entirely by its age, but rather on its intelligence, understanding and knowledge of solemnity of an oath.

6. Criminal law ⚷1158(4)

When it appears that a child is intelligent and possesses such knowledge and ability to reasonably state the facts and appreciates the solemnity of an oath, determination of a court after examination that child is competent to testify as a witness will rarely ever be interfered with on appeal. Code Civ.Proc. § 1880.

7. Criminal law ⚷407(1)

In prosecution for commission of lascivious acts on a five-year old child, statement of child's mother that she told defendant that child said defendant had removed her clothes, to which accusation defendant made no reply, was admissible. Pen.Code, § 288.

8. Criminal law ⚷781(4)

In prosecution for commission of lascivious acts on a five-year old child, instruction that evidence of an accusatory statement is not received for purpose of proving its truth, but only to explain conduct of accused in face of it, and unless jury should find that defendant's conduct at time child's mother accused defendant of removing child's clothing indicated an admission that accusatory statement was true, jury should entirely disregard statement was proper. Pen.Code, § 288.

◆

Henry W. Mahan, Benicia, for appellant.

Fred N. Howser, Attorney General, Doris H. Maier, Deputy, Attorney General, for respondent.

THOMPSON, Justice.

The defendant was tried by a jury and convicted of lascivious acts upon a five-year old child, contrary to the provisions of Section 288 of the Penal Code. He contends that the verdict and judgment are not supported by the evidence chiefly because the child was not competent to testify and because her evidence is inherently improbable. He also asserts that the court erred in receiving evidence of defendant's failure to contradict a charge of guilt which was made within his hearing, and in giving to the jury an instruction on that subject.

The parents of the child lived with their family in the upper story of a cottage on Liberty Island in Solano County. The girl, who was called "Ann", was five years of age, and apparently quite intelligent. The mother was a registered nurse. The father and Joe Jose were engaged with the defendant as partners in a farming enterprise on that island. The family and the other partners ate their meals together in a separate building near by, which was called the "kitchen." The mother of the child did the cooking for all of them. In the two-story building where the parents lived there were two adjoining rooms on the lower floor. A mere partition of boards separated the two rooms. The defendant and Joe Jose slept in separate beds in one of the rooms on the ground floor. The other room was connected with their bedroom by a door, and was vacant. About 8 o'clock on the evening of May 22, 1948, Ann's father asked her to go and tell the defendant to come to dinner. The child went to do so. After the child had been gone ten minutes or more, the mother became anxious about her failure to promptly return and went from the kitchen to the defendant's room in search of her. She found the door locked and she entered the adjoining room through a door from the garage. She found Ann in that vacant room near the door leading to the defendant's bedroom, which was closed. The child was then putting on her panties. Her undershirt was on, and her sunsuit lay upon the floor. The mother immediately became suspicious and called to the defendant by name. He was then in the adjoining room. He promptly answered her. Within the hearing of the defendant she then asked Ann, "Who took off your clothes?" The child replied, "Isaac did it, Mommy." The defendant did not deny that statement or reply to that charge. The mother admonished the defendant, and took the child away with her. She discussed the affair with her husband. The child told her parents that the defendant took off her clothes and placed her on a bed in his room and performed the lascivious acts with which he was subsequently charged. The mother, being a registered nurse, examined the child and found that her parts were inflamed. The parents took her to a physician in Rio Vista, who made a physical examination and took a "smear" for analysis. He promptly communicated with the probation officer regarding the affair. He did not testify as a witness at the trial. The following day the parents and the probation officer interviewed the defendant in the presence of the child, and told him exactly what the child had told them regarding his licentious conduct. He was then asked, "Do you think this little girl would tell a lie?" to which inquiry he merely bowed his head and made no reply. It is true that during that conversation the defendant said "I did not do this thing." He said, "She was the one that touched mine." But subsequently he wrote a letter to the parents asking them to "Please excuse the thing that I have done." He then asked them to take pity on him and to settle the matter between themselves and permit the farming partnership business to continue.

[1, 2] The testimony of the mother and the probation officer at the trial was quite convincing and fully supports the verdict and judgment of the court. The evidence of the child adduced at the trial was also very persuasive of the guilt of the defendant. She appears to have been unusually intelligent and clear-minded for a child of five years of age. She was fully and carefully examined as to her knowledge of the solemnity of an oath and as to her qualifications to become a witness. There is nothing in the record to indicate that she was not entirely qualified and competent as a witness. The court concluded that she was qualified, and we concur in that ruling.

There are some slight discrepancies in the evidence, which are not of importance, and which may be readily reconciled. The mother had the impression and testified that the child told her the offense occurred in the vacant room adjoining the defendant's bedroom. The child stated that the defendant took off her clothes and committed the offense in his bedroom. There is no dispute over the fact that when the mother arrived the child was just putting on her panties in the vacant room adjoining the defendant's bedroom, and that he was then within hearing beyond the closed door and the board partition, for he answered the mother's call to him. The child's sundress then lay upon the floor near that door. The mother may have erroneously gotten the impression that the offense was committed in that room. That discrepancy is immaterial. At least it is reconcilable. There is no doubt the child told the mother that the defendant committed the offense. It was the duty of the jury to reconcile the evidence if reasonably possible.

[3] The child's testimony was not inherently improbable. It has been frequently held that a judgment will not be reversed on the ground that the evidence is inherently improbable unless the statement of material facts is physically impossible or so clearly false and unbelievable that reasonable minds may not differ with respect thereto. People v. Showers, 90 Cal.App.2d 248, 202 P.2d 814; People v. Salais, 92 Cal. App.2d 533, 206 P.2d 1109; People v. Pyle, 80 Cal.App.2d 498, 181 P.2d 644; People v. Carlson, 73 Cal.App.2d 933, 937, 167 P.2d 812.

[4-6] We are satisfied the child in this case was not incompetent to testify as a witness. The record of her preliminary examination indicates that she was bright, intelligent and fully qualified to testify as a witness. The law does not fix any standard of intelligence required of a witness, but leaves the determination of that capacity almost wholly to the discretion of the trial court. The qualification of an infant child to become a witness is not determined entirely by its age, but rather upon its intelligence, understanding and knowledge of the solemnity of an oath. When it appears that a child is intelligent, and possesses such knowledge and ability to reasonably state the facts of the case, and appreciates the solemnity of an oath, the determination of a court after examination that it is competent to testify as a witness will rarely ever be interfered with on appeal. Code of Civil Procedure, sec. 1880; People v. Ash, 70 Cal.App.2d 583, 161 P.2d 415; People v. McKelvey, 91 Cal.App. 684, 688, 267 P. 390; Cheeseman v. Cheeseman, 99 Cal.App. 290, 278 P. 242; People v. Morcumb, 28 Cal.App.2d 465, 467, 82 P.2d 714; 27 Cal.Jur. 37, sec. 25; 11 Cal.Jur. Ten-Year Supp. 624, sec. 25.

[7] The admission of the statement of the mother that she told the defendant, in the room where she found her daughter unclothed and putting on her panties, that the child said he had removed her clothes, to which accusation he made no reply, was not prejudicial. We think it was competent. The defendant was just beyond an intervening door and responded when the mother called his name. Clearly he heard and understood the nature of the charge that was made against him. That statement may be deemed to have been made in his presence notwithstanding the fact that a door intervened between them when the statement was made, for the reason that his response indicated that he clearly heard and understood the nature of the charge. Moreover, the evidence shows that same statement in greater details was subsequently made in the immediate presence of the defendant when the mother, the child and the probation officer were present, to which accusation he at first made no reply, but merely bowed his head and said nothing. He was then definitely charged with actually tampering with the child by performing licentious acts upon her body. It is true that he afterward said "I did not do this thing." We may assume that was not a denial that he removed the child's clothing, but rather that he was thereby denying that he actually performed the licentious acts upon her with which he was then charged. The evidence is therefore not prejudicial, but merely cumulative. His subsequent letter to the parents appears to refute his denial that he performed the acts with which he was charged.

[8] The court did not err in giving to the jury an instruction which in effect charged the jury that if it found that the defendant was accused of the licentious acts against the child, and that fully understanding and appreciating the charge, he failed to deny it, or that he made false or evasive statements with regard to that accusation, the jury had a right to consider that fact in determining the defendant's

guilt. That instruction correctly informed the jury that: "* * * Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

Instructions similar to the foregoing one were approved in several California cases. People v. Willmurth, 77 Cal.App.2d 605, 615, 176 P.2d 102; People v. Amaya, 134 Cal. 531, 541, 66 P. 794; People v. Richardson, 83 Cal.App. 302, 306, 256 P. 616; People v. Bailey, 91 Cal.App.2d 578, 205 P.2d 418.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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94 Cal.App.2d 61

COLETTI v. STATE BOARD OF EQUALIZATION et al.

Civ. 16874.

District Court of Appeal, Second District, Division 3, California.

Oct. 7, 1949.

Michael Coletti sought a writ of mandate directing the State Board of Equalization and members thereof to vacate an order revoking an on-sale general liquor license theretofore issued to the plaintiff and another as partners which was revoked by the board because of violations of the liquor law by the other partner.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., granted a peremptory writ requiring the board to restore possession of the license to the plaintiff and the defendants appealed.

The Court of Appeal, Shinn, P. J., reversed, holding that the action of the Court was unauthorized and that a transfer of the license if made, would have to be by the board.

1. Intoxicating liquors ⚷71

A partnership application for an on-sale general liquor license should be denied if one of the partners is unable to qualify. Gen.Laws, Act 3796, §§ 10, 40, subds. 1, 2.

2. Intoxicating liquors ⚷103

Under the Alcoholic Beverage Control Act the provisions for transfer of licenses is applicable to a transfer from a partnership to one of the partners. Gen.Laws, Act 3796, §§ 7, 7.2, 21.1.

3. Intoxicating liquors ⚷103, 106(4)

Where an on-sale general liquor license was issued to a partnership and one partner was found guilty of violations of the law calling for revocation of license at its place in which the other partner had no interest, revocation of the license to the partnership was required and the court was without authority to create a new license with the innocent partner as a licensee, since such action must be taken through the Board of Equalization. Gen.Laws, Act 3796, §§ 3, 7, 7.2, 10, 21.1, 36b(3), 40, subds. 1, 2.

Fred N. Howser, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., for appellants.

Prentiss Moore and Charles M. Hughes, Los Angeles, for respondent.

SHINN, Presiding Justice.

The State Board of Equalization and the members thereof, hereinafter referred to as defendants, appeal from a judgment for the issuance of a writ of mandate directing them to vacate an order revoking an on-sale, general liquor license theretofore issued to Michael Gerbosi and Michael Coletti, the latter alone being the plaintiff in the action. The defendants demurred to the petition, the matter was submitted on the petition and demurrer, the demurrer was overruled and judgment entered commanding the board to vacate its order revoking the license and to restore physical possession of the license to the plaintiff Coletti.

From the petition and the findings of the hearing officer of the board, which were incorporated in the petition, the following facts appear: A license had been issued under section 6, paragraph J of the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, to petitioner and Gerbosi for the sale of beer, wine and distilled spirits for consumption on the premises at 1903 West Sixth Street, Los Angeles. Coletti and Gerbosi were partners in a restaurant at that location. Gerbosi was the holder of another license applying to premises at 742–746 South Vermont Avenue, Los Angeles. Gerbosi and his wife owned and operated an unlicensed cafe on Atlantic Boulevard in county territory. The employees of Gerbosi at the unlicensed cafe made numerous sales of distilled liquors which were found to have been made with the consent and knowledge of Gerbosi. These acts were charged as violations of sections 3 and 40 (2) of the Act. Gerbosi also was found to have been in possession of 348 emptied, undestroyed, distilled spirits bottles on the same premises, in violation of section 36b (3) of the Act. Coletti, admittedly, had no interest in the Atlantic Boulevard cafe and no knowledge of said violations of law. The accusation brought by the District Liquor Control Administrator was for revocation of the license held by Gerbosi alone, and also that held by Gerbosi and Coletti.

The question is: Upon these facts was defendant board authorized to revoke the partnership license? Under section 40(1) and 40(2) of the Act, a license may be suspended or revoked "When the continuance of such license would be contrary to public welfare or morals" etc., and where a licensee is guilty of violating or permitting a violation of the Act (with exceptions not involved here) or any rules and regulations of the board, or "any other penal provisions of law of this State prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding or mislabeling of alcoholic beverages or intoxicating liquors." It is not questioned by plaintiff Coletti that the evidence was sufficient to justify the suspension or revocation of any license held by Gerbosi. His contention is that even if the partnership license could be suspended as to Gerbosi's interest he may not be deprived of his interest for the reason that he is not responsible for the acts of his partner unconnected with the operation of the partnership and committed without his own knowledge or authority.

[1] Under section 10, an application for a license may be made by a partnership. It must give the names of the individual partners and be signed by each, and must contain a statement to the effect that the applicant has not been convicted of a felony, has not violated and will not violate or cause or permit to be violated any of the provisions of the Act, etc. The board must deny an application if either the applicant, or the premises for which the license is applied for, do not qualify for a license. It seems clear that a partnership application should be denied if one of the partners is unable to qualify.

[2] If the judgment should be given effect, the result will be that the partners will continue to hold a license or Coletti alone will be the licensee. The provision of the judgment that the board must restore physical possession of the license to Coletti might indicate a purpose to make him the sole licensee. If this was the purpose, it is clearly one that cannot be accomplished by the judgment. The Act contains elaborate provisions for the transfer of licenses, including the giving of notice, establishment of an escrow, payment of claims against the transferor, payment of a transfer fee, and the application for transfer must have the approval of the board, following a complete investigation to be made by the State Liquor Administrator (Deering's Gen.Laws, Act 3796, secs. 7, 7.2, 21.1). A transfer from a partnership to one of the partners is clearly subject to these provisions. Gerbosi's interest in the license can be taken from him only by revocation. Even if the license could be revoked only as to his interest and if the order of the board should be given that effect, there would be nothing to transfer to Coletti. It was not competent for the court to create a new li-

cense with Coletti as licensee. If he is to be made the sole licensee it must be through action by the board.

There is, however, no authority in the board to revoke a partnership license as to the interest of one of the partners. There was but a single license, although it stood in the names of the two partners. It cannot be invalid as to one partner and valid as to the other.

[3] The revocation was effective as to both partners or to neither. It is clear that it was the duty of the board to terminate Gerbosi's rights under the license. He violated the conditions under which it was held when he engaged in the illegal sale of liquor. It would be a violation of section 3 of the act for him to exercise any of the rights and privileges of a licensee. What he cannot do as an individual, he cannot do through a partnership. Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided in the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by unauthorized acts of a copartner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held. It is immaterial here that the offenses of Gerbosi were committed at the Atlantic Boulevard cafe in which Coletti had no interest. A violation of law in the sale of intoxicating liquor is a cause for revocation of a license, and it is none the less a cause if it is committed away from the licensed premises. Coletti has suffered an injustice at the hands of Gerbosi, but not at the hands of the board. He assumed this risk when he entered into partnership with Gerbosi in obtaining the liquor license. The court cannot relieve him from the consequences of Gerbosi's violation of the conditions under which the license was issued and held. The question whether a liquor license issued to two persons should be revoked in its entirety for the offense of one of the licensees was considered in the following cases: In re Panichi's License, Pa.1941, 41 Pa.Dist. & Co. 256; In re Pompeo's License, Pa.Com.Pleas 1943, 57 York Legal Rec. 84; Kisslinger's Appeal, Pa.Quar.Sess.1946, 59 Pa.Dist. & Co. 126, 30 North. 401; Lewis & Potter v. Commonwealth, 1909, 134 Ky. 837, 121 S.W. 643. It was held in each case that the license was revocable in its entirety, for the offense of one of the licensees which constituted a violation of conditions under which it was issued and held. No court, so far as we know, has reached a contrary conclusion.

We therefore conclude that the judgment appealed from was in error.

The judgment is reversed with instructions to sustain the demurrer of the Board of Equalization and its members and to render judgment in their favor.

WOOD and VALLÉE, JJ., concur.

93 Cal.App.2d 757

DUFFEY et ux. v. GENERAL PETROLEUM CORPORATION.

Civ. 7669.

District Court of Appeal, Third District, California.

Sept. 26, 1949.

Julius C. Duffey and Audrey M. Duffey, his wife, sued General Petroleum Corporation, a corporation, for injuries to plaintiffs' premises alleged to have been sustained as result of contamination of their water supply by gasoline spilled by defendant's employee when delivering gasoline to plaintiffs' premises to fill a tank maintained by plaintiffs.

The Superior Court, Shasta County, Albert F. Ross, J., rendered judgment for plaintiffs and defendant appeals.

The District Court of Appeal, Adams, P. J., affirmed, holding that plaintiff was properly allowed to amend complaint at beginning of trial by increasing amount of damages, that rulings on instructions and evidence were without error, and that $4,000 damages was not excessive.

1. Pleading 🔑245(3), 246(1)

Allowance by trial court of plaintiffs' motion, made at beginning of trial, to amend complaint by increasing amount of damages, was not error although made without notice and over defendant's objections, where defendant denied any damages and did not move for a continuance of trial and plaintiffs did not act in bad faith.

2. Pleading 🔑236(1)

The allowance of amendments to pleadings is within discretion of trial court.

3. Appeal and error 🔑882(12)

Defendant was not entitled to complain on appeal of alleged incorrect instruction on the measure of damages where it offered no evidence or instruction on its theory of damages and in questioning its own valuation witness applied the same rule applied by the trial court and made no objection at trial to the testimony adduced by plaintiff on its theory.

4. Appeal and error 🔑207

Objection to admission in evidence of correspondence which revealed that defendant carried liability insurance could not be made by defendant for first time on appeal.

5. Trial 🔑127

No reversible error is committed in admitting evidence indicating that a party to an action carries insurance where the information comes in incidentally or where the record does not show that the particular answer was sought or anticipated.

6. Waters and water courses 🔑49

$4,000 for injuries to premises sustained as result of contamination of plaintiffs' water supply by gasoline spilled by defendant's employee when delivering gasoline to plaintiffs' premises to fill a tank maintained by plaintiffs, was not excessive under the evidence.

7. Appeal and error 🔑1004(3)

District Court of Appeal was bound by conclusion of trial court on motion for new trial that damages were not excessive.

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J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Chico, for appellant.

L. C. Smith, Redding, for respondents.

ADAMS, Presiding Justice.

Plaintiffs, husband and wife, brought this action against defendant corporation for injuries to their premises alleged to have been sustained as the result of the contamination of their water supply by gasoline spilled by defendant's employee when delivering gasoline to such premises to fill a 50 gallon tank maintained by plaintiffs for general use thereon. The original complaint, filed March 17, 1948, alleged damages in the sum of $2100. Defendant denied any damage whatsoever.

At the beginning of the trial, on October 19, 1948, plaintiffs' counsel moved to amend the complaint by increasing the amount of the alleged damage to $4000, and the motion was granted. Defendant interposed an objection to the amendment, but did not ask for a continuance of the trial by reason thereof. The jury returned a verdict for $4000.

On this appeal it is conceded that there was sufficient evidence to support the implied finding of the jury that defendant and its employee were negligent. Errors of law, only, are relied upon for reversal.

[1] The first alleged error is the allowance by the trial court of plaintiffs' motion to amend the complaint by increasing the amount of the damages alleged. It is urged that it was made without notice and over defendant's objection, that it took defendant by surprise and was inevitably prejudicial to it. No authority is cited and we find no merit in this contention. Defendant could not have been prejudiced by lack of notice, since it denied any damages at all. It made no motion for a continuance of the trial in order to permit it to make further preparation therefor, and it can-

not be said that plaintiffs acted in bad faith or without just reason in making their motion since the evidence shows that after the filing of their complaint they made efforts to secure a water supply not contaminated, by drilling a new well in a different location, but found the water there contaminated also.

[2] The allowance of amendments to pleadings is within the discretion of a trial court. Ray v. American Photo Player Co., 46 Cal.App. 311, 315, 189 P. 130; Isaacson v. Union Trust Co., 95 Cal.App. 633, 638, 273 P. 119; Unruh v. Kauffman, 205 Cal. 238, 244, 270 P. 440. We find no abuse of such discretion here.

[3] Appellant's second contention is that an incorrect measure of damages was employed by plaintiffs and submitted to the jury in an instruction submitted by plaintiffs to the effect that there was a permanent injury to their property and the measure of damages was the decrease in market value attributable to the injury. Appellant argues that the proper measure was the cost of restoration of the property to its former condition, provided such cost did not exceed the value of the property. Evidence in the case, however, supports a conclusion that the injury to plaintiffs' land is permanent, and that the cost of providing water from another source was so highly speculative as to be impossible of estimation. If such be the case the property cannot be restored to its former condition. Appellant offered no evidence as to what such cost would be, nor did it offer an instruction on its present theory. Also, in questioning its own valuation witness it applied the same rule applied by the trial court in its instruction given, and it made no objection at the trial to testimony educed by plaintiffs as to the market value of the property before and after the injury. Under such circumstances the decision in Wolfsen v. Hathaway, 32 Cal.2d 632, 646–647, 198 P.2d 1, 10, is applicable. The court there said: "Appellants may not now complain of the method of proving the amount which would compensate respondents for their loss of crops, pursuant to section 3333 of the Civil Code, since that evidence was admitted without objection and was the apparent theory of the measure of damages upon which the case was tried in an effort to determine upon an award which would 'fairly compensate' respondents 'for the actual injury suffered.' (Staub v. Muller, supra, 7 Cal.2d 221, 229, 60 P.2d 283, 287.)" Also see Revis v. I. S. Chapman & Co., 130 Cal.App. 109, 115, 19 P.2d 511.

[4] Appellant's next contention is that the trial court erred in admitting in evidence certain correspondence between plaintiffs' counsel and defendant which revealed the fact that defendant carried liability insurance. One of the letters, dated January 13, 1948, written to plaintiffs' attorney by defendant's attorney, referred to letters written by the former regarding plaintiffs' claim and stated that said letters had been referred to the Western National Insurance Company who would reply to his inquiries. However, the record shows no objection by appellant to this correspondence, nor any motion to strike it out. Objection, therefore, cannot be made for the first time on appeal. Mullanix v. Basich, 67 Cal.App.2d 675, 682, 683, 687, 155 P.2d 130.

[5] Also it frequently has been held that no reversible error is committed in admitting evidence indicating that a party to an action carries insurance where the information comes in incidentally or where the record does not show that the particular answer was sought or anticipated. See Packard v. Moore, 9 Cal.2d 571, 580, 71 P.2d 922; Ades v. Brush, 66 Cal.App.2d 436, 446, 152 P.2d 519; Speck v. Sarver, 20 Cal.2d 585, 589–590, 128 P.2d 16; Moniz v. Bettencourt, 24 Cal.App.2d 718, 725, 76 P.2d 535.

[6] Finally, appellant urges that the damages are excessive. It cannot be said that the award is not supported by the evidence, since two witnesses testified that the values of the property before the spillage of gasoline were as follows: Witness Bruce, $10,000 before and $6,000 afterward; witness Plotts, $10,000 to $12,000 before and $5,000 to $7,000 afterward.

[7] The question of excessive damages was raised on motion for a new trial, and

found by the trial court to be without merit. We are satisfied with and bound by its conclusion. See Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 51–52, 177 P.2d 32.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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94 Cal.App.2d 4

COLBURN v. SESSIN et al.

Civ. 17078.

District Court of Appeal, Second District,
Division 2, California.
Oct. 5, 1949.

Rehearing Denied Oct. 24, 1949.
Hearing Denied Nov. 28, 1949.

J. G. Colburn sued to recover commissions for a sale of realty made by defendants David Sessin, and others, to defendants Myron C. Winton, and others.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., rendered judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment, and held that an alleged oral contract for commissions was unenforceable notwithstanding plaintiff had allegedly introduced the actual purchasers to the owners.

1. Brokers ⚷43(2)

Agreement authorizing or employing a broker to purchase or sell realty for compensation or commission is invalid unless agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. Civ.Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

2. Brokers ⚷43(2)

Where broker allegedly relied on owners' promise to execute written memorandum of oral agreement for commissions, and broker introduced parties obtained by him who subsequently became purchasers, contract was void, and broker could not recover against owners on theory of estoppel. Civ.Code, § 1624, subd. 5; Code Civ. Proc. § 1973, subd. 5.

3. Brokers ⚷43(2)

Where broker allegedly relied on owners' promise to execute written memorandum of oral agreement for commissions, and broker introduced parties obtained by him, who subsequently became purchasers, contract was void, and broker could not recover against purchasers by reason of their alleged connivance with owners in frustrating recovery of compensation. Civ. Code, § 1624, subd. 5; Code Civ.Proc. § 1973, subd. 5.

Lane & McGinnis, Los Angeles, for appellant.

Snyder & Naiditch, Los Angeles, for respondents Sessin and Gutlin.

Samuel Greenfield and Daniel A. Weber, Beverly Hills, for respondents Winton.

WILSON, Justice.

Appeal from judgment in favor of defendants after the sustaining of a demurrer to plaintiff's complaint without leave to amend.

The action was brought by plaintiff, a licensed real estate broker, to recover a commission for the sale of real property made by defendants Sessin and Gutlin to defendants Winton. The facts alleged in the complaint are as follows: Defendants Sessin and Gutlin, owners of real property, entered into an oral agreement with plaintiff whereby his services were retained to obtain a purchaser ready, able and willing to purchase the property; the owners agreed to pay plaintiff 5 per cent of the sale price for his services in the event the property could be sold; the owners agreed that they would furnish plaintiff with a signed, written memorandum confirming the agreement; in reliance thereon he undertook to and did locate purchasers; he so informed the owners and submitted to them a proposed written memorandum of the broker's commission agreement and requested its execution; they assured him they would execute and deliver it but requested him to introduce them to the prospective purchasers so that the proposed transaction might proceed in the interim; relying on such representations plaintiff introduced the proposed purchasers to the owners; the latter had no intention of fulfilling their promise and made it only with the intention of causing plaintiff to disclose the identity of the purchasers; the owners failed to execute the memorandum for the payment of the commission and thereafter sold the property to defendants Winton who were the purchasers produced by plaintiff.

Defendants demurred to the complaint generally and on the ground that the alleged contract is void and unenforceable by reason of subdivision 5 of section 1624 of the Civil Code. Demurrers were sustained without leave to amend and judgment was entered in favor of defendants.

[1] An agreement authorizing or employing a broker to purchase or sell real estate for compensation or commission is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent. Civil Code, sec. 1624, subd. 5; Code Civ.Proc., sec. 1973, subd. 5; Blanchard v. Pauley, 92 Cal.App.2d 244, 206 P.2d 864, 865; Marks v. Walter G. McCarty Corp., 33 Cal.2d 814, 819, 205 P.2d 1025, 1027.

[2] The pleaded facts do not, as plaintiff contends, bring the case within an exception to the general rule. This action has no similarity to Le Blond v. Wolfe, 83 Cal.App.2d 282, 188 P.2d 278, where the broker cancelled a contract with the seller of real property upon the oral promise of the purchaser that he would pay the commission. In that case the broker changed his position to his own detriment by releasing the sellers from any obligation to pay him a commission. Such change of position created an equitable estoppel against the purchaser from setting up the statute of frauds as a defense. An examination of Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, upon which plaintiff mainly relies, will show that it does not support his position.

The instant case is similar to Sweeley v. Gordon, 47 Cal.App.2d 381, 118 P.2d 14, and White v. Hirschman, 54 Cal.App.2d 573, 129 P.2d 430, in each of which the broker relied on an oral contract or an unsigned memorandum as his authority to effect a sale, and in each action the broker was denied recovery. In the White case the court held that where the broker's commission agreement is unenforceable by reason of the statute of frauds he is not entitled to enforce the agreement indirectly by an action for the reasonable value of time and money laid out for expenses and advertising in attempting to effect the sale. In both cases and in Hicks v. Post, 154 Cal. 22, 96 P. 878, it is well said that to allow a broker to recover under circumstances alleged in the complaint in the instant action would abrogate the statutory requirement that authority to sell real property must be in writing.

[3] Plaintiff does not contend that the purchasers, respondents Winton, agreed to pay a commission but apparently seeks to hold them liable by reason of their purported connivance with the sellers in frustrating plaintiff's recovery of compensation for bringing the parties together. Such contention is disposed of in a second case entitled Sweeley v. Gordon, 47 Cal.App.2d 385, 118 P.2d 16, 842, where a conspiracy between purchaser and seller was alleged. The court held, 47 Cal.App.2d 385, page 387, 118 P.2d 16, 842, that the seller had the legal right to stand upon the statute of frauds and the purchaser was not liable in damages to the plaintiff even if he did in fact induce the seller to assert nonliability by reason of the statute.

In the instant case plaintiff did not change his position. He did not, as in the Le Blond case, yield a claim against one party to the transaction on the oral promise of another to pay a commission. The proceedings were initiated between plaintiff and the owners and the former, relying upon an invalid contract, brought the sellers and the purchasers together. Plaintiff was presumed to know it to be the law that oral contracts for a commission on the sale of real property are void and unenforceable. His plea of estoppel is made under circumstances similar to those in the White and Sweeley cases above cited and rejected by the court.

Judgment affirmed.

MOORE, P. J. and McCOMB, J., concur.

94 Cal.App.2d 65

LOS ANGELES JEWISH COMMUNITY COUNCIL et al. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 17150.

District Court of Appeal, Second District,
Division 3, California.
Oct. 7, 1949.

The Los Angeles Jewish Community Council, a corporation, employer, and the National Automobile & Casualty Insurance Company, a corporation, filed a petition to review a compensation award to Margareta Frederika Cohn, claimant, for the death of her husband.

The District Court of Appeal, Shinn, P. J., affirmed the award, holding that the commission was warranted in holding that death of deceased was compensable as arising out of and in course of employment.

1. Workmen's compensation ⚷723

If employee, at time he was struck by automobile and fatally injured, was going to his place of employment, as usual, to perform his customary duties as part-time librarian, his widow would be excluded from the benefits of the Compensation Act under the "going and coming rule," but if he was engaged on a special mission for his employer the death would be compensable as one "arising out of and in course of employment".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Out Of and In Course Of Employment".

2. Workmen's compensation ⚷723

Where ordinary duties of librarian were performed from Monday to Friday, but on opening week he was expected to be present every evening to conduct ceremonies and deliver a brief talk, and on Saturday evening of opening week member of library committee ordered librarian to come to the library about an hour ahead of time, and, while on his way to library that evening, librarian was struck by automobile and fatally injured, librarian was on a "special errand" or "special mission" at time of accident, so that his widow was entitled to compensation on ground that his death was result of an accident "arising out of and in course of employment".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Errand" and "Special Mission".

Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

T. Groezinger and Alvin L. Dove, San Francisco, for respondent, Industrial Acc. Commission.

SHINN, Presiding Justice.

[1] A writ was heretofore issued on petition of Los Angeles Jewish Community Council and National Automobile and Casualty Insurance Company for the review of an award of $6,000 by the Industrial Accident Commission as a death benefit to Margareta Frederika Cohn, widow of Rabbi Emil Bernard Cohn. In the petition the statement of question involved reads as follows: "Whether the Industrial Accident Commission's affirmance of findings and award on rehearing, said affirmance being based upon an erroneous assumption of facts by the referee, should be permitted to stand." We shall discuss this question later. As we view it the question, also argued by petitioners, is whether, at the time of his death, Rabbi Cohn

was going to his place of employment, as usual, to perform his customary duties as part-time librarian or was engaged on a special mission for his employer, the Community Council. If the former, his widow would be excluded from the benefits of the Workmen's Compensation Act under the "going and coming" rule. If the latter, and the fatal accident arose out of and in the course of decedent's employment, the case would come within an exception to the rule and the death would be compensable.

Decedent's usual hours of employment as part-time librarian were from 2:00 p. m. to 6:00 p. m., five days per week, Monday through Friday. The library was normally not open on Saturdays or Sundays. For some months prior to the opening of the library, the duties of the employee were to catalogue the volumes belonging to the library. The library committee of the employer was to be informed when the cataloguing was to be completed and the library ready for opening. At the time of hiring, no precise arrangements for the opening were made. The deceased, however, was aware that the opening week would include Saturday, and that he would be expected to be present in the evenings for that opening week.

Approximately two months before the completion of the cataloguing of the books, the deceased informed the library committee of the approximate date of completion. On January 7, 1948, the committee voted to open the library during the week beginning February 22, 1948, and to combine with the opening a "special celebration or reception." The minutes of the employer's library committee, dated February 18, 1948, contain the following: "The Los Angeles Jewish Community Library will be formally opened on Sunday, February 22nd at 2:00 P.M. It will be open Sunday, Monday, Tuesday, Wednesday, Thursday from 2:00 P.M.—5:00 P.M., and from 8:00 P.M. —10:00 P. M. The week will close Saturday 8:00—10:00 P. M. On Sunday afternoon Mrs. Samuel Moss, President of the Conference of Jewish Women's Organizations, the hostess group will preside. The following will be introduced to speak for a few moments: Mr. Charles Brown and Mr. Peter Kahn, acting chairman of the Library committee. *Dr. Emil Bernhard Cohn will be prepared to give a short talk at each session.* Each host group will be responsible for a short program." (Emphasis added.) The decedent was notified of the fact that he was to give short talks in the evenings, during the opening week. The library was closed until sundown on Saturday, February 28, 1948, and the deceased did not work from 2:00 p. m. to 6:00 p. m. on that day. Mr. Schapiro, a member of the library committee and a former head of the Hebraic Department of the Library of Congress, had been appointed to make recommendations concerning the purchase of books. On Saturday morning, February 28, 1948, he telephoned Rabbi Cohn and requested that he come to the library early that evening to inspect and discuss certain purchases. The deceased agreed to come at the earlier hour. Rabbi Cohn on the preceding nights during the opening ceremonies had left his home at about 7:45 or 7:50 and had arrived at work at 8:00 or 8:05 p. m. After rehearsing to his wife the speech he was to deliver at the library, the Rabbi left his home on Saturday night, February 28, 1948, at about 7:15 or 7:20 p. m., to go to the library. He was carrying a book belonging to the library. At 7:45 p. m., or thereabouts, while crossing the street in the vicinity of the library he was struck by an automobile and received injuries which resulted in death.

Dr. Schapiro testified that Dr. Cohn had received certain books which had been ordered upon his recommendation and that he "ordered" Dr. Cohn to come to the library "an hour ahead of time to be there to show me the books that he received." The occasion for this agreement was that Dr. Schapiro was usually out of the city but, as he intended to be present at the ceremony that evening, considered that it would be a good time to discuss the books with Rabbi Cohn.

[2] The circumstances of the case are most unusual. It was a part of Dr. Schapiro's duties to recommend books and it was a part of Rabbi Cohn's duties to see

that they were obtained. Inspecting them after their receipt was in the line of the duties of both men. However, Rabbi Cohn's ordinary duties as librarian were performed between 2:00 p. m. and 6:00 p. m. from Monday to Friday, inclusive, of each week. He attended the ceremonies during the evenings of the week in question for the special purpose of conducting the ceremonies and delivering a brief talk. There was testimony that these latter services were discussed at the time of his employment and were among his understood duties. Inspecting books at the library was not a part of Rabbi Cohn's duties to be performed in the evenings. It might be argued with much reason from the evidence that he was not required as part of his regular duties to comply with Dr. Schapiro's request. In fact it would appear from Dr. Schapiro's testimony that he considered his request an unusual one and there was no evidence that Rabbi Cohn had previously been requested to perform or had performed such duties except during the course of his day-time employment. The circumstances required the drawing of a rather fine distinction in order to classify Rabbi Cohn's trip to the library in response to Dr. Schapiro's request as a special mission, but we nevertheless think that sufficient reason existed for classifying it as such. In two respects the employee was called upon to deviate from the usual course of his services: he was requested to come to the library at an earlier hour than was usual or necessary in order to fulfill the conditions of his employment; and the services to be rendered to Dr. Schapiro were not the usual ones agreed to be performed and which were usually performed by Rabbi Cohn in the evenings. These circumstances justify the conclusion that his trip was an extraordinary event which was necessary in the performance of a special service beyond the scope of the employment agreement.

If decedent was on a "special errand" or "special mission" he was rendering services for his employer from the time he left home. Mr. Campbell, in his work on Workmen's Compensation, Vol. 1, sec. 184, p. 173, states the rule as follows: "Where an employee is requested by his employer to return and do 'a service outside his regular duty,' the sole purpose of which was to help his employer in the latter's business, a different rule applies, and the employee is then on a special errand. The special request for unusual service is the decisive factor which brings the employee, throughout the entire trip to and from the place of business, in the course of rendering a service for the employer. In all these cases, confusion is avoided if the test be applied, 'Was the employee at the time rendering service for the employer within the meaning of the Act?'" See also State Compensation Ins. Fund v. Industrial Acc. Comm., 89 Cal.App. 197, 264 P. 514; Robinson v. George, 16 Cal.2d 238, 105 P.2d 914; Dauphine v. Industrial Acc. Comm., 57 Cal. App.2d 949, 135 P.2d 644; Sun Indemnity, Co. v. Industrial Acc. Comm., 76 Cal.App. 165, 243 P. 892. The conclusion of the commission in the present case that the employee was on a special errand is in harmony with the holdings in the foregoing cases.

The award was reviewed on a rehearing and affirmed by the commission. Petitioner contends that the referee, who acted throughout, concluded that the decedent was injured in the course of his employment under a mistaken belief that the decedent had worked at the library in the afternoon of the day of his death and was returning to work in the evening. As we read the record, the reverse is true. The referee recommended a rehearing under the impression that decedent had worked in the afternoon and that the case might fall within the "going and coming" rule. The award was affirmed when the referee became satisfied from the evidence that decedent had not worked during the afternoon. The record leaves no doubt on this point.

The award is affirmed.

WOOD and VALLÉE, JJ., concur.

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34 Cal.2d 349

In re TEEL'S ESTATE.

TEEL v. ARBO.

L. A. 20596.

Supreme Court of California, in Bank.

Sept. 30, 1949.

Proceeding in the matter of the estate of Grace Vivian Teel, deceased, wherein Ira McDowell Teel, divorced husband of deceased, petitioned to have set apart to him a house and lot selected as a homestead by deceased out of community property, contested by Adele Arbo, administratrix.

The District Court of Appeal, Moore, P. J., reversed the order of the Superior Court, Los Angeles County, Newcomb Condee, J., granting the petition, and the administratrix appealed.

The Supreme Court, Traynor, J., reversed the order, holding that property settlement agreement and deed were ineffective as an abandonment by petitioner of homestead but that the court in granting deceased an interlocutory divorce decree assigned to the deceased, the homestead, and that petitioner could not collaterally attack decree.

Schauer, J., dissented.

Prior opinion, 200 P.2d 201.

1. Homestead 🔑140, 141(1)

If the homestead selected by husband and wife, or either of them, during their coverture, and while both were living, was selected from community property, it vests on death of either spouse absolutely in survivor. Probate Code, § 663; Civ.Code, § 1265.

2. Homestead 🔑145

A property settlement agreement entered into by parties to divorce action, and a deed executed by husband after wife was granted interlocutory divorce decree, were ineffective as declaration of abandonment of homestead and did not preclude homestead selected by former wife from community property from vesting absolutely in divorced husband on death of former wife, where agreement or deed was not jointly acknowledged and recorded as required by statute. Civ.Code, §§ 1242–2144; Probate Code, § 663; Civ.Code, § 1265.

3. Homestead 🔑154

Statutory requirements for abandonment of a homestead must be strictly complied with. Civ.Code, §§ 1242–1244.

4. Homestead 🔑145

In determining whether parties intended by property settlement agreement approved by interlocutory divorce decree for wife, to convey to wife homestead selected by wife from community property, so as to preclude divorced husband from taking homestead absolutely as surviving spouse, that agreement did not refer to recorded homestead and that divorced husband did not have actual knowledge thereof when agreement was executed, were material. Probate Code, § 663; Civ.Code, §§ 146, 1265.

5. Homestead 🔑166

An instrument is effective as a declaration of abandonment of a homestead even though it makes no reference thereto, when the object of instrument is to effect a complete settlement and adjustment of all property rights. Civ.Code, §§ 1242–1244.

6. Homestead 🔑145

Parties to divorce action by executing a property settlement agreement whereby husband agreed to convey all his interest in property which had been declared by wife as homestead out of community property, and waived all his rights therein, and by deed executed by husband pursuant thereto, intended to effect a complete adjustment of rights in property involved, including homestead, and court by approving agreement in granting wife interlocutory divorce decree made an "assignment" precluding husband from claiming property absolutely as surviving spouse. Probate Code, § 663; Civ.Code, §§ 146, 1265.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Assignment".

7. Divorce ⚷249(1), 254

In divorce action, the immediate disposal of property by an interlocutory decree is within jurisdiction of trial court, and decree cannot be modified after it has become final.

8. Divorce ⚷255

An interlocutory divorce decree assigning to successful wife a homestead selected by wife from community property could not, after time for appeal had elapsed, be collaterally attacked by former husband after death of his former wife, on petition in probate court, to have the property set apart to him as surviving spouse. Probate Code, § 663; Civ.Code, §§ 146, 1265.

Marion P. Betty, Los Angeles, for appellant.

Nixon A. Lange, Huntington Park, and Charles E. Beardsley, Los Angeles, for respondent.

TRAYNOR, Justice.

In the proceedings for the administration of the estate of decedent, her divorced husband petitioned to have set apart to him a house and lot selected as a homestead by decedent out of community property. The probate court found that the homestead was valid and subsisting at decedent's death and that title thereto vested in petitioner as the surviving spouse. The administratrix appeals from the order granting the petition.

Petitioner and decedent were married in 1933 and thereafter occupied the property until after January 11, 1945. In 1944 petitioner commenced an action for divorce and decedent cross-complained for separate maintenance. On January 11, 1945 decedent filed a declaration of homestead on the property without the actual knowledge of petitioner.

In March, 1945 petitioner and decedent entered into a property settlement agreement whereby petitioner agreed to convey to his "wife as her separate property, *all of his right, title, claim and interest in and to the community property of the parties,* consisting of a house and lot * * * which property is held as joint tenants with right of survivorship; the foregoing is to be effective when wife procures her interlocutory decree of divorce. * * *" The agreement also provided that "Each party does hereby release, relinquish and waive to the other any and all claims he or she may now have or may hereafter acquire against the other for support and maintenance, or otherwise and does hereby release, relinquish and waive all rights to administer upon the estate of the other after the death of such other, and *does hereby release, relinquish and waive unto such party his or her successors and next of kin or heirs at law any right or claim for* family allowance, *homestead,* support or maintenance, or otherwise, against such other's estate, and *agrees not to hereafter claim any interest in the other's property,* except as herein provided." [Italics added.]

On May 1, 1945 decedent amended her cross-complaint to pray for divorce and was granted an interlocutory decree approving the property settlement agreement. On the same date, pursuant to the agreement petitioner executed a deed conveying the property to decedent. No appeal was taken from the interlocutory decree, and it has now become final. On May 27, 1945 decedent died.

Thereafter, petitioner filed an action in equity against the administratrix of decedent's estate, alleging that he and decedent had become reconciled and that they had orally agreed to cancel the deed conveying the property. He prayed that the interlocutory decree of divorce be vacated, the property settlement agreement be set aside and the deed be cancelled. The court entered judgment for the administratrix, find ing that at the time of decedent's death the property was her separate property and the administratrix had the right to possession thereof. That judgment has now become final.

[1] "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property * * * it vests, on the death of either spouse, absolutely in the survivor." Prob.Code, § 663; see also, Civ.Code, § 1265. Since the interlocutory decree of divorce did not dissolve the marriage, In re Estate of Seiler, 164 Cal. 181, 128 P. 334, Ann.Cas.1914B, 1093; In re Estate of Dargie, 162 Cal. 51, 121 P. 320, petitioner is entitled to the property as the surviving spouse unless the homestead was abandoned by the property settlement agreement or deed to the property, or unless he is barred from asserting any interest in the property by reason of the judgments in the divorce or equity actions.

[2, 3] The property settlement agreement and deed were ineffectual as declarations of abandonment of the homestead. "A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married * * *." Civ.Code, § 1243; see also, Civ.Code, § 1242, and "is effectual only from the time it is filed in the office in which the homestead was recorded." Civ. Code, § 1244. There is no evidence that either the agreement or the deed was jointly acknowledged by petitioner and decedent or that these instruments were recorded. Since the statutory requirements must be strictly complied with, Dixon v. Russell, 9 Cal.2d 262, 70 P.2d 196, Freiermuth v. Steigleman, 130 Cal. 392, 62 P. 615, 80 Am.St.Rep. 138, it must be concluded that the effect of these instruments was, not to terminate the homestead with its right of survivorship in the surviving spouse, but to convey the property to decedent as her separate property. Dixon v. Russell, supra, 9 Cal.2d 262, 70 P.2d 196; Wall v. Brown, 162 Cal. 307, 122 P. 478; Brandon v. Faria, 99 Cal.App. 594, 279 P. 192.

Appellant asserts, however, that the interlocutory decree of divorce effectually and finally disposed of the property rights of the parties and cannot be attacked in this proceeding, since the time for appeal therefrom has elapsed.

Section 146 of the Civil Code provides: "If a homestead has been selected from the community property, it may be assigned to the party to whom the divorce is granted * * *. The assignment may be either absolutely or for a limited period * * *." Accordingly, if the court in the divorce action made an assignment of the homestead to decedent, petitioner can claim no interest in the property. Simpson v. Simpson, 80 Cal. 237, 22 P. 167; Towne v. Towne, 6 Cal. App. 697, 92 P. 1050. Appellant contends that the court made such an assignment by approving the property settlement agreement.

Two questions are thus presented: (1) Did the parties intend by the instruments in question to effect a complete and final settlement of all their rights to the property including any right to a homestead that may have been declared thereon? (2) Was the court's approval of the agreement tantamount to an assignment of the homestead to decedent? If, as petitioner asserts, the parties did not intend to convey the homestead to decedent, mere approval of the agreement by the court could not terminate petitioner's interest therein.

[4, 5] Petitioner points out that the agreement does not refer to the recorded homestead and that he did not have actual knowledge thereof at the time the agreement was executed. These facts are of course material to the question whether it was the parties' intention to convey the homestead to decedent by the agreement in question. It has been held, however, that an instrument is effective as a declaration of abandonment of a homestead even though it makes no reference thereto, when the object of the instrument is to effect a "complete settlement and adjustment of all their property rights." In re Estate of Winslow, 121 Cal. 92, 94, 53 P. 362, 363.

Petitioner conveyed to decedent "all of his right, title, claim and interest in and to" the property which, the agreement recites, was held by the parties "as joint tenants with right of survivorship." He also agreed to forego, without reservation, the assertion of any future claim he might have to the property including the right to a homestead therein. If petitioner's interest in the homestead persists notwithstanding these instruments, it is obvious that petitioner did not convey "all of his interest" in the property, yet that is the plain import of the language he employed. If petitioner may now assert a claim to the property based upon survivorship in the homestead, it is evident that he does so in the face of his express promise not to "claim *any* interest in [decedent's] property" and his express relinquishment of any right to a homestead therein.

[6] It is clear from the instruments in question that the parties intended to effect a complete adjustment of all their rights to the property including the homestead declared thereon. In re Estate of Winslow, supra, 121 Cal. 92, 53 P. 362. Independently of the property settlement agreement, it was within the jurisdiction of the court in the divorce action to assign the homestead to decedent, since the property rights of the parties were put in issue. Civ.Code, § 146(3), supra. The court made such an assignment by approving the agreement by which petitioner agreed to convey all his interest in the property to decedent and waived all his rights therein. Towne v. Towne, 6 Cal.App. 697, 704–706, 92 P. 1050.

Petitioner contends, however, that an interlocutory decree of divorce cannot of itself effect a final disposition of the property rights of the parties, citing Remley v. Remley, 49 Cal.App. 489, 193 P. 604 and Leavitt v. Leavitt, 134 Cal.App. 145, 24 P.2d 910. In the cited cases, appeals were taken from interlocutory decrees of divorce. It was there held that the trial court erred in attempting to make final disposition of the homestead in the interlocutory decree, since the homestead persisted until entry of the final decree.

[7, 8] In the present proceeding, however, the time for appeal from the interlocutory decree has elapsed. Petitioner seeks to attack that decree collaterally. In Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697, this court held that the immediate disposal of property by an interlocutory decree is within the jurisdiction of the trial court and that the decree cannot be modified after it has become final. Accordingly, since the interlocutory decree approving the property settlement agreement has become final, it cannot be attacked by petitioner in this proceeding. Petitioner is therefore barred from asserting any interest in the homestead.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached, but it appears doubtful law to hold that a deed from husband to wife, coupled with a property settlement agreement of the type here involved, is not sufficient to constitute an abandonment of the homestead as far as the husband is concerned. That does not mean that the homestead would not be good as against creditors. It would mean only that the husband has forfeited his right to take as survivor of his wife. There is a valid distinction between such a transaction and one where one spouse is conveying to a stranger. In that case, the homestead protection against creditors is lost. Such protection is the purpose of homestead laws. It is clear here, as pointed out by the majority opinion, that the property settlement agreement and deed evinced an unequivocal agreement by the husband to give up his right of survivorship. He has done all he could to do so, and therefore has no standing to claim otherwise. Rather than *protecting* his wife who *did not join* in the execution of the deed, the rule protects the husband. While it is true that some cases have held in accordance with the majority view on this point, I am inclined to think they should be overruled. At least, it is not necessary to reaffirm them and give new vitality to them in this case, for the opinion holds that the interlocutory decree of divorce assigned the homestead to the wife, thereby depriving the husband of his right of survivorship thereunder. That being so, it could be assumed, *without deciding,* that the deed and property settlement agreement involved in this case are insufficient for that purpose, but this precise point should be left open for future consideration by this court should a similar factual situation be presented.

SCHAUER, Justice.

I dissent. I do not agree that "The court made such an assignment [of the recorded homestead, the existence of which was unknown to the court and to the petitioner, and which was not mentioned in either the property settlement agreement or in the interlocutory decree] by approving the agreement by which petitioner agreed to convey all his interest in the property to decedent and waived all his rights therein." Such holding is inconsistent in principle with the very cases cited earlier in the opinion. The judgment of the trial court should be affirmed.

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34 Cal.2d 362

DOTSON et al. v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES & MOVING PICTURE MACHINE OPERATORS OF UNITED STATES & CANADA, LOCAL 162, et al.

S. F. 17559.

Supreme Court of California, in Bank.

Sept. 30, 1949.

Leslie Dotson and Walter J. Murrah sued International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, Local 162 thereof, and others, for writ of mandate compelling defendant local and certain of its officers to admit plaintiffs to membership as moving picture projectionists, for an injunction and damages.

The Superior Court, City and County of San Francisco, Frank T. Deasy, J., granted writ of mandate and an injunction, but denied general and exemplary damages, and plaintiffs and defendants appealed.

The Supreme Court, Gibson, C. J., reversed, holding, inter alia, that plaintiffs were not entitled to injunction under the evidence on ground that defendant union maintained a closed shop and an arbitrarily closed union to plaintiffs' injury.

Prior opinion 191 P.2d 778.

1. Trade unions 🔑4, 8

A labor organization may not properly maintain both a closed shop and an arbitrarily closed or partially closed union.

2. Trade unions 🔑4.5, 8

Where a labor organization maintains both a closed shop and an arbitrarily closed or partially closed union, to the injury of an employee, the employee may obtain an injunction ordering the union, in the alternative, either to admit him to full membership upon reasonable conditions applicable to all persons, or to refrain from preventing his employment upon the ground that he does not belong to the union.

3. Trade unions 🔑4.5

An employee who sues for an injunction ordering labor union to admit him to full membership upon reasonable terms applicable to all persons, basing his right to relief on ground that union maintains both a closed shop and an arbitrarily closed or partially closed union, has burden to prove that he is entitled to membership and that membership is arbitrarily closed to him.

4. Trade unions 🔑4

A labor union need not admit all persons to membership as a condition to maintaining closed shop agreements and union can reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by union.

5. Trade unions 🔑4.5

The withholding of labor union membership from an applicant who does not meet all reasonable requirements or qualifications prescribed by union as conditions of membership is not an "arbitrary" act by union entitling employee to obtain an injunction ordering union to admit employee to full membership if union also maintains a closed shop.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arbitrary".

6. Specific performance 🔑117

Although an unqualified repudiation by promisor may excuse tender or performance of conditions precedent in advance of suit, the repudiation does not excuse a party, when seeking specific performance, from pleading and proving at trial that he is ready, able and willing to perform the contractual conditions.

7. Trade unions 🔑4.5

Employees who sought injunction ordering labor union to admit them to membership on ground that union, to their injury, maintained a closed shop and an arbitrarily closed union, were required to show at trial that union's conditions for admission to membership were unreasonable and contrary to public policy, or that plaintiffs had complied with requirements or had offered to do so, coupled with proof of ability, even if proof showed that application for membership would have been arbitrarily rejected.

8. Trade unions 🔑3

Provision of constitution of international union recognizing right of a local to which transfer card issued by another local to a member of such other local is presented to require holder of transfer card to apply for membership and to submit to a re-examination of qualifications as a condition of membership is not contrary to public policy.

9. Trade unions 🔑4.5

If members of international who held transfer cards were qualified for full membership in a local other than the local to which they belonged and from which they had obtained transfer cards, but local to which they desired to transfer arbitrarily denied their admission to membership and refused to admit them to work without belonging to local to which they desired to transfer, such members would be entitled to recover damages for wrongful interference with their right to work.

Gladstein, Andersen, Resner & Sawyer and Herbert Resner, San Francisco, for plaintiffs and appellants.

Bodkin, Breslin & Luddy, Peter E. Giannini and Michael G. Luddy, Los Angeles, for defendants and appellants.

GIBSON, Chief Justice.

Plaintiffs, Leslie Dotson and Walter J. Murrah, sought a writ of mandate compelling defendant Local 162, a labor organization, and certain of its officers to admit plaintiffs to membership as moving picture projectionists. They also asked an injunction to restrain defendants from preventing their employment in the area under the local's jurisdiction, general damages for alleged loss of wages, exemplary damages, and restitution of claimed overcharges in dues. Defendants have appealed from portions of a judgment which granted a writ of mandate directing defendants to admit plaintiffs to full journeyman membership and an injunction restraining defendants from interfering with plaintiffs' employment or refusing to dispatch them to employment with seniority and other rights equal to those of journeyman members. Plaintiffs have appealed from portions of the judgment which denied them general and exemplary damages. The judgment also allowed plaintiffs certain sums as overcharges in dues, but these sums have been paid and are not included in the present appeals.

Local 162 is affiliated with the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, hereinafter called the International, which is chartered by the American Federation of Labor. The local has jurisdiction over projectionists employed in San Francisco and Marin Counties, and it has either written or oral contracts with at least seventy-five of the approximately eighty motion picture theaters in the area that they will employ only members of the local or persons dispatched by it as projectionists.

Members of the locals are also members of the International, and, under its constitution, they may secure work in areas beyond the jurisdiction of their home locals by applying to the local situated where employment is desired, but they may remain members of their home locals instead of joining the local which dispatches them to work. Workers having this status were referred to at the trial as "outside members" or "visiting members" of Local 162. Outside members have no right to vote or otherwise participate in the local's affairs, and they have limited rights to work. All positions within the jurisdiction of a local must be filled by its own members, but if the local membership is unable to care for all vacancies, preference must be given to members of affiliated sister locals, and persons not members of the International may not be given employment until all members of resident and out-of-town locals have been employed.

Under the International's constitution each member must obtain from his home local a "working card," which appears to be in the nature of a membership card, and before accepting a position in the jurisdiction of another local he must deposit his working card with the secretary of the sister local who holds this card until the member leaves the jurisdiction. Const. of Internat., art. 21, §§ 7, 8. An outside member who wishes to join the local which dispatches him to work, instead of remaining in the status of an outside or visiting member, may proceed by either of two distinct methods authorized by the International constitution, (1) by "application for membership * * * upon the official printed form of this Alliance, to be supplied to the applicant by the local union to which he seeks admission", Const. of Internat., art. 21, § 2, or (2) by obtaining a "transfer card" * from his home local and presenting this card to the local with which he desires to become affiliated. Const. of Internat., art. 19, § 18. Under either of these methods the applicant must obtain the approval of the local to which he applies.

For many years plaintiffs have been members of locals situated in other states, Dotson being a member of an Arkansas local and Murrah of one in Oklahoma, and they remained members in good standing of their home locals at all times involved herein. Murrah came to San Francisco in November, 1938, and Dotson arrived in February, 1939. They did not apply for membership or present transfer cards to Local 162 but, rather, deposited their working cards with the local, and they were assigned to work as outside members. They continued to pay dues to their respective home locals, remaining members thereof, and they were dispatched to work because as members of their home locals they were also members of the International.

Plaintiffs and other outside men consulted a law firm, which, on March 7, 1945, wrote a letter to the president of the International stating that certain visiting members of Local 162, whose names were not disclosed, desired to become members of Local 162 but that the local refused to admit them. The letter further stated that the local engaged in other assertedly improper and discriminatory practices, that the outside members were considering the possibility of litigation, and that they wished the International's president to investigate the matter.

Copies of this letter and of a second similar one from the law firm were sent by the International to Local 162. Much resentment developed in the local, because its officers felt that the letters to the International should not have been sent without revealing the names of the complainants, that the charges should first have been presented to the local, and that the outside members should not have hired attorneys who, it was claimed, represented C.I.O. unions and Communists. There is testimony, though denied, that at a union meeting Billingsley, the local's business agent, stated that the men responsible for the letters had "consulted a phony 'Commy' lawyer" and that "as soon as they were sure who the men were that they would be on their way out of town."

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* This transfer card relates only to the transfer of membership from one local to another and it is not to be confused with the working card which is in the nature of a membership card issued by the home local and is necessary to secure work either within or without the jurisdiction of the home local. Const. of Internat., Art. XXI, § 7.

Plaintiffs were accused of having caused the letters to be sent to the International, but they denied the fact. Murrah subsequently told Billingsley that he did not desire to remain at work while the question of who sent the letters was being investigated. After giving the required two weeks' notice for leaving work, he quit on July 13, 1945, and on July 15, he requested return of his working card or membership card, which was mailed to him the next day and was never redeposited with the local. Dotson last worked in San Francisco as an out-of-town member on July 24, 1945. The working card which he had deposited with Local 162 expired on August 1, 1945, and when he received a new working card from his home local he kept it and did not deposit it with Local 162 but obtained work elsewhere. On at least two occasions in August and October, 1945, plaintiffs asked Billingsley if there was any work for them, and Billingsley replied that there was none.

At trial plaintiffs based their claims with respect to membership in Local 162 upon two somewhat inconsistent theories, first, that the local had actually accepted them as members by permitting them to work under its jurisdiction for a number of years but nevertheless wrongfully deprived them of the privileges and indicia of full membership, and second, that the local maintained closed shop contracts with employers and at the same time arbitrarily refused to admit plaintiffs to membership or dispatch them to work. It was also asserted that defendants, actuated by malice, conspired to deprive plaintiffs of their employment as projectionists, entitling them to both general and exemplary damages.

The trial court found that plaintiffs had not become members of or transferred to Local 162 but had paid dues to and remained members of their out-of-state locals, and the evidence is ample to support this finding. The court found and concluded, however, that the local had closed shop contracts with practically all of the theaters in the area and that it had maintained an arbitrarily closed union from 1919 until the time of trial, and the local was ordered to admit plaintiffs to full journeyman membership and was enjoined from interfering with their employment as projectionists. It was further found that there was no conspiracy, fraud, malice, intimidation, or coercion on the part of defendants to deprive plaintiffs of their livelihood or to deny them admission into the local and that plaintiffs, in July, 1945, had picked up the membership cards which they had deposited with Local 162 and therefore were not available for work within the jurisdiction. Apparently upon the basis of these findings the court denied plaintiffs' claim for general and exemplary damages.

Defendants' Appeal

[1, 2] The principal question presented by defendants' appeal is whether plaintiffs have established a right to relief under the recent decisions of this court that a labor organization may not properly maintain both a closed shop and an arbitrarily closed or partially closed union. James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Williams v. International etc., of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; Thompson v. Moore Drydock Co., 27 Cal.2d 595, 165 P.2d 901. These decisions also hold that an employee who has been injured by a union's conduct in violation of this principle may obtain an injunction ordering the union, in the alternative, either to admit him to full membership upon reasonable terms and conditions applicable to all persons or to refrain from preventing his employment upon the ground that he does not belong to the union.

In the present case plaintiffs have established that Local 162 maintains closed shop agreements with practically all of the theaters within its jurisdiction and that it is impossible for moving picture machine operators to obtain work unless they are dispatched by the local. Further, it is clear that defendants cannot satisfy their duties under the Marinship case by offering to resume dispatching plaintiffs to work as outside men, because the record shows that giving plaintiffs work in this manner would not be equivalent to granting them full membership in Local 162. As visiting members, plaintiffs would have few of the privileges accorded to regular members, for instance they would not be allowed to vote for officers or upon matters of union policy, and their seniority rights, if existing at all, would not be equal to those of members. Although they would be under the control of the local and would be required to pay the same percentage of their wages as is paid by regular members of the local, they would be kept in an inferior status analogous to that of the auxiliary membership considered in James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, and the junior membership condemned in Cameron v. International Alliance, etc., 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594. The basic question, therefore, insofar as defendants' appeal is concerned, is whether plaintiffs have been arbitrarily excluded from full journeyman membership in Local 162.

[3-5] Whether or not a labor organization is arbitrarily closed to a particular worker depends, of course, upon the facts of each case, and it is plaintiffs' burden to prove that they are entitled to membership, that membership is closed to them, and that it is arbitrarily closed, since these matters are essential parts of their cause of action under the Marinship case. Defendants contend that plaintiffs have not met this burden and that the trial court erred in granting the requested relief because plaintiffs have not shown either that they are able and willing to comply with the requirements and regulations of the union or that the requirements are unreasonable. As recognized in the Marinship case, a union is not compelled to admit all persons as a condition to maintaining closed shop agreements, and it has the "right * * * to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union." James v. Marinship Corp., 25 Cal.2d 721, 736, 155 P.2d 329, 338, 160 A.L.R. 900. For example, the court there in effect upheld the right of the union to impose initiation fees and dues. It has also been held that an assessment of union members for the purpose of opposing a proposed amendment to the state Constitution is reasonable and that a member's refusal to pay the assessment can properly result in suspension of his membership and consequently, by virtue of collective bargaining, contracts, loss of his right to perform radio services or produce radio programs. DeMille v. American Fed. of Radio Artists, 31 Cal.2d 139, 187 P.2d 769, 175 A.L.R. 382. Clearly a union cannot be said to have acted arbitrarily in withholding membership from an applicant who does not meet all reasonable requirements or qualifications prescribed by the union as conditions of membership.

Here it appears that the constitution of the International authorizes only two methods by which a person may become a member of an affiliated local, that is, by "application for membership * * * upon the official printed form of this Alliance" or by obtaining a "transfer card" from the local of which he is a member and presenting this card to the local which he desires to join. The application blank provided for in the by-laws of the International contains a statement that the applicant authorizes the local to which he applies to be his exclusive agency for collective bargaining and that he agrees to abide by the rules of the local and the International. The form also requires certain information, including a list of theaters, laboratories, and studios where the applicant has worked, apparently to assist an investigation and appraisal of his qualifications, and the making of an application obviously constitutes a part of the union's regular procedure in processing new members. Murrah, however, testified that he had not presented an application for membership or a transfer card to Local 162, and there is no evidence that Dotson ever applied for membership by either method. To the contrary, plaintiffs admit in their briefs that they did not apply.

Further, the constitution of the International prescribes certain other qualifications, such as that the applicant must be a citizen of the United States or Canada, that he must not be a member of "any organization having for its aim or purpose the overthrow, by force, of the Constitution and Government of the United States or the Government of the Dominion of Canada," and that he must be of good moral character and reputation. Const. of Internat., art. 1, § 3, art. 21, § 1. A member found to lack any of the qualifications is subject to expulsion. Const. of Internat., art. 1, § 3.

The constitution of Local 162 provides certain other prerequisites for membership, among which are payment of $250 initiation fee, Const. of Local 162, art. 2, § 4, and presentation of a physician's certificate that the applicant is free of tuberculosis and is physically able to perform the duties required of him. Const. of Local 162, art. 2, § 2.

Plaintiffs do not claim that any of the foregoing qualifications or requirements for membership is unreasonable or beyond the scope of legitimate activity of a labor union, and this question is not before us.

The trial court did not make findings as to plaintiffs' qualifications for membership except that they were competent and qualified moving picture machine operators and projectionists, and no attempt was made by plaintiffs to prove compliance or ability to comply with all the terms and conditions prescribed by the constitutions, nor did they offer to comply. Further, it is admitted that plaintiffs did not apply for membership, and they state that at trial they relied on the belief that an application was not necessary in order to bring them within the rule of James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900. This position is, of course, without merit, since the Marinship case expressly recognized the right of a union to impose reasonable requirements as conditions of obtaining membership. 25 Cal.2d 721, 736, 155 P.2d 329, 160 A.L.R. 900.

Plaintiffs also say that they did not apply for membership because it would have been an idle act, and, although not expressly argued, they apparently rely upon this theory as an excuse for failure to meet other requirements of the union. In support of their contention they point to evidence which they assert establishes that any application would have been arbitrarily rejected. The record shows that from 1924 to July, 1945, no outside men had been admitted to membership, although five were admitted in August, 1945, before the complaint was filed herein, and six were admitted after the complaint was filed but before trial. There is also evidence of statements and conduct by the local's officers from which plaintiffs could reasonably have believed that no outside man would be admitted without the personal approval of Billingsley, the local's business agent, and that Billingsley would not approve plaintiffs as members because they were suspected of having instigated the writing of the letters to the president of the International containing the charges made against Local 162.

The evidence, although conflicting and not entirely satisfactory, is sufficient, when considered as a whole, to show that defendants in effect told plaintiffs that they could not become members of Local 162 and that it would be useless and an idle act for them to apply. The trial court made no specific finding upon this issue, but it did conclude that Local 162 had maintained an arbitrarily closed union from 1919 until the time of trial, and this may be sufficient to permit implication of a finding that it would have been useless for plaintiffs to apply. The question need not be determined here, however, because on the record before us an express finding to this effect would not, without more, be sufficient to entitle plaintiffs to a judgment for the reason that they did not attempt at the trial to prove compliance with the terms and conditions prescribed by the union, nor did they offer to comply.

Even if we assume that it would have been an idle act for plaintiffs to apply for membership and to make an offer to comply with other requirements of the union prior to commencement of the action, it was nevertheless incumbent upon them at trial to establish compliance or offer to comply with all reasonable terms and conditions prescribed by the union. In the absence of such a showing or offer, they were not entitled to compel specific performance of the duty imposed on the union by the doctrine of the Marinship case to admit them to membership or to refrain from interfering with their right to work. Obviously, proof that it would have been an idle act for plaintiffs to make an application would not establish that they are qualified as members or that they are able and willing to meet the requirements for membership. Since a union is not required to accept as members persons who do not meet reasonable conditions imposed by it, the court could not properly grant the relief requested unless plaintiffs were able and willing to comply with all reasonable regulations.

[6] The matter clearly is not one of mere formality, because if courts were to order admission of persons into a union without requiring compliance with reasonable conditions it would in effect give such persons rights and privileges beyond those extended to regular members and might lead to disruption of the union. See James v. Marinship Corp., 25 Cal.2d 721, 736, 155 P.2d 329, 160 A.L.R. 900. Closely analogous is a problem arising under the law of contracts, where it is the settled rule that although an unqualified repudiation by the promisor may excuse tender or performance of conditions precedent in advance of suit, it does not excuse a party, when seeking specific performance, from pleading and proving at trial that he is ready, able, and willing to perform the contractual conditions. See Buckmaster v. Bertram, 186 Cal. 673, 678, 200 P. 610; Ray Thomas, Inc., v. Cowan, 99 Cal.App. 140, 146, 277 P. 1086; Cockrill v. Boas, 213 Cal. 490, 492, 2 P.2d 774; 4 Pomeroy, Equity Jurisprudence, 5th Ed., 1941, 1051; 49 Am.Jur. 184.

[7] It follows that proof that plaintiffs' applications would have been arbitrarily rejected would not relieve them of the necessity of showing at the trial that the union's conditions for membership were unreasonable and contrary to public policy or that plaintiffs had complied with the requirements or at least had made an offer to do so, coupled with proof of ability.

Plaintiffs, however, assert that under the constitution of the International they have an absolute right to be admitted as transfer members and that Local 162 has refused to accept any outside men by this method, and they have requested this court to receive additional evidence for the purpose of showing that the local has ignored the transfer card provision of the International's Constitution. There is no merit in this position. While the constitution of the International compels a local to issue transfer cards to its members, the constitution does not compel a local to accept members by the transfer method. Instead it recognizes the right of the local to which the card is presented to reject the applicant, and there is nothing therein which forbids the practice adopted by Local 162 of requiring outside men to meet some or all of the qualifications required of new members.

[8] This, of course, does not mean that there is any right to reject outside men arbitrarily, since under the Marinship doctrine, as we have seen, a union must either accept all applicants for membership upon compliance with reasonable terms and conditions or refrain from interfering with their right to work. However, it does not appear that there is anything improper or contrary to public policy in the requirement of Local 162 that outside men file an application and submit to a re-examination of their qualifications as a condition for membership. The mere fact that an outside man may have originally complied with the requirements of the International at the time he joined his home local does not mean that he still meets those qualifications, nor does it in any way indicate that he can and does meet other reasonable conditions imposed by Local 162. In the absence of a showing that the constitution of the International precludes Local 162 from requiring an application from outside members and from imposing other requirements as conditions for membership or that such requirements are unreasonable, plaintiffs have not shown that they are entitled to the requested relief.

There is nothing in the additional evidence offered on appeal which tends to prove that plaintiffs have complied with the local's requirements for membership or that those requirements are unreasonable. Plaintiffs merely offered to prove that, after the decision by the District Court of Appeal, Murrah and a third person presented transfer cards to Local 162 but were notified that their cards had been rejected without prejudice to their right to become members by the application method. This evidence, if true, would not justify or require affirmance of the judgment. Plaintiffs, therefore, are not entitled to its admission on appeal, and the request is denied. The offer of defendants to present rebuttal evidence is also denied.

The judgment must be reversed for the reasons above stated, and it is unnecessary to discuss defendants' further ground for reversal that plaintiffs failed to exhaust their remedies, within the machinery provided by the union, by appealing to the president of the International or to the general executive board or the convention of the International.

Plaintiffs' Appeal

Plaintiffs claim that the court erred in denying them both general and exemplary damages, and they rely in part upon their testimony that they were forced to leave their work and in part upon the finding of the trial court that since July, 1945, defendants have not made work available to them and have not dispatched them to employment.

The refusal to allow damages may not be successfully attacked upon the theory that plaintiffs were forced to leave their work, because the evidence is clearly sufficient to support the specific finding of the trial court that "it is not true that a conspiracy existed or that fraud, malice, intimidation or coercion was practiced by or on the part of defendants * * * to deprive plaintiffs of their livelihood as motion picture operators or of their membership in the International union, or to deny them admission into Local 162." Nor can the court's refusal to grant damages be attacked on the ground that plaintiffs were not dispatched to work as outside members, since the constitution of the International provides that outside men must keep their working cards on deposit with the local, and plaintiffs admit that they had picked up their working cards.

[9] The provision requiring deposit of working cards, however, applies only to outside men, not to regular members. If plaintiffs were qualified for full membership in Local 162 but defendants nevertheless arbitrarily denied them admission and at the same time refused to permit them to work without belonging to the local, plaintiffs would be entitled to recover damages for wrongful interference with their right to work. See James v. Marinship Corp., 25 Cal.2d 721, 728-729, 155 P.2d 329, 160 A.L.R. 900. Rest., Torts, §§ 766, 810; 31 Am.Jur. 844 et seq.; 30 Am.Jur. 64; cf. Brotherhood of Locomotive Firemen, and Enginemen v. Tunstall, 4 Cir., 163 F.2d 289, 293; Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 135, 111 P.2d 948. The trial court's findings show that plaintiffs' earnings were greatly reduced after they stopped working in the jurisdiction of Local 162. No findings were made, however, relating to plaintiffs' right to damages on the theory that the reduction in their earnings was caused by a wrongful interference with their right to work, and the denial of damages, at least in the absence of findings upon the matter, is inconsistent with the court's conclusion that plaintiffs were entitled to the status of full membership and should have been given that status retroactive to June 29, 1945.

Inasmuch as the portions of the judgment pertaining to plaintiff's rights to full membership must be reversed, and since the right to damages depends, at least in part, upon the outcome of the membership issue, the entire matter should be remanded to the trial court so that all of the problems may be considered together.

All portions of the judgment appealed from are reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

34 Cal.2d 320

PEOPLE v. ADAMSON.

Cr. 4989.

Supreme Court of California, in Bank.
Sept. 29, 1949.

Admiral Dewey Adamson was convicted of murder in the Superior Court, Los Angeles County, Thomas L. Ambrose, J., and he appealed from an order denying his motion to vacate in the nature of coram nobis.

The Supreme Court, Schauer, J., dismissed the appeal holding that no grounds for relief within the scope of the writ of coram nobis were stated and that the petitioner failed to present credible allegations of fact which would constitute a prima facie case in any form of proceeding.

Carter, J., dissented.

1. Criminal law 🔑997

Petition for coram nobis is in legal effect a motion to vacate a judgment.

2. Criminal law 🔑997

Purpose of "coram nobis" is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if trial court had known it and which through no negligence or fault of defendant was not then known to the court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Coram Nobis".

3. Criminal law 🔑997

Petition for coram nobis must show that facts upon which petitioner relies were not known to him and could not in exercise of due diligence have been discovered at any time substantially earlier than time of his motion for writ, otherwise no ground for relief is stated.

4. Habeas corpus 🔑29

Habeas corpus is proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights.

5. Criminal law 🔑997

Appropriate writ to secure relief from a judgment of conviction obtained by use of false testimony known by prosecution to be false is not coram nobis but habeas corpus.

6. Habeas corpus 🔑29

Habeas corpus is proper proceeding to raise question of systematic, discriminatory exclusion of Negroes from grand jury.

7. Habeas corpus 🔑25(1)

Habeas corpus can be used to advance a defendant's contention of denial of right to counsel, at least where no other remedy is available.

8. Criminal law 🔑997

Where a defendant seeks to vacate a solemn judgment of conviction, particularly one affirmed on appeal, showing of diligence essential to granting of relief by way of coram nobis should be no less than similar showing required in civil cases where relief is sought against lately discovered fraud, and in such cases, defendant must aver not only probative facts upon which basic claim rests but also time and circumstances under which facts were discovered, and mere allegation of ultimate facts or of legal conclusion of diligence is insufficient.

9. Criminal law 🔑997

Where defendant contended that state used perjured testimony to obtain murder conviction and that method of selection of judges and jurors permitted systematic exclusion of colored persons, and defendant did not exercise due diligence in advancing contentions, no ground for relief was stated within scope of writ of coram nobis.

10. Criminal law 🔑997

Petition for coram nobis and supporting affidavits failed to state sufficient credible facts from which trial court and Supreme Court would be justified in believing that defendant had some expectance of establishing his conclusionary allegations of violations of due process of law. U.S.C.A.Const. Amend. 14.

11. Criminal law 🔑997

Coram nobis proceeding is a court-made proceeding, and, within limits of constitutional requirements, is subject to such limitations and procedural requirements as creating court may prescribe.

12. Criminal law ⚷997

Coram nobis proceeding is not subject to all rules applicable to an original trial but is an attack upon a judgment which has become final and in favor of which there are strong presumptions of regularity, and petition is regarded as a motion to vacate judgment and not as a complaint nor does it initiate an independent action.

13. Criminal law ⚷997

Where state filed a demurrer to petition for a writ of coram nobis, Supreme Court would not accept as true allegations in petition but would consider circumstances in which those allegations were made and state's affidavits controverting them. Pen. Code, § 1265.

14. Criminal law ⚷997

In coram nobis proceeding, defendant failed to present credible allegations of fact which would constitute a prima facie case for relief in any form of proceeding.

15. Criminal law ⚷641(4)

Defendant's right to counsel did not include right to postpone trial of a case indefinitely and reject services of public defender while defendant at his leisure attempted to find counsel who would serve without charge and of whom defendant and another person approved.

16. Criminal law ⚷304(1)

Supreme Court can take judicial notice that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminals than public defender of Los Angeles County and his staff.

17. Criminal law ⚷1001, 1131(4)

Where proceeding in nature of an application for writ of coram nobis and appeal therefrom had as their object nothing more than delay in execution of a judgment, stay of execution previously granted would be terminated, appeal from judgment denying petitioner coram nobis would be dismissed, and trial court would be directed to proceed with execution of its sentence in manner provided by law.

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Morris Lavine, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Walter L. Bowers, Assistant Attorney General, William E. Simpson, District Attorney, Jere Sullivan and Robert Wheeler, Deputy Attorneys General, Los Angeles, for respondent.

SCHAUER, Justice.

There are before this court defendant's appeal from a judgment denying his petition for coram nobis and the People's motions that this court dismiss such appeal, vacate all orders staying execution of the sentence,[1] direct the trial court to proceed in the manner provided by law with execution of its sentence (which imposes the death penalty), and direct immediate issuance of the remittitur. For the reasons hereinafter stated, we have concluded that the motions of the People should be granted.

[1] By his petition for coram nobis (which is, in legal effect, a motion to vacate a judgment [People v. Adamson (1949), 33 Cal.2d 286, 287-288, 201 P.2d 537]) defendant attacks a judgment of conviction of first degree murder which has been affirmed by this court (People v. Adamson (1946), 27 Cal.2d 478, 165 P.2d 3; rehearing denied) and by the United States Supreme Court (Adamson v. California (1947), 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223; rehearing denied, 332 U.S. 784, 68 S.Ct. 27, 92 L.Ed. 367). He contends: That he was given only two days in which to prepare his defense and was thus deprived of the right to effective aid of counsel. That "there has been a constant and systematic exclusion of colored persons in the appointment of judges" of the Los Angeles Superior Court, wherein he was convicted, thus denying to defendant, a Negro, "due process of law and equal protection of the law." "That the mode and

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[1] The only presently existing order staying execution is an order of this court made May 4, 1949.

method of selection of jurors in Los Angeles County was such as to permit systematic and persistent exclusion of members of the colored or African race on account of race * * *, and that the jury commissioner called only white persons to attend the trial and try Admiral Dewey Adamson * * *, and that the jury selected to try your petitioner consisted entirely of women, all white. That such procedure and proceedings denied him the equal protection of the law and due process of law." That defendant was convicted upon false testimony of fingerprint experts and of Mrs. Frances Turner, used by the State with knowledge of its falsity.

The judgment attacked on the above grounds was rendered on November 27, 1944. It was affirmed on appeal on January 4, 1946 (People v. Adamson, supra, 27 Cal. 2d 478, 165 P.2d 3); a petition for rehearing was denied on January 31, 1946; and defendant was resentenced by the trial court on February 15, 1946. On June 23, 1947, the United States Supreme Court affirmed the decision of this court (Adamson v. California, supra, 332 U.S. 46, 67 S. Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223), and on October 13, 1947, that court denied a petition for rehearing, 332 U.S. 784, 68 S.Ct. 27, 92 L.Ed. 367. On November 18, 1947, the trial court set February 6, 1948, as the date for defendant's execution. On January 30, 1948, just one week before the date set for his execution, defendant petitioned this court for the writ of habeas corpus. The petition was denied. The United States Supreme Court denied certiorari to this court (Adamson v. California (February 5, 1948), 333 U.S. 831, 68 S.Ct. 610, 92 L.Ed. 1115). Thereafter (later in the day on February 5, 1948), a judge of the United States District Court granted a stay of execution to permit consideration of a petition for habeas corpus in that court. On February 16, 1948, the district judge denied the petition for habeas corpus and on March 2, 1948, he refused a certificate of probable cause for appeal. On March 29, 1948, the trial court again fixed a date for execution: June 4, 1948. Thereafter a judge of the United States Court of Appeals for the Ninth Circuit denied defendant's application for certificate of probable cause for an appeal from the District Court order (Ex parte Adamson (May 11, 1948), 167 F.2d 996). The United States Supreme Court denied certiorari to the Court of Appeals (Ex parte Adamson (June 1, 1948), 334 U.S. 834, 68 S.Ct. 1342, 92 L.Ed. 1761). On June 2, 1948, defendant filed his petition for coram nobis in the trial court and that court ordered execution stayed and issued its order to show cause why the petition should not be granted. The People then filed a "Motion for a Denial of the Relief Prayed For" with affidavits denying generally and controverting specifically the material allegations of the petition, and also a "Demurrer." On July 12, 1948, the trial court made its order that "Demurrer to petition * * * is sustained without leave to amend." Defendant attempted to appeal from this non-appealable order (see People v. Adamson (1949), supra, 33 Cal. 2d 286, 201 P.2d 537). After dismissal of this purported appeal the trial court, on February 15, 1949, heard argument and rendered the "Judgment Denying Petition for Writ of Error Coram Nobis" from which the present appeal is taken, and set May 6, 1949, as the date of execution. On April 25, 1949, defendant filed with this court an application for stay of judgment pending appeal and, some of the justices being of the view that defendant had shown probable cause for reversal, on May 4, 1949, we granted defendant's application for stay of execution. After further consideration we are satisfied that the appeal is devoid of merit.

The Failure to State any Ground for Relief within the Scope of the Writ of Coram Nobis.

[2, 3] In this state a motion to vacate a judgment in the nature of a petition for coram nobis is a remedy of narrow scope. (See People v. Darcy (1947), 79 Cal.App. 2d 683, 693, 180 P.2d 752; People v. Martinez (1948), 88 Cal.App.2d 767, 774, 199 P.2d 375.) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault

of the defendant, was not then known to the court. (People v. Gilbert (1944), 25 Cal.2d 422, 442, 154 P.2d 657; In re Lindley (1947), 29 Cal.2d 709, 725-726, 177 P.2d 918; People v. Tuthill (1948), 32 Cal.2d 819, 821, 198 P.2d 505.) The applicant for the writ "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief." (People v. Shorts (1948), 32 Cal.2d 502, 513, 197 P.2d 330, 336.)

[4–7] With expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights. Thus, the appropriate writ to secure relief from a judgment of conviction obtained by the use of false testimony known by the prosecution to be false is not coram nobis but habeas corpus (In re Lindley, supra, page 725 of 29 Cal.2d, page 928 of 177 P.2d; see People v. Mooney (1918), 178 Cal. 525, 174 P. 325; Mooney v. Holohan (1934), 294 U.S. 103, 113, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; In re Mooney (1937), 10 Cal.2d 1, 73 P.2d 554), although coram nobis has been used for this purpose (see People v. Kirk (1946), 76 Cal.App.2d 496, 498, 173 P.2d 367). And habeas corpus, not a nonstatutory motion to vacate the judgment (in the nature of a petition for coram nobis), is the proper proceeding to raise the question of systematic, discriminatory exclusion of Negroes from the grand jury which indicted defendant, a Negro. (See People v. Montgomery (1942), 51 Cal.App.2d 444, 125 P.2d 108.) Habeas corpus can be used to advance the contention of denial of the right to counsel, at least where no other remedy is available. (See In re Egan (1944), 24 Cal.2d 323, 337, 149 P.2d 693, 701 ["It may be assumed that a petitioner would be entitled to release on habeas corpus if he could show that deprivation of counsel resulted in an unfair trial or in substance in no trial at all"]; In re Jingles (1946), 27 Cal.2d 496, 498, 165 P.2d 12 [proceeds directly to consideration of the merits of the contention, without discussing whether the writ is a proper remedy]; In re Tedford (1948), 31 Cal.2d 693, 192 P.2d 3 [same]; In re McCoy (1948), 32 Cal.2d 73, 76, 194 P.2d 531 [habeas corpus is available where petitioner has no other adequate remedy]; see also In re Connor (1940), 16 Cal.2d 701, 705, 108 P.2d 10, 13 ["Under the general rule well established in this state, but which admits of some modification under exceptional circumstances, this contention cannot at this late date be made the basis of a successful collateral attack by habeas corpus upon the validity of the judgment"; the contention could have been raised by direct appeal or by a nonstatutory motion to vacate the judgment].)

Defendant's application for the writ of coram nobis ignores the above summarized holdings as to the respective functions of that writ and of habeas corpus. Apparently defendant formerly recognized that in this state habeas corpus rather than coram nobis is the appropriate proceeding in which to raise the questions whether he was deprived of the right to counsel and whether there was discrimination against Negroes in the selection of judges and trial jurors in Los Angeles County, for he advanced these contentions in his petitions for habeas corpus addressed to this court and to the United States District Court. Defendant now repeats these contentions without suggesting any reason why he should be permitted to reiterate the same collateral attacks upon the judgment in various proceedings. Furthermore, he does not even attempt to make the showing fundamentally necessary for issuance of the writ of coram nobis; he does not suggest that he was diligent in advancing these contentions. The facts as to the asserted deprivation of the effective aid of counsel and the asserted discriminatory exclusion of Negroes from bench and jury either were known to defendant or in the exercise of ordinary diligence should have been known to him (at least through his counsel) at the time of trial and defendant does not attempt to show that such facts were not known to the trial court, nor does he explain his failure to raise them in orderly fashion on appeal from the judgment of conviction.

[8] As to his contention that the State knowingly used perjured testimony, not only does defendant present it in this inappropriate proceeding, but he does not comply with the requirement that he show that he has exercised due diligence. "[W]here a defendant seeks to vacate a solemn judgment of conviction, particularly where such judgment has been affirmed on appeal, the showing of diligence essential to the granting of relief by way of coram nobis should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, but also the time and circumstances under which the facts were discovered, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts or of the legal conclusion of diligence, is insufficient." (People v. Shorts (1948), supra, 32 Cal.2d 502, 513, 197 P.2d 330, 337.) Defendant does not even mention the time and circumstances under which the asserted falsity of the fingerprint evidence was discovered. Nor does he mention in his petition or supporting affidavits the time and circumstances of his asserted discovery that the prosecution used Mrs. Turner's testimony with knowledge that it was false. His first and only attempt to make this essential explanation was before this court when he applied for a stay of execution. At that time he made the following vague averment: "The perjury involved particularly the testimony of Frances Jean Turner, a white woman, and was based upon an investigation made by a detective employed by friends of the accused, as her testimony weighed not only with this Court, but the United States Supreme Court in its consideration of the sufficiency of the testimony." If Mrs. Turner's testimony was false, this fact was known to defendant at the time she testified, and he cannot be excused for his failure to raise the question of its falsity until after he discovered that this court and the United States Supreme Court (as appellate courts must do on appeal) gave credence to this evidence which tends to support the judgment of conviction.

The Failure to Present Credible Allegations of Fact which Would Constitute a Prima Facie Case in any Form of Proceeding.

[9–13] The petition for coram nobis and supporting affidavits not only state a case wholly outside the tenable scope of the writ; they also fail to state sufficient credible facts from which the trial court (and this court) would be justified in believing that defendant had some expectance of establishing his conclusionary allegations of violations of due process of law. The proceeding designated "coram nobis" in this state is a court-made proceeding and, within the limits of the constitutional requirements pointed out in People v. Shorts (1948), supra, 32 Cal.2d 502, 506, 197 P.2d 330, must, therefore, be subject to such limitations and procedural requirements as the creating court may prescribe. Such proceeding is not subject to all the rules applicable to an original trial; it is an attack upon a judgment which has become final and in favor of which there are strong presumptions of regularity; the "petition" is regarded as a motion to vacate the judgment; it is not a complaint nor does it initiate an independent action (In re Paiva (1948), 31 Cal.2d 503, 509, 190 P.2d 604). The facts that the People filed inter alia a document entitled "Demurrer" and that the trial court made an order (superseded by the order now appealed from) that the "Demurrer * * * is sustained without leave to amend" did not require the trial court and do not require this court to accept every allegation of the petition and supporting affidavits at face value. The trial court considered, and we are entitled to consider, the circumstances in which those allegations were made and the People's affidavits controverting them.

In the circumstances of the present case —a coram nobis attack upon a judgment which has become final after affirmance on appeal—we hold that this court, like the trial court, has "every right and the plain duty to scrutinize [defendant's claims] with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in [the trial]." (Hysler v. Florida (1941), 315 U.S. 411, 417, 316 U.S. 642, 62 S.Ct. 688, 692, 86 L.Ed. 932.) This rule is the same whether the proceeding be before us on appeal or on direct application. (See Pen.Code, § 1265.) The Hysler case concerns the Florida procedure whereby convicted defendants can, even after affirmance of the judgment on appeal, obtain relief of the sort sought here; i. e., "the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process" (page 415 of 315 U.S., page 691 of 62 S.Ct.). "The state's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the state Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction" (page 422 of 315 U.S., page 694 of 62 S.Ct.). And in giving such consideration we, like the trial court, are "not bound to accept at face value the allegations of the petition" (Taylor v. Alabama (1948), 335 U.S. 252, 262, 68 S.Ct. 1415, 1420, 92 L.Ed. 1935).

[14] Before discussing separately the specific contentions of defendant we note the following matters which bear upon the sincerity of the whole of his petition: He alleges, "I desire to testify at the hearing on my petition for writ of error coram nobis, or any other appropriate writ, for which this application is being considered, on the grounds that my rights under the Fourteenth Amendment to the Constitution of the United States have been violated, and request that the court enter an order for my appearance at said hearing, or otherwise grant an opportunity so that my deposition might be taken." At his trial defendant chose not to testify before the jury. He was, to be sure, then confronted with a difficult choice: whether to take the stand and have prior convictions of felony disclosed to the jury, or to fail to explain or deny the evidence against him an have such failure commented upon by the prosecuting attorney and the trial court (see discussions of this problem, People v. Adamson (1946), supra, 27 Cal.2d 478, 494, 165 P.2d 3; Adamson v. California (1947), supra, 332 U.S. 46, 57, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223). But we are justified in considering that defendant's belated desire to take the stand (not, it should be noted, before a jury, but only before a judge) is not because of any belief that he can give testimony relevant to the asserted deprivations of constitutional rights (the allegations of his petition and affidavit show that he can give very little testimony in this connection) but only to secure further delay.

We are justified also in considering that defendant, after having set forth in his petition all the contentions above stated (210 P.2d 14), has on this appeal seen fit to confine his argument to one contention: that his allegations as to the falsity of Mrs. Turner's testimony required that the question of fact be tried out. Yet examination of the record of the trial discloses that, of all the matters complained of in his petition, the testimony of Mrs. Turner is by far the least important. Furthermore we note that defendant is under sentence for four burglaries unconnected in their commission with the murder here under consideration, and that such four convictions rest upon fingerprint evidence of precisely the same character as that questioned here and were obtained before the same judge and the verdicts were rendered by a jury selected in the same manner as in the murder case. Defendant is also under sentence for a burglary connected in its commission with the murder; the verdict of guilty of that burglary rests upon precisely the same evidence and was rendered in the same trial as the verdict of guilty of murder. Yet it is only the conviction of murder, carrying with it the death penalty, which defendant has questioned. We are entitled to question the sincerity of contentions directed only to the judgment which would deprive defendant of life and not, as they could be, to those judgments which deprive him of liberty.

We note, also, the lengthy history of attacks upon the judgment of death (210 P. 2d 15) and the fact that at all times since defendant went to trial on the murder charge he has been represented by experienced and devoted counsel of his selection. In these circumstances we cannot accept his allegations that he is "poor" and "ignorant" as an excuse for his failure to present a convincing factual showing in support of his conclusionary allegations of want of due process.

Deprivation of Effective Aid of Counsel.

As to this contention the records on appeal from the judgment of conviction and the judgment denying the petition for coram nobis show the following:

Defendant was arrested on August 24, 1944. A few days later, according to a police officer, defendant said, "When the time comes I will have my witnesses there to prove [an alibi defense], and I will be defended by one of the best attorneys in Los Angeles"; on August 28 and August 31 defendant made similar statements to the officer.

[15, 16] At the preliminary hearing defendant was represented by Mr. Ward Sullivan. The information was filed September 14, 1944. On September 18, 1944, defendant appeared for arraignment without counsel; the public defender was appointed to represent him and trial was set for November 9, 1944. On October 3, 1944, the public defender was allowed to withdraw as counsel for defendant. Defendant has not attempted to explain why Mr. Sullivan withdrew from the case; we cannot assume that he withdrew in violation of his duty and against defendant's wishes. The only attempt to explain why the public defender withdrew from the case appears in an affidavit of Mr. Milton Safier, who represented defendant at the trial. Mr. Safier avers that defendant "informed me that the court * * * without his wishes or consent, appointed a Deputy Public Defender to represent him but that the Deputy Public Defender, named Richard Bird, was not an attorney of his choice; that he knew nothing about Richard Bird's ability; that Richard Bird was unsatisfactory to him * * * That he wanted counsel of his own choice and counsel chosen by Loyd Wright, * * * with his approval and consent." Of course defendant's right to counsel does not include the right to postpone the trial of a case indefinitely and reject the services of the public defender while defendant, at his leisure, attempts to find counsel who will serve without charge and of whom defendant and Mr. Wright approve. (See People v. Manchetti (1946), 29 Cal.2d 452, 458, 175 P.2d 533, and cases there cited.) This court can take judicial notice, too, that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the public defender of Los Angeles County and his staff.

Mr. Safier, an associate of Mr. Morris Lavine, undertook to represent defendant on November 6, 1944, pursuant to a request of Mr. Wright made to Mr. Lavine. On November 6 Mr. Safier requested and was refused a continuance. Four charges of burglaries unrelated to the murder went to trial on November 9, 1944; on this trial defendant was represented by both the public defender and Mr. Safier. On November 14, when the trial of these four charges ended, the trial for murder and the burglary connected therewith commenced at once, with Mr. Safier representing defendant. Defendant did not testify and produced no witnesses.

Defendant alleges that he gave Mr. Safier "the names of eleven persons whose testimony he said was vital, some of whose addresses he furnished and others whose addresses he could not furnish, most of which witnesses Adamson said could establish an alibi defense," but there was insufficient time for Mr. Safier to locate and interview these witnesses. However, defendant has not seen fit to identify these witnesses or to suggest what their testimony would be, other than alleging that at about the time the murder was being committed he was with his brother and mother and thereafter he "talked with Mrs. Robbie Babinean." In this proceeding we need not be so credulous as to believe that because Mr. Safier did not have more time to prepare a defense, defendant could not produce his mother and brother as witnesses.

Asserted Systematic Exclusion of Negroes from the Los Angeles Superior Court Bench and Jury Panel.

The petition contains no suggestion of the manner in which defendant hoped to prove these allegations. When they were presented to the trial judge on argument as to the petition, he stated, "I don't believe you can prove anything of that sort." We are justified in concluding that defendant's counsel agreed with this statement, for he made no attempt in the trial court and has made no attempt in this court to show that he has any expectance of establishing the allegations.

The Fingerprint Evidence.

Defendant has not suggested that he can produce any evidentiary facts to support the alleged conclusion that the fingerprint evidence was false and that the People knew of its falsity. Shortly after the beginning of testimony on the morning of the murder trial, the prosecuting attorney said that "when we tried the other case against this defendant [the four burglary charges not connected in their commission with the offenses now under consideration] it involved finger print testimony * * * and counsel, in commenting to the jury in that case, mentioned the fact that finger print experts were expensive"; that the same fingerprint expert would testify for the People in the present case. The prosecuting attorney requested and the trial court agreed that the court appoint as its own witness some expert who had had no connection with the case. The judge stated that he would appoint any qualified expert whom defendant's counsel suggested. Defendant's counsel suggested Mr. Chester Allen. The judge replied that he knew Mr. Allen and did not wish to appoint him because he had not been in fingerprint work for some 20 years. Appointment of the court's witness was postponed to give defendant's counsel an opportunity to find a qualified expert. He was apparently unable to find one satisfactory to him, and the court appointed Harry Rogers of the sheriff's office. Mr. Rogers compared fingerprints found in deceased's apartment with defendant's prints, came to the conclusion that the prints found in the apartment were those of defendant, and so testified at the trial.

On argument in the trial court as to the petition for coram nobis defendant produced as a witness the above mentioned Mr. Allen. Mr. Allen was permitted to take the stand rather than to give a supporting affidavit. He testified that he had not been active in fingerprint work for 19 years and did not believe that he could qualify as an expert. Therefore, he was not allowed to give any evidence as to the comparison of the prints. (The averments as to the falsity of the fingerprint evidence are contradicted by affidavits, filed in opposition to the petition for coram nobis, of the deputy district attorney who prosecuted defendant, the fingerprint expert who testified for the People, the court appointed fingerprint expert, the two police officers who investigated the homicide, the officer who originally found and photographed the fingerprints in deceased's apartment, and the officer who first entered deceased's apartment after the killing.)

The fingerprints identified as defendant's at the trial were there described by the experts as "latent." In his affidavit defendant avers upon information and belief that "latent finger prints, unlike other types of finger prints, are inaccurate and subject to many combinations and discrepancies and falsehoods; that these facts were known to the State." "Latent" prints, according to the expert testimony at the trial (and this defendant does not question), are simply prints left when the finger, slightly oily and damp with ordinary body secretions, touches a reasonably clean, smooth surface, i. e., the type of prints which constitute an essential part of the basis for virtually all fingerprint identification insofar as connecting a defendant with a particular crime is concerned. In the absence of any suggestion of evidentiary facts to that effect, we need not believe that defendant has discovered evidence tending to show that practically all expert testimony as to such fingerprint identification is false or mistaken or unreliable.

The Testimony of Mrs. Turner.

Although, as stated above, this is the only point which defendant has argued to this court, his petition minimizes its importance by averring that "defendant was convicted principally, if not solely, upon [the finger print] evidence."

The murder was committed and deceased's diamond rings disappeared about July 25, 1944. The witness Turner testified that at a time between the 10th and the 14th of August, 1944, she overheard defendant ask an unidentified man in a bar whether he would like to buy a diamond ring. In his affidavit defendant avers on information and belief that Mrs. Turner's husband was "under investigation for theft" and that she agreed to testify as the People wished in return for a promise that her husband would not be prosecuted. An affidavit of Mr. Harold Gaines contains the only direct allegations of evidentiary facts tending to support defendant's assertion that the People knowingly used false testimony. Such allegations are: About two days before Mrs. Turner testified at the trial of Adamson, Gaines saw her at a bar with a man unknown to Gaines. Thereafter, Mrs. Turner told Gaines that the man was "the District Attorney" and that "she did not know why the District Attorney wanted her to testify in Dewey's case, because she didn't know anything about it." The next morning, while Gaines was at Mrs. Turner's home, a man arrived and said that "he wanted her to go down town with him to the District Attorney's office." Mrs. Turner left with this man. She returned with the same man and told Gaines that in the district attorney's office she had been shown "some horrible pictures of a deceased woman * * *; that they told her that was what they had Dewey for." She asked Gaines "what date it was that Dewey wanted to sell Tim the rings." Gaines replied that he had not been present on any such occasion. "Then Frances Jean Turner said perhaps she was mistaken, whereupon the man from the District Attorney's office told her not to mention anything about dates." After defendant's conviction Mrs. Turner told Gaines "that at the time she gave her testimony in the case she thought she was testifyng for Dewey and testified exactly to what she had been told to say." (In opposition to the petition for coram nobis the People filed an affidavit of Mrs. Turner that her testimony "was true at the time it was given at said trial and is now true.")

At the time of argument on the petition Mrs. Turner, who had been subpœnæd by Mr. Lavine, was present in the court room. However, since the trial court concluded that the petition and supporting affidavits did not require the trying out of issues of fact, he did not permit defendant to call Mrs. Turner to the stand. Independently reappraising the credibility and effect of the Gaines affidavit in the light of all the facts before us, we conclude that such affidavit does not sufficiently show a deprivation of due process. Defendant has not attempted to explain why, although he must have known that Mrs. Turner's testimony was false (if it was false) at the time it was given, he did not raise this point until, nearly three years and nine months after he was convicted, he filed his petition for coram nobis. We are not informed who Mr. Gaines is or why years elapsed between the trial and the making of his affidavit. The averments of the Gaines affidavit do not support the assertion, found only in the affidavit of defendant and only upon information and belief, that Mrs. Turner gave false testimony in return for a promise by an unidentified officer of the State that her husband would not be prosecuted for theft. In striking contrast to the lack of allegations concerning the discovery of the relevant facts averred in the Gaines affidavit, are defendant's detailed, lengthy allegations as to other matters, some unimportant, some incompetent, and practically all known to defendant at the time of his trial, concerning Mrs. Turner and her testimony. Defendant devotes a large portion of his petition and affidavit to describing a causal social meeting of Mrs. Turner and defendant which took place after the murder and before defendant's arrest and which has no connection with the crime. The petition and supporting affidavits contain a number of allegations such as the following: Defendant's counsel avers on information and belief that after defendant's conviction an unidentified person interviewed, by telephone, one Dauzat, owner of the bar where, according to Mrs. Turner's testimony, she overheard defendant's conversation regarding rings, and Dauzat "inferred to the interviewer that this woman was not a person of reputable character. He also stated that petitioner Adamson frequently came into the place and was not a drinking man, preferring coca-cola, and that he never knew Adamson to be other than a perfect gentleman; that throughout his experience in this type of business he found that when a party wanted to make some kind of a deal he would not discuss it at the bar, where talk could be overheard, he would do so in a private conversation, and that from his association with petitioner Adamson and his observation of Adamson while in the establishment, he was of the opinion that Adamson would not think of discussing any business at the bar. He further stated that he does not believe that Frances Turner ever heard Adamson in this diamond ring conversation, but thinks that she testified as she did because she wanted to clear herself from any association with colored men." Harold Gaines avers in his affidavit that "During all of the time I have known Frances Jean Turner I have known her to be a steady drinker and a confirmed drunkard and a person who sought the limelight." Defendant avers in his affidavit that Mrs. Turner "was a white woman who had been out with Dewey Adamson, had visited his home and that she had had drinks with the said Dewey Adamson." These and similar averments, incompetent to establish defendant's contention that Mrs. Turner perjured herself, are relevant to a determination of the sincerity with which that contention is advanced. By seeking to buttress a contention of deprivation of due process with allegations such as those last quoted, defendant and his counsel indicate a desperate resolve to delay execution of judgment rather than a sincere attempt to present a serious question of fact and law.

Upon the showing made to us nearly five years after the judgment of conviction was rendered, we conclude that "it is asking entirely too much of the court to believe" the allegations of the petition and supporting affidavits (see Taylor v. Alabama (1947), supra, 335 U.S. 252, 271, 68 S.Ct. 1415, 1424; 92 L.Ed. 1935); we can only believe that this proceeding in the nature of an application for coram nobis and the appeal therefrom have had as their object nothing more than delay in the execution of the judgment under attack.

[17] For the reasons above stated, the stay of execution heretofore granted is terminated, the appeal from the judgment denying the petition for coram nobis is dismissed, and the trial court is directed to proceed with execution of its sentence in the manner provided by law. (See People v. Shorts (1948), supra, 32 Cal.2d 502, 518, 197 P.2d 330.) Let the remittitur issue forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, Justice.

I concur in the judgment solely upon the ground that relief by coram nobis was properly denied because habeas corpus is the available and proper remedy. The courts developed the modern use of the writ of error coram nobis in an era when it furnished the only remedy for reviewing certain serious errors. However, in recent years, generally speaking, habeas corpus has been made available for the correction of errors within the category of lack of procedural due process of law. In re McCoy, 32 Cal.2d 73, 194 P.2d 531; In re Jingles, 27 Cal.2d 496, 165 P.2d 12; In re Mooney, 10 Cal.2d 1, 73 P.2d 554. Accordingly, the compelling necessity for the use of a writ of error coram nobis is no longer present. Moreover, the enlarged use of habeas corpus avoids the necessity for the time consuming practice of making an application for relief in the trial court followed by an appeal from an adverse determination.[1] See People v. Nixon and Murphey, Cal.Sup., 209 P.2d 385; People v. Shorts, 32 Cal.2d 502, 197 P.2d 330.

The effect of the present decision is to foreclose in the future most, if not all, of the present uses of the writ of error coram nobis, for there are no significant situations where that writ might be used in which habeas corpus is not now available. This result reflects sound policy directed to protection of the rights of persons improperly convicted, and at the same time expedites the efficient administration of justice.

I do not agree with the protracted discussion in the majority opinion as to the procedure for obtaining coram nobis and the nature of the proceeding. (See dissent, In re Paiva, 31 Cal.2d 503, at page 511, 190 P.2d 604.) The opinion holds that "With the expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights." By that rule, the modern use of the writ of error coram nobis is judicially "repealed" and it is entirely unnecessary to discuss rules of pleading applicable to a proceeding which it is said may not be maintained. If consideration of those principles were proper, I would state my reasons for disagreeing with much of what is stated.

CARTER, Justice.

I dissent.

While it may be true that defendant has failed to allege sufficient facts to show due diligence—why he did not discover sooner the basis for his attack on the judgment and proceed accordingly, yet the demurrer to his petition should not have been sustained without leave to amend. He may be able to allege facts which would show diligence and should be given the opportunity to do so. Those comments are also applicable to the other alleged defects in the petition and affidavits of petitioner. But in addition to the foregoing, I do not believe it is the function of this Court to pass upon the credibility and "sincerity" of petitioner's pleadings. Likewise, the trial court should not do so in ruling on a demurrer.

This Court is merely reviewing the action of the trial court in sustaining a demurrer interposed by the People. In so doing it must give full weight to the trial court's determination the same as in any other case. The majority opinion gives no reason and cites no authority for the unique proposition that a different rule applies to the pleadings in a coram nobis proceeding than that applicable to pleadings in other proceedings. The majority opinion is replete with statements that the allegations cannot be believed, that they are not sincere, that they are mere conclusions and the like. On demurrer all the pleaded facts must be taken as true—must be believed. That is especially true where the demurrer is general. Moreover, they must be liberally construed. Hudson v. Craft, 33 Cal.2d 654, 204 P.2d 1. Certainly when a man's life is in the balance and constitutional issues are raised, the rule of liberal construction is even more imperative than in the ordinary case. It is said in People v. Long, 346 Ill. 646, 178 N.E. 918, 919: "The facts set out were sufficiently definite to raise the issue of whether the plea of guilty was entered through an excusable mistake or ignorance of the accused, and whether he was deprived of a substantial defense which he might have urged on his trial. Under such circumstances, the trial court could not arbitrarily refuse a full hearing upon the petition. The allegations of a petition need be only prima facie sufficient for the granting of such a hearing." See also, Howie v. State, 121 Miss. 197, 83 So. 158, 10 A.L.R. 205.

If the facts stated in the petition and affidavits, taken at their face value, are insufficient as a matter of law to constitute a ground or basis for relief, the demurrer should have been sustained, and, in the absence of an amendment setting forth further facts, that should be the end of the story. The discussion in the majority opinion relative to the good faith and sincerity of petitioner and his counsel in making the statements contained in the petition and affidavits, goes entirely beyond the scope of the review which this Court is called upon to make in deciding the issue presented by this appeal.

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[1] The 1949 amendment to section 1265 of the Penal Code has avoided some of the present procedural steps. (Stats. 1949, Ch. 1309 [A.B. 2575].)

I would reverse the judgment and direct the trial court to permit petitioner to amend his petition if he be so advised.

HOWARD GREER CUSTOM ORIGINALS v. CAPRITTI et al.

Civ. 17036.

District Court of Appeal, Second District, Division 1, California.

Oct. 3, 1949.

Rehearing Granted Nov. 1, 1949.
See 213 P.2d 78.

Howard Greer Custom Originals, sued J. C. Capritti, doing business under the fictitious firm name and style of Rose Marie of California, and other fictitious defendants, and Rose Marie of California, Inc., sued as Black and White Company, for claim and delivery, conversion and damages for breach of contract, wherein a cross-complaint was filed by the corporate defendant.

A default judgment was entered against the defendant, J. C. Capritti, and its motion to set aside the default was denied by the Superior Court of the County of Los Angeles, Stanley N. Barnes, J., and such defendant alone appealed.

The District Court of Appeal, Drapeau, J., affirmed the order on ground that defendant had failed to prove any of the grounds provided for under statute which would enable trial court to grant relief requested.

1. Appeal and error 🔑113(1)

An order denying motion under statute to set aside judgment as taken through mistake, inadvertence, surprise, or excusable neglect, is appealable. Code Civ.Proc. § 473.

2. Judgment 🔑139

In considering motions to set aside defaults, trial court must exercise a sound and legal discretion in such matter as to serve and not defeat or impede ends of substantial justice. Code Civ.Proc. § 473.

3. Judgment 🔑363

The statute authorizing court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, is remedial and should be liberally construed so as to dispose of cases on their substantive merits and give party claiming meritorious right in good faith opportunity to present it. Code Civ.Proc. § 473.

4. Appeal and error 🔑982(2)

Reviewing courts will scan more closely and are more prone to reverse orders denying relief from judgments on ground of mistake, inadvertence, surprise or excusable neglect than orders granting such relief, but the rule not to disturb trial court's action except in clear case of abuse of discretion has not been relaxed. Code Civ.Proc. § 473.

5. Appeal and error 🔑1008(3)

On appeal from order made on affidavits, involving the decision of a question of fact, appellate court is bound by same rule that controls it where oral testimony is presented for review, and if there is any conflict in affidavit, those in favor of prevailing party must be taken as true, and fact stated therein must be considered to be established.

6. Appeal and error 🔑948

On appeal from order denying motion under statute to set aside default judgment, burden of convincing that denial of motion was an abuse of discretion was on appellant. Code Civ.Proc. § 473.

7. Judgment 🔑162(4)

Affidavits supporting and opposing individual defendant's motion to set aside default judgment under statute as taken through mistake, surprise, inadvertence, or excusable neglect on ground that defendant had meritorious defense and that he had failed to answer individually under impression that amended answer and amended cross-complaint filed by corporate defendant would be sufficient showed sufficient facts to warrant trial court's belief that defendant had failed to prove any of the grounds provided for under statute which would enable it to grant relief requested. Code Civ.Proc. § 473.

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Geo. W. Rochester, Los Angeles, for appellant.

Abraham Gottfried, Los Angeles, for respondent.

DRAPEAU, Justice.

This is an appeal from an order denying a motion of defendant Capritti made under section 473, Code of Civil Procedure to set aside a default judgment.

It appears from the record herein that on March 19, 1948, respondent corporation sued J. C. Capritti doing business as Rose Marie of California, and other fictitious defendants, for claim and delivery, conversion and damages for breach of contract, and on April 1, 1948, filed its amended complaint based on contract. On the latter date writ of attachment issued against the personal property of defendant Capritti, hereinafter referred to as appellant. Undertaking to discharge such attachment was filed on behalf of appellant in his individual capacity on April 23rd.

Thereafter, on May 7th, the answer and cross-complaint of Rose Marie of California, Inc., sued as Black and White Company, a corporation, were filed, and on the following day summons on the amended complaint was filed showing proof of service thereof on appellant as of April 26th. Demurrers to the answer and the cross-complaint were interposed and sustained on May 20th and defendant was given fifteen days to amend.

In the meanwhile, on May 17, 1948, upon request of respondent the default of appellant was entered by the Clerk.

Thereafter, on June 24th, Rose Marie of California, Inc., filed its petition in bankruptcy and E. A. Lynch was appointed receiver.

On July 21st, appellant in his individual capacity filed an answer to the amended complaint in which he alleged that he did not at any time "do business under the fictitious name and style of Rose Marie of California, but was employed by Rose Marie of California, a corporation organized and existing under the laws of the state of California, as an employee having no other business nor entering into any agreements, contracts or understandings of any kind whatsoever, save and except within the capacity of his employment with the said Rose Marie of California, Inc."

On July 22nd counsel for appellant filed and served notice of motion to set aside the default, supported by appellant's affidavit averring that an answer to the amended complaint having been filed on behalf of Rose Marie of California, a corporation, "affiant was under the impression that this would be sufficient and that there was no need for affiant to file an answer in his individual and personal capacity"; that when informed that a default had been entered against him, he conferred with counsel for the corporation, who prepared and filed an answer in his behalf on July 21st.

The default and appellant's motion to set it aside were heard jointly on July 29, 1948, resulting in a denial of the motion and the granting of a default judgment against appellant.

No appeal was taken from such judgment which was entered on August 3rd, but on August 5th, appellant served and filed his notice of motion under section 473, Code of Civil Procedure, to set such judgment aside, and for permission to file his proposed answer to the amended complaint, such motion being supported by affidavits of appellant, his counsel and others, all to the effect that appellant had a meritorious defense to the action, to wit: that he had been employed as manager of the plant owned and operated by Rose Marie of California, Inc., and at no time had done business under the fictitious name and style of Rose Marie of California.

By reason of a filed alternative writ of prohibition, which was subsequently discharged, Howard Greer Custom Originals v. Superior Court, 87 Cal.App.2d 816, 197 P.2d 768, said motion went off calendar, but was later restored to calendar for hearing on October 21st, when the matter was submitted; and was denied on November 1, 1948. This appeal followed.

Appellant here contends that the denial of his motion to set aside the default judgment was an abuse of discretion which deprived him of his day in court and the opportunity to present a meritorious defense.

At the outset respondent urges the dismissal of this appeal on the grounds (1) the order of November 1st is nonappealable; (2) a motion to set aside a default judgment must be denied where a motion to set aside the entry of default has been previously denied.

[1] A motion to dismiss made upon practically the same grounds has been denied by this court during the pendency of this appeal. Moreover, it was held in Swan v. Riverbank Canning Co., 81 Cal.App.2d 555, 557, 184 P.2d 686, 687: "That an order denying a proper motion under section 473 of the Code of Civil Procedure is appealable, seems to be settled. See Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 282, 153 P.2d 714; Funk v. Campbell, 15 Cal.2d 250, 251, 100 P.2d 762; In re Yoder, 199 Cal. 699, 702, 251 P. 205; Huffaker v. Decker, 77 Cal.App.2d 383, 386, 175 P.2d 254."

In the Winslow case, supra, it was held [25 Cal.2d 274, 153 P.2d 718]: "In those cases *where the law makes express provision for a motion to vacate*—as under sections 473, 473a and 663, 663a of the Code of Civil Procedure—an order denying such motion is regarded as a 'special order made after final judgment' and as such is appealable under section 963, subdivision 2, of the Code of Civil Procedure. California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Funk v. Campbell, 15 Cal.2d 250, 100 P.2d 762." (Emphasis included.)

[2] The general rules applying to motions such as the one here under review are well stated in Toon v. Pickwick Stages, Northern Division, Inc., 66 Cal.App. 450, 453, 226 P. 628, 629: "The legal principles by which courts are guided in considering motions to set aside defaults are well established and are comparatively simple. The trial court is to exercise a sound and legal discretion in passing upon the application. This discretion is not capricious or arbitrary, but it is an impartial discretion, and is to be exercised in such a manner as to conform with the spirit of the law by subserving and not impeding or defeating the ends of substantial justice. Waite v. Southern Pac. Co., 192 Cal. 467, 221 P. 204. 'Section 473,' says the court in Nicoll v. Weldon, 130 Cal. [666], 667, 63 P. [63], 64, 'is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. * * * It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court may impose as the condition of granting the motion.' See, also, Brasher v. White, 53 Cal.App. 545, 200 P. 657."

[3, 4] Again, in Kent v. County Fire Ins. Co., 27 Cal.App.2d 340, 341, 80 P.2d 1019, it is stated: "The purpose of section 473 of the Code of Civil Procedure is remedial. It should be liberally construed so as to dispose of cases upon their substantive merits and give the party claiming in good faith to have a meritorious right, an opportunity to present it. Because of this the reviewing courts will scan more closely orders denying relief and are more prone to

reverse orders of denial. They look with disfavor upon a party, who, regardless of the merits of his case, attempts to take advantage of mistake, surprise and inadvertence of his adversary. Brill v. Fox, 211 Cal. 739, 743, 297 P. 25."

However, the foregoing is qualified somewhat by the following statement appearing in 14 Cal.Jur. 1078, sec. 116: "But notwithstanding statements by the supreme court to the effect that the discretion is better exercised when it tends to bring about decision on the merits, the rule not to disturb the trial court's action except in a clear case of abuse of discretion 'has never been relaxed'; such statements 'have been in the nature of advice' to the court below and not a compulsion to act in the manner suggested. (Citation of authorities.)"

No doubt has been raised as to the propriety of the instant motion. And the "question here is the one that was before the [trial] court on the motion to vacate the judgment, namely, whether appellant made a sufficient showing for relief under section 473, Code of Civil Procedure, although we are, of course, under a duty to abide by the ruling of the trial court unless we are satisfied that in denying the motion the court was guilty of an abuse of discretion." Nicholson v. Nicholson, 85 Cal.App.2d 506, 508, 193 P.2d 112, 113.

[5] In the late case of Mann v. Pacific Greyhound Lines, 92 Cal.App.2d 439, 207 P. 2d 105, 108, in discussing a motion made pursuant to section 473, supra, it was said: "The problem presented to the trial court on the motion was whether plaintiffs were entitled to relief from the judgment of dismissal because of their 'mistake, inadvertence, surprise or excusable neglect.' That problem was presented on affidavits, and it is definitely settled that 'In the consideration of an appeal from an order made on affidavits, involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established.' 1 Cal.Jur. p. 681; 2 Cal.Jur. p. 932."

Turning to the affidavits filed in support of the instant motion, (1) that of appellant averred, among other things, that Rose Marie of California, Inc., was incorporated on September 25, 1947; that on October 1st, affiant was employed by such corporation as manager of its manufacturing plant; that when on March 26, 1948 he was served with summons and complaint directed against him as J. C. Capritti doing business as Rose Marie of California, he was instructed "by said corporation to confer with its attorney, Geo. W. Rochester, Esq., in regard to defense"; that affiant filed an answer on behalf of the corporation and "was under the impression that this would be sufficient as the said coporation's attorney assured him that the plaintiff and plaintiff's counsel understood the situation." That on June 24th, the corporation filed a petition in bankruptcy, and affiant filed a claim in that proceeding for wages due him. Further, that he fully and fairly stated all the facts in the case to his counsel, Mr. Rochester, and "is advised by said counsel and he verily believes that he was a valid and meritorious defense to the within action upon the merits."

(2) The affidavit of Mr. George W. Rochester, counsel for the corporation, avers that "on or about the middle of July, 1948, he became the attorney for J. C. Capritti"; that about April 21, 1948, one Dragna, Secretary-Treasurer of Rose Marie of California, Inc., a corporation, showed affiant the complaint and amended complaint filed in the within action which had been served on the president thereof about March 26 and April 1, 1948, respectively; that at the hearing of May 20th on the demurrers to the answer and cross-complaint of respondent corporation, it was stated in the presence of respondent's attorney, Mr. Abraham Gottfried, "that his suit was intended to be against Rose Marie of California, Inc., a corporation, inasmuch as there was no J. C. Capritti doing business under the fictitious name and style of Rose Marie of California." That after imparting such information to said attor-

ney, "affiant was under the impression * * * that the amended answer and amended cross-complaint would suffice for the purposes of getting the causes of action at issue." That thereafter said Mr. Gottfried interposed demurrers to the amended answer and amended cross-complaint "setting up hyper-technical objections to the pleadings, one of them being 'whether Rose Marie of California, Inc. is a defendant herein, and if so, for which of the named defendants it is appearing,' he, Abraham Gottfried, knowing full well the factual situation and that Rose Marie of California, Inc., answered the complaint for the reason that there was no such legal entity as J. C. Capritti doing business under the fictitious firm name and style of Rose Marie of California." That hearing on the demurrers was set for June 24, 1948, and continued by stipulation between affiant and Mr. Gottfried to July 1, 1948; that on June 24, 1948, affiant advised Mr. Gottfried that Rose Marie of California, Inc. had filed a petition in bankruptcy and that therefore the action would have to be defended and tried by the attorney for the receiver. Further, affiant averred that early in July of 1948, a deputy county clerk telephoned him and said that Mr. Gottfried had requested from her "a setting for trial of a default taken against J. C. Capritti doing business under the fictitious firm name and style of Rose Marie of California"; whereupon he talked to Mr. Gottfried and told him in substance that, after the implied understanding between them, for Mr. Gottfried to "now try to 'pull the sneak' was indeed a surprise to affiant, but that if he wanted J. C. Capritti to file an answer, contrary to our mutual understanding, of course, affiant would try and get hold of Mr. J. C. Capritti and file the answer. Said Abraham Gottfried over the telephone then stated to affiant that an answer should be filed for J. C. Capritti in his personal capacity, whereupon affiant assured Abraham Gottfried that the answer from J. C. Capritti would be filed"; that such answer was filed on July 21, 1948, and on that very afternoon affiant received notification that a default trial had been set for "J. C. Capritti dba Rose Marie of California" on July 29, 1948; that he thereupon had his motion to set aside such default set for hearing on the same day, at which time it was denied; that he thereafter made the instant motion under sec. 473, C.C.P. to set aside the "default judgment on file herein, by reason of 'inadvertence, suprise or mistake', caused by affiant's reliance upon his understanding with Abraham Gottfried, a member of the Bar of California * * *"

The several other affidavits made in support of the motion contained averments with respect to the defense which it was proposed to present. No allegations were made touching upon the elements of "mistake, inadvertence, surprise or excusable neglect" necessary to be shown in order to prevail under section 473, supra.

In opposition to the motion, respondent's counsel, Mr. Gottfried, filed his affidavit in which he averred, among other things, that on March 2, 3, 4, 8, 9, 10, 11, 18, 24, April 21 and 26, 1948, he had numerous conversations with appellant and the various attorneys representing him, to wit: Harry M. Umann, Esq., of the firm of Altagen, Rubin & Umann; Bernard S. Selber, Esq., and George W. Rochester, Esq., and at no time during such conversations did any of the attorneys or appellant advise affiant or his client that appellant was not the owner of the business and that same was owned by a corporation; that to the contrary, Mr. Umann specifically advised affiant that he represented appellant personally; that the day before respondent's complaint was filed, affiant together with the president and secretary of respondent corporation visited the place of business of appellant, at which time the latter stated that he was the owner of the business, Rose Marie of California; that on March 19th, affiant filed the original complaint herein and attached the bank account of appellant dba Rose Marie of California; that on March 24th Mr. Umann telephoned affiant that he "would enter an appearance for Mr. J. C. Capritti" requesting that affiant furnish him a copy of the summons and complaint, which was done. Affiant then averred upon information and belief that when service of summons and complaint was made upon appellant, that the latter conferred with Mr. Umann, who advised that a personal appearance would have to be made for appellant; that appellant thereupon instructed Mr. Umann to turn over the files in the case to Mr. Rochester; that among these files "affiant is informed and believes, was the original complaint and summons, together with correspondence showing that Mr. Capritti dealt with plaintiff in his individual capacity."

It is further averred that on May 6th, Mr. Rochester filed an answer on behalf of Rose Marie of California, Inc. Also that appellant, as well as his attorneys, "knew at all times that he was sued in his individual capacity and that the same is evidenced by the fact that his undertaking to release the attachment was given for Mr. Capritti only, and that as a result of such undertaking, the Sheriff released the property held under attachment." That he is now informed that the corporation is a bankrupt, and "that the present action on the part of J. C. Capritti is an attempt to avoid liability and to saddle a bankrupt corporation with his responsibilities." That Mr. Rochester was representing appellant in his individual capacity long before July, 1948, may be seen by his letter dated May 24, 1948, addressed to affiant, a copy of which is attached to the affidavit. Affiant also denied that he had any understanding with Mr. Rochester that the action was intended to be against the corporation and not against appellant; or that the amended answer and cross-complaint would suffice for the purpose of getting the causes of action at issue. Further, that affiant at all times told Mr. Rochester that he was not interested in any corporation, but was interested only in appellant, individually; that affiant made no statement, representation or indication to Mr. Rochester to the contrary; that Mr. Rochester knew that appellant was the real party in interest and on May 6th when he entered the appearance of Rose Marie of California, Inc., he also knew or had reason to believe that the corporation was insolvent and was contemplating bankruptcy.

The affidavits of the president and secretary respectively of respondent corporation in opposition to motion were to the effect that at no time did appellant state that he was not personally responsible under the contract which forms the basis of the instant action; or that it was not made between respondent and appellant personally; or that appellant represented a corporation, but to the contrary, appellant represented that he was the owner of the business.

[6, 7] On appeal the burden is on appellant to convince this court that the denial of the motion for relief was an abuse of discretion. Mann v. Pacific Greyhound Lines, supra, 92 Cal.App.2d 439, 207 P.2d 105. An examination of the affidavits supporting and opposing the motion discloses that appellant has not sustained such burden. The affidavits show sufficient facts to warrant the court's belief that appellant failed to prove any of the grounds provided for under section 473 which would enable it to grant the relief requested.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

93 Cal.App.2d 808

KAUFFMAN et al. v. KAUFFMAN.

Civ. 3963.

District Court of Appeal, Fourth District, California.

Sept. 29, 1949.

Barton James Mitchell Kauffman and Betty Lee Ruth Kauffman sued Angie Florence Kauffman to impress a trust upon the proceeds of a United States war risk insurance policy insuring Barton H. Kauffman, deceased.

The Superior Court of San Diego County, L. N. Turrentine, J., rendered a judgment for defendant and plaintiffs appealed.

The District Court of Appeal, Mussell, J., affirmed judgment, holding that National

Life Insurance Act of 1940 under which the policy was issued, was constitutional, and that property settlement between insured and his first wife was an "assignment" of proceeds prohibited under statute, and that children of insured after his death could not enforce the agreement against defendant who married insured after the first wife of insured obtained divorce.

1. Army and navy ⚷63

United States war risk insurance is a contract made in pursuance of federal statute and must be construed with reference to such statute, the regulations promulgated thereunder, and the decisions applicable thereto, rather than by laws and decisions governing private companies. National Life Insurance Act of 1940, §§ 601–618, 38 U.S.C.A. §§ 801–818.

2. Army and navy ⚷63

A United States war risk insurance contract is solely between the government and the insured. National Life Insurance Act of 1940, §§ 601–618, 38 U.S.C.A. §§ 801–818.

3. Army and navy ⚷58(2)
States ⚷4.2

The National Life Insurance Act of 1940 is a constitutional exercise of the powers granted to Congress, and is the supreme law of the land. National Life Insurance Act of 1940, §§ 601–618, 38 U.S.C.A. §§ 801–818.

4. States ⚷4.1

Since the United States is a government of delegated powers, none of which may be exercised throughout the nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state, and such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements.

5. States ⚷4.7

The activities of the federal government are free from regulation by any state.

6. Army and navy ⚷77(6)

Under provision of National Life Insurance Act giving insured rights to designate beneficiary within specified classes, and the right to change beneficiaries, an insured could change beneficiaries without consent of those who were first named as beneficiaries, the fact that they were first named beneficiaries giving them no vested right in proceeds of policy. National Service Life Insurance Act of 1940, §§ 601–618, 602(g-i), 38 U.S.C.A. §§ 801–818, 802(g–i); 38 U.S.C.A. § 454a.

7. Army and navy ⚷78

A property settlement agreement between an insured under United States war risk insurance policy and his first wife, providing for his first wife to be beneficiary and required children of insured to be named as beneficiaries should the parties obtain divorce, was an "assignment" of proceeds prohibited under statute, and children of insured after his death could not enforce the agreement against a woman insured married after his first wife obtained divorce. National Service Life Insurance Act of 1940, §§ 601–618, 602(g–i), 38 U.S.C.A. §§ 801–818, 802(g–i); 38 U.S.C.A. § 454a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Assignment".

8. Appeal and error ⚷934(2)

Where appeal was upon judgment roll alone, and only question presented was whether the findings supported the judgment, the findings would be given such construction as would uphold rather than defeat the judgment.

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Eugene A. Horton, San Diego, for appellants.

Edgar B. Hervey, San Diego (Henry F. Walker, Los Angeles, of counsel), for respondent.

MUSSELL, Justice.

This is an action to impress a trust upon the proceeds of a United States War Risk Insurance policy and was filed by plaintiffs, the son and daughter respectively of the deceased Barton H. Kauffman, against their stepmother Angie Florence Kauffman who was the beneficiary named in the policy. The appeal is from a judgment in favor of defendant and is presented upon the judgment roll.

The facts alleged and found by the court are as follows:

On August 27, 1941, Gertrude A. and Barton H. Kauffman (parents of the plaintiffs herein) entered into a property settlement agreement which provided, as far as is applicable here, as follows:

"13. It is agreed between the parties hereto that the husband has caused to be issued in his name a Five Thousand Dollar ($5000.00) United States War Risk Insurance Policy No. $\frac{39184}{K965765}$. It is understood and agreed that so long as said policy remains in full force and effect, the wife shall be named as beneficiary under said policy; provided, however, that if a final decree of divorce should be granted to either party hereto, then and in that event Betty Lee Ruth Kauffman and Barton James Mitchell Kauffman, the children of the parties hereto, shall be named as beneficiaries of said policy in the sum of Two Thousand Dollars ($2000.00) each so long as said policy remains in full force and effect.

"14. Each of the parties hereto agrees to execute all necessary and proper papers to properly carry out the purposes and effect of this agreement."

Subsequent to the execution of this agreement Gertrude A. Kauffman secured an interlocutory judgment of divorce from Barton H. Kauffman and a final judgment of divorce was rendered on October 20, 1942. In the final decree all property of the parties was assigned in accordance with the terms of the interlocutory decree in which the court had approved and confirmed the terms of the property settlement agreement. After entry of the final decree of divorce Barton H. Kauffman married the defendant herein and on November 20, 1942, Kauffman changed the beneficiaries of the insurance policy, as follows: The beneficiary of record (Gertrude A. Kauffman, divorced wife) was cancelled and new beneficiaries named were his wife, Angie F. Kauffman, $1000.00; plaintiff son $2000.00; and plaintiff daughter $2000.00. These changes were in accordance with the provisions of the property settlement agreement and the terms of the divorce decrees.

On October 20, 1947, Barton Kauffman made a further change in the beneficiary provisions of the insurance policy by designating his wife, Angie F. Kauffman, defendant herein, as sole beneficiary thereunder. This change was made without the consent of his divorced wife, Gertrude, and without the knowledge or consent of plaintiffs.

Barton Kauffman died on February 28, 1948, and pursuant to the terms and conditions of the insurance policy, the United States Government has paid or will cause to be paid to defendant the sum of $5000.00 in accordance with the designation of beneficiary made by Kauffman on October 20, 1947. Payments by the Government were begun as of February 29, 1948, and were scheduled to continue for a period of thirty-six months at the rate of $145.95 per month. Plaintiffs seek to impress a trust on these funds in the total amount of $4000.00, and contend that they are each entitled to the sum of $2000.00 in accordance with the terms of the property settlement agreement.

The trial court found that the defendant is the beneficiary under the insurance policy in question and "is the owner of and entitled to keep any funds which have been or may hereafter be paid to her as such beneficiary, and that defendant is under no obligation to deliver or turn over to the plaintiffs, or either of them, such funds or any part thereof", and concluded that plaintiffs were entitled to take nothing. Judgment was rendered accordingly.

[1-5] War Risk Insurance is a contract made in pursuance of Federal Statute and must be construed with reference to such statute, the regulations promulgated thereunder, and the decisions applicable thereto, rather than by laws and decisions governing private companies. Sternfeld v. United States, D.C., 32 F.2d 789, 790. The insurance contract is solely between the Government and the insured and the only relations of contract are between the Government and him. White v. United States

et al., 270 U.S. 175, 180, 46 S.Ct. 274, 70 L.Ed. 530; Barton v. United States, D.C., 75 F.Supp. 703, 704. In the latter case, 75 F.Supp. at page 705, it was held that the National Life Insurance Act of 1940, 38 U.S.C.A. §§ 801–818, is a constitutional exercise of the powers granted to Congress, citing U. S. Constitution Art. I, § 8, cls. 1, 13, and as such is the supreme law of the land, if Congress so willed. Id., Art. 6, cl. 2. In Mayo v. United States, 319 U.S. 441, 445, 63 S.Ct. 1137, 1139, 87 L.Ed. 1504, 147 A.L.R. 761, it was held that: "Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible."

In Conrad v. Conrad, 66 Cal.App.2d 280, 285, 152 P.2d 221, this court in construing the rights of the parties in United States Savings Bonds, held that the Federal Statutes and their interpretation by the Federal Courts should be applied rather than the rules of law of the States and the decisions of the State Courts. United States v. Clearfield Trust Co., 3 Cir., 130 F.2d 93; Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L. Ed. 838; Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239, 63 S.Ct. 246, 87 L. Ed. 239.

In Davies v. Beach, 74 Cal.App.2d 304, 308, 168 P.2d 452, 455, it was held that the Second Liberty Bond Act, 31 U.S.C.A. § 752, is a valid exercise by Congress of its constitutional power "to borrow Money on the credit of the United States"; that the borrowing power necessarily includes the power to fix the terms of the obligation of the United States; that the State cannot vary the terms of Federal obligations and that a Savings Bond issued under the Second Liberty Bond Act and the regulations of the Treasury Department is a contract obligation of the United States to the owner and to the beneficiary severally. It was also there said that "The statutory right, afforded by the State, to dispose of property by will is not paramount to the power of the federal government to borrow money. If such a statutory power can render nugatory the provisions of the bonds and the rules and regulations of the Treasury Department, upon which purchasers of the bonds rely, the power of the federal government to raise money will be impaired. The capacity of the federal government to borrow money depends on the inviolability of its obligation, and on its ability to carry it out strictly in accordance with its terms. If the State may treat the bonds as the property of some person other than the one whom the contract has designated the federal government will be prevented from carrying out its agreement."

The National Life Insurance Act, 38 U.S.C.A. §§ 801–818, as applicable here, provides, § 802(g): "The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

Section 802(h) contains provisions as to the manner in which the proceeds shall be paid to beneficiaries designated by the insured, if living, and in § 802(i), it is provided in part that "No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h)."

In this connection it has been held that the interest of a beneficiary of a War Risk Insurance policy is vested only so far as the Government makes it so, and such interest may be divested or changed without in any way transgressing any obligations, Adams v. Jackson et al., 23 Tenn.App. 118, 126 S.W.2d 899, 904; that title to unaccrued instalments of War Risk Insurance does not vest in a beneficiary so as to pass to the estate of the beneficiary, In re Pivonka's Estate, 202 Iowa 855, 211 N.W. 246, 55 A.L.R. 570; that a beneficiary under a War Risk Insurance policy has no such vested interest therein as will prevent Congress from enacting later legislation giving the balance of the insurance due at the beneficiary's death to the estate of the insured, Palmer v. Mitchell, 117 Ohio St. 87, 158 N.E. 187, 55 A.L.R. 566, and that beneficiaries of the contract, after the death of the insured, have no vested interest. Battaglia v. Battaglia, Tex.Civ.App., 290 S.W. 296.

In Re Estate of Young, 215 Cal. 127, 130, 8 P.2d 846, it was held that none of the permitted class of beneficiaries under the War Risk Insurance Act, 46 U.S.C.A. § 1128 et seq., had a vested right to the balance of the fund remaining unpaid upon the death of the insured and that Congress has in plain terms specifically designated the class, and prescribed the methods by which the estate may be enjoyed by the class so designated.

[6] These authorities impel us to conclude that the insured, in the instant case, under the provisions of the Federal Statute, 54 Stat. 1009, 38 U.S.C.A. § 802(g), was specifically authorized to change the beneficiaries in the policy with which we are here concerned without the consent of the plaintiffs herein, or either of them, and that the fact that they were first named beneficiaries gave them no vested rights in the proceeds of the policy.

Section 454a of the World War Veterans' Relief Act, Title 38 U.S.C.A., in so far as here applicable, provides: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

[7] We conclude that the property settlement agreement was an assignment of the proceeds of the policy in question, Chilwell v. Chilwell, 40 Cal.App.2d 550, 553, 105 P.2d 122; that such an assignment is prohibited by the terms of the Federal Statute, § 454a, supra, and is therefore not enforceable against the defendant beneficiary. Lewis v. United States, 3 Cir., 56 F.2d 563; Von Der Lippi-Lipski v. United States, 55 App. D.C. 202, 4 F.2d 168; Bradley v. United States, 10 Cir., 143 F.2d 573; Tompkins v. Tompkins, 132 N.J.L. 217, 38 A.2d 890; Yake v. Yake, 170 Md. 75, 183 A. 555; Robertson v. McSpadden, D.C., 46 F.2d 702; United States v. Williams, 302 U.S. 46, 50, 58 S.Ct. 81, 82 L.Ed. 39.

The provision in § 454a that the payments and benefits due or to become due are exempt from taxation and the claims of creditors, and are not subject to legal or equitable process indicates that Congress intended to control the title to such payments and benefits both before and after payment. This control and the provisions of the section have been recognized and enforced. Barton v. United States, D.C., 75 F.Supp. 703, 705; Carrier v. Bryant, 306 U.S. 545, 548, 59 S.Ct. 707, 83 L.Ed. 976.

We are not dealing here with such a situation as was presented in Wissner v. Wissner, 89 Cal.App.2d 759, 201 P.2d 837. In that case the widow of the insured claimed a right to one half of the proceeds of a national service insurance policy as against the named beneficiaries on the basis that all of the insurance premiums were paid with community earnings or funds. It was there held that the wife had a vested interest under the community property laws of this State and that she was therefore entitled to one half of the proceeds of the policy.

In the instant case the record is silent as to the source of the premium payments. Such payments may have been made entirely from separate funds of the insured to and including the date of the property settlement agreement and thereafter from community funds of the insured and defendant herein. Plaintiffs' action is based solely on a contract which under the findings and judgment is unenforceable.

[8] The trial court found that the right of plaintiffs to the proceeds of the insurance policy was not superior to that of defendant; that defendant is the beneficiary under the policy and is the owner of and entitled to keep any funds which have been or may hereafter be paid to her as such beneficiary. Where, as here, the appeal is upon the judgment roll alone, and the only question presented is whether the findings support the judgment, the findings must be given such construction as will uphold rather than defeat the judgment. Oakley v. Rosen, 76 Cal.App.2d 310, 312, 173 P.2d 55; Fitzpatrick v. Underwood, 17 Cal.2d 722, 728, 112 P.2d 3.

Judgment affirmed.

GRIFFIN, Acting, P. J., concurs.

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94 Cal.App.2d 25

MOST WORSHIPFUL HIRAM OF TYRE GRAND LODGE OF ANCIENT FREE & ACCEPTED MASONS (COLORED) OF STATE OF CALIFORNIA v. MOST WORSHIPFUL SONS OF LIGHT GRAND LODGE ANCIENT FREE & ACCEPTED MASONS, JURISDICTION OF CALIFORNIA.

No. 13948.

District Court of Appeal, First District, Division 1, California.

Oct. 6, 1949.

Rehearing Denied Nov. 5, 1949.

Hearing Denied Dec. 1, 1949.

The Most Worshipful Hiram of Tyre Grand Lodge of Ancient Free and Accepted Masons (Colored) of the State of California sued the Most Worshipful Sons of Light Grand Lodge Ancient Free and Accepted Masons, Jurisdiction of California, to enjoin defendants from conducting a grand lodge of colored Freemasonry within the state.

The Superior Court for the City and County of San Francisco, Stanley Murray, J., rendered a judgment for plaintiff, and defendant appealed.

The District Court of Appeal, Bray, J., reversed the judgment, and held that plaintiff could enjoin defendant from representing that its lodge was the only bona fide grand lodge of Freemasonry within the state, and from making confusing representations.

1. Beneficial associations 🔑5(1)

Reference in constitution of fraternal lodge to Masonic Jurisprudence, which declares that in a given state first grand lodge to be formed acquires exclusive jurisdiction, governed interior relationships only, and did not bind the lodge, in dealings with another lodge claiming exclusive Masonic jurisdiction within the same state.

2. Appeal and error 🔑1009(3)

Where evidence was conflicting in action for injunction, but there was substantial evidence to support trial court's finding, appellate court was bound thereby.

3. Beneficial associations 🔑5(1)

In action by fraternal lodge to enjoin second lodge from conducting a grand lodge of colored Freemasonry within the state, court was not bound by Masonic law.

4. Evidence 🔑22(1)

Court may judicially notice that long prior to 1910 there was established and ever since has existed a grand lodge of white Masons in California.

5. Corporations 🔑49(2)

An established voluntary association for religious, fraternal, benevolent, or social purposes is entitled to an injunction against use by another person, association, or corporation of its name or emblem, and of any name or emblem so similar to its as to be likely to create confusion or to deceive or induce persons to join or treat with the latter as the former.

6. Trade-marks and trade-names and unfair competition ⚬68(1.20)

Where first fraternal lodge was organized long prior to second and had established a good reputation with the public, and second misrepresented that it was the older and the only colored Masonic group entitled to function within the state, and confusion occurred, first lodge could enjoin second from representing that its lodge and subordinates were the only bona fide lodges of colored Freemasonry in the state, and from doing any act tending to confuse the public or prospective members.

7. Appeal and error ⚬173(10)

Where defense of laches was raised neither by pleadings nor at trial, defense could not be considered on appeal.

◆

Goldstein, Lewis & Barceloux, J. Oscar Goldstein, Marvin E. Lewis, P. M. Barceloux, Burton J. Goldstein, San Francisco, for appellant.

Sol A. Abrams, Anthony E. O'Brien, San Francisco, for respondent.

BRAY, Justice.

Two actions involving conflicting claims of rival colored Masonic organizations were consolidated for trial. The first was an action for conversion in which a cross-complaint was filed asking damages for fraud. The second action was one brought by the Hiram of Tyre Grand Lodge against the Sons of Light Grand Lodge to enjoin the latter from conducting a grand lodge of colored Freemasonry in California.[1] The trial court found against Light in both actions. Thereupon Light attempted to appeal from both judgments. However, this court heretofore granted a motion to dismiss the appeal in the conversion case on the ground that the judgment was not final, an accounting being required. Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge, 91 Cal.App.2d 582, 205 P.2d 722. The present appeal deals only with the injunction action and the first action will be disregarded.

Facts.

In 1910 Tyre was incorporated under California law as a non-profit fraternal organization. It has operated continuously since that time and has at present 20 subordinate lodges with over 2000 members. It was formed out of three "Blue" lodges in claimed accordance with Masonic law as set forth in "Masonic Jurisprudence" by Mackey. Its constitution contained the following: "The 7th edition of Mackey's Jurisprudence is hereby adopted and made the legal authority on all questions of masonic law not provided for by this Constitution." At one time Tyre sent its grand master to a national congress of grand masters (colored) and once submitted a dispute to the congress, which resulted in Tyre being recognized by the congress as the exclusive authorized colored grand lodge in California.

In 1941 there was a split-up within the congress and several factions each formed their own congress. In 1942 one congress withdrew recognition from Tyre, although a different congress continued to recognize it.

In 1943 three Masonic lodges not connected with Tyre were formed. Based on these lodges and on the contention that Tyre no longer had grand lodge jurisdiction in California because of the withdrawal of recognition by one of the congresses, Light was incorporated the same year under California law as a non-profit fraternal organization. Its constitution stated, among other things, that it was formed "to do any and all things provided, required and set forth in Mackey's Manual of Masonic Jurisprudence." The congress which had withdrawn recognition from Tyre, in 1944 recognized Light as the exclusive authorized grand lodge in this state. In speaking to prospective members, representatives of Light stated that it was the only authorized colored grand lodge in California. When asked about Tyre, they replied that it did not "amount to much" and was not recognized by the congress. In 1946 many of the members of four subordinate Light lodges withdrew from those lodges and organized new subordinate lodges under Tyre. These new lodges took names similar to or identical with the names of the lodges they had left, and also took with them the money and equipment of those lodges. Thereupon Light brought the conversion action and Tyre brought this action.

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[1] For brevity, the Hiram of Tyre Grand Lodge will hereafter be referred to as Tyre, and the Sons of Light Grand Lodge as Light.

Issues.

On this appeal there seems to be considerable confusion as to just what the issues were and what the court found at the trial. The complaint alleged, in effect, that plaintiff by reason of its prior organization and because of the application of Mackey's Masonic Jurisprudence, was, as between the parties, the only colored Masonic grand lodge entitled to operate in California. It further alleged that defendant deceitfully and fraudulently obtained members from plaintiff by falsely representing that defendant and its subordinate lodges were the only bona fide, sole and exclusive grand and subordinate Masonic lodges of Scottish Rite Masonry of colored persons within the state. The court found in accordance with the allegations of the complaint. There is no allegation nor is there any finding that confusion occurred because of any similarity in the names of the two corporations. Nor was there any proof of such confusion. There is evidence that because of the representations made by defendant's officers, several persons were induced to join defendant's lodges under the belief that Light was the oldest and only authorized colored grand lodge in California. The court's findings and decree were not based on any similarity in names, but, first, on the premise that Mackey's Jurisprudence bound both parties and the court and that as plaintiff was first formed, it had the exclusive right to operate a colored Masonic grand lodge and subordinate lodges in California; and secondly, that because of the false representations made as above mentioned, defendant had taken into membership actual and prospective members of plaintiff's lodges and would "continue an extensive campaign * * * to induce members of plaintiff corporation and its subordinate Masonic Lodges," to leave them "and join defendant" and that plaintiff's "actual and prospective members" would "be misled and diverted to defendant" because of said false representations.

The court further found that Light should be, and ordered it, restrained from operating a Masonic grand lodge and from using the words "Mason," "Freemasonry," "Masonic," "Ancient Free and Accepted Mason" or similar words; using rituals, badges, uniforms, etc., customarily used by Masonic orders, or practicing Freemasonry in California. The decision was based upon two grounds: (1) that plaintiff had an exclusive right to operate as a grand lodge of colored Masonry in California, under Masonic law; and (2) that on principles of unfair competition defendant was misleading the public by misrepresenting that it was the only colored Masonic grand lodge and subordinate lodges entitled to function in California and also giving the impression that it was the oldest, thereby obtaining the advantage of plaintiff's reputation, built up over many years.

Masonic Law.

Mackey's Masonic Jurisprudence declares, in effect, that in a given state the first grand lodge to be formed acquires exclusive Masonic jurisdiction within that state. Plaintiff contends that the courts are bound by this law, particularly as in its constitution Light makes reference to Mackey's Masonic Jurisprudence. Defendant contends that such reference merely meant that it would accept Mackey in its relations with its members and subordinate lodges, and that it is obvious that it would not incorporate as a grand lodge and then adopt a rule which immediately would put it out of existence, and therefore it has not agreed to be bound to this extent by Mackey; secondly, that the courts are not bound by Mackey; and thirdly, that even applying Mackey, as one of the congresses had withdrawn recognition from Tyre, California at the time of Light's organization was open territory for the establishment of a grand lodge.

[1] We agree with defendant that the reference in its constitution to Mackey did not constitute an agreement (by Light) to be bound by Mackey in its dealings with Tyre. It is plain that such reference was to govern its interior relationships only.

[2] As to the third point, the evidence shows that there was a split in the Masonic congress and that Tyre was recognized by one element of this split and Light by the others. Moreover, on conflicting evidence the trial court found, contrary to defendant's contention, that the Masonic congresses had no power over individual grand lodges, and that a congress' refusal to recognize a grand lodge did not deprive the latter of any standing as a true Masonic grand lodge in its own territory. As there is substantial evidence to support this finding we are bound by it.

[3] On the second point, the courts are not bound by Masonic law for several reasons: (1) Defendant has not referred to, nor have we been able to find, any case in which a court has determined a dispute between two Masonic grand lodges by reference to Mackey other than Most Worshipful King Solomon Grand Lodge, Ancient Free & Accepted York Masons v. Most Worshipful Prince Hall Grand Lodge, Free & Accepted Masons etc., 76 Colo. 469, 232 P. 664, in which it was agreed at the trial by both parties that Mackey's was the guiding law. In a later case involving conflicting claims of two Masonic grand lodges, the Colorado Supreme Court said: "Plaintiff proved that it operated according to Mackey's text-book on Masonic Jurisprudence, and introduced portions of the compilation in evidence, to show that under the laws, rules, and regulations of Masonry defendant is a Masonic outlaw in Colorado. The proof was confined to plaintiff's adherence to Mackey; it was not shown that defendant or that lawful Masonic lodges as a whole are so governed. Such proof was insufficient to warrant us in relying on Mackey. To make it so, it was necessary to show that not only one of the parties but both were so bound or under a legal obligation to observe its precepts. We are therefore relegated solely to the laws of the state to decide the case. Masons may or may not know that their order is subject to Mackey's Masonic Jurisprudence, but it is not a matter of such common or general knowledge as to warrant the court in taking judicial notice thereof. 15 R.C.L. p. 1058; Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 P. 302. The fact that Masonry is a secret order only emphasizes the impropriety and impossibility of our taking judicial notice of its inner workings." Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Hiram Grand Lodge, 85 Colo. 17, 273 P. 648, 651-652.

[4] Secondly, if Mackey's does bind the courts, we are faced with the interesting situation that plaintiff is not the first Masonic grand lodge established in California. It was stated many times at the trial, and the court must take judicial knowledge of such a well known fact, that long prior to 1910 there was established and ever since has existed a grand lodge of white Masons in California. Mackey makes no distinction as to color. Hence, if Mackey does apply, neither party would have any right to exist. It may be that there has grown up an organization of colored Masonry separate and parallel to the white organization. If so, it is not under the terms of Mackey's, and hence in order that disputes between colored organizations might be settled in accordance with rules similar to Mackey's, such organizations would have to agree in some way that their disputes might be so settled. Moreover, if a rule similar to Mackey's exists binding colored lodges, plaintiff failed to bring itself under it as it failed to show that it was the only colored grand lodge in existence in California in 1910, at the time of its formation. Defendant offered at one time of the trial to prove that plaintiff was neither the first colored grand lodge to be organized here, nor the only one existing in 1910, but the court declined to permit it to do so. It therefore appears that the evidence fails to establish Mackey's as the governing law, nor is there any legal authority for applying Mackey's in a case where one of the grand lodges has refused to be bound by it in a dispute with a rival grand lodge.

Unfair Competition.

[5] It is now well established that, as said in Talbot v. Independent Order of Owls, 8 Cir., 220 F. 660, 661: "An established voluntary association for religious, fraternal, benevolent, or social purposes is entitled to an injunction against the use by another person, association, or corporation of its name or emblem, and of any name or emblem so similar to its as to be likely to create confusion, or to deceive or induce persons to join or treat with the latter as the former, because such a name or emblem in effect defrauds the former and the persons so confused or deceived. [Citing many cases.]" See also Purcell v. Summers, 4 Cir., 145 F.2d 979, where there is a long list of cases in which injunctions have issued to prohibit use of names similar to those of previously established fraternal organizations.

However, there was no evidence of confusion in the names nor any finding to that effect. The court did not enjoin the defendant from using "Sons of Light" but from using any words which indicated it was connected with Masonry. This only could be on the theory that plaintiff had the exclusive right to practice Masonry in California.

It is conceded and the court found that both plaintiff and defendant are "clandestine" Masonic lodges. It is difficult to understand how a court can grant an exclusive right to operate a clandestine lodge on the ground that the lodge which is first formed has the sole right to exist. However, while the court cannot grant an exclusive right to the first formed lodge it can prevent a second lodge from misrepresenting so as to give the impression that it is the other lodge or has an exclusive right.

[6] There is substantial evidence to support the court's findings (1) that Tyre was organized long prior to the organization of Light; (2) that it had established with the public a good reputation as a fraternal order (this is a reasonable inference to be drawn from, among other matters, the length of its existence and the increase of its membership); (3) that defendant misrepresented to members and prospective members that it was the only colored Masonic group entitled to function in California and led them to believe it was the older organization; (4) that because of such misrepresentations confusion had occurred, harm had been caused to plaintiff, and continued to be caused it. There was testimony at the trial that persons had joined Light thinking it was the older organization, not because of any similarity in names but because of the representations of defendant to that effect.

Plaintiff cites section 538b of the Penal Code which makes it a misdemeanor to wear the badge, insignia or apparel of any fraternal organization unless "entitled to wear and use the same under the constitution, by-laws or rules and regulations" of such organization. Just how this helps plaintiff it is difficult to understand. The interpretation of this section claimed by plaintiff would prevent plaintiff from using Masonic badges, insignia or wearing apparel, inasmuch as plaintiff is not included in the constitution, by-laws, rules or regulations of the older white order.

It is not necessary for us to consider the question of whether the use of generic terms such as "Mason" or "Masonic" can be enjoined in California, and the effect of American Automobile Ass'n v. American Automobile Owners' Ass'n, 216 Cal. 125, 13 P.2d 707, 82 A.L.R. 699, for the reason that these terms in defendant's name were not enjoined by the lower court on the theory that they caused a similarity with plaintiff's name but on the erroneous theory that plaintiff had the exclusive right to practice Masonry in California.

We have been cited to no case, nor have we been able to find any in which a court has assumed the right to give exclusive lodge jurisdiction to one clandestine fraternal organization over another, with two exceptions. The first is the case of Most Worshipful King Solomon Grand Lodge etc. v. Most Worshipful Prince Hall Grand Lodge etc., supra, 232 P. 664, where the parties stipulated that Mackey's Masonic Jurisprudence was determinative of the rights of the parties. The second are cases from jurisdictions like Oklahoma, where there is an express statute to the effect that the first fraternal order of a given character to be organized in the state has the exclusive right to operate such order. See Saint Joseph's Grand Lodge, etc. v. Most Worshipful Saint John's Grand Lodge, 193 Okl. 283, 143 P.2d 119, and John A. Bell Grand Lodge, etc. v. Most Worshipful St. John's Grand Lodge, etc., 89 Okl. 112, 214 P. 114. Colorado has a similar statute. See Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Hiram Grand Lodge, supra, 273 P. 648.

In Grand Lodge, I. B. & P. O. O. Elks v. Grand Lodge, I. B. & P. O. O. Elks, 4 Cir., 50 F.2d 860, cited by plaintiff, the court enjoined the defendant lodge, which was comprised of withdrawees from the plaintiff, from using the name which was identical with that of plaintiff except for the word "of" on the ground that the use of a name so similar was a fraud upon the original order and upon the public. It is significant, however, that the court only denied the defendants the right to use a name similar to that of plaintiff, but did not deny it the right to operate an Elks lodge, even though it pointed out that the evidence showed that all colored Elks lodges in the United States have recognized the jurisdiction of a national grand lodge, and have expressed their rights as such under its dispensation. (The colored Masonic orders have not done so.)

In Most Worshipful Widows' Sons Grand Lodge v. Most Worshipful etc., 1947, 160 Pa.Super. 595, 52 A.2d 333, there is related the early history of Negro Masonic Lodges in the United States. Petitioners, a group of colored persons, none of whom were members of the Masonic fraternity, petitioned the court for a charter of a corporation to practice Masonry in Pennsylvania. The court stated, 52 A.2d at page 335: "The issue here is fraudulent representation, and not exclusive right, although" defendant "has such exclusive right." It then held that the incorporation of such a group who not being Masons had no right to organize as such, would be a fraud on the already existing defendant lodges and on that ground refused to grant a corporation charter to petitioners. It is obvious that this decision is not in point in our case.

The position of the courts as regards rival fraternal organizations is well stated in Cuney Grand Lodge, C. A. F. & A. M. v. State, 1926, 142 Miss. 894, So. 298, 302: "The court cannot judicially know what the principles and degrees of free Masonry are, or of any particular brand of doctrine known as free Masonry, if there be differences of organizations and principles. That is a matter with which the state is not concerned so long as no fraud is used to deceive a person solicited to join or be received into these orders."

The injunction in this case went too far. It should have been limited to prohibiting defendant, its officers, agents servants and employees from representing that its grand lodge and its subordinate lodges were or are the only bona fide grand lodge and subordinate lodges of Freemasonry in California, or making any representation or performing any act which would tend to confuse, in the minds of the public, or prospective members, its organization with plaintiff and its subordinate lodges, or by misrepresentation to attempt to lure away plaintiff's members.

Estoppel.

[7] Defendant on this appeal attempts to raise the doctrine of laches. It was raised neither by the pleadings nor at the trial. Hence it cannot be considered here.

The judgment is reversed with directions to the trial court to enter a judgment in accordance with the views here expressed.

PETERS, P. J., and WARD, J., concur.

93 Cal.App.2d 796

TWAITS et al. v. STATE BOARD OF EQUALIZATION et al. (three cases).

Civ. 7666, 7667, 7668.

District Court of Appeal, Third District, California.

Sept. 29, 1949.

Two actions by Ford J. Twaits and Morrison-Knudsen Co., Inc., and an action by Ford J. Twaits against the State Board of Equalization and others to recover taxes paid under the Retail Sales Act of the Statutes 1933, page 2599, section 1 et seq., § 2(e), as amended, St.1941, p. 1322. The three actions were consolidated for trial.

The Superior Court, Sacramento County, B. F. Van Dyke, J., entered judgment for the defendants and the plaintiffs appealed.

The District Court of Appeal, Schottky, J. pro tem, held that the plaintiffs did not come within the legislative exemption of the sales tax and were not entitled to a refund and affirmed the judgments.

1. Statutes 🔑176

A court is not justified in ignoring the plain words of a statute unless it clearly appears that the language used is contrary to what was, beyond question, the intent of the legislature. Code Civ.Proc. § 1858.

2. Taxation 🔑204(2)

Statutes exempting property from taxation are strictly construed.

3. Taxation 🔑204(2)

Grants of exemption from taxation cannot be allowed unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the instrument by which the right is claimed.

4. Licenses 🔑8(2)

Where Sales Tax Law was amended to provide that meals served by employers to employees engaged in work upon a particular project, were not subject to sales tax, amendment was a change in the tax law which previously only exempted meals served by employer to its own employees. St.1933, p. 2599, § 1 et seq., § 2 (e), as amended, St.1941, p. 1322; Revenue and Taxation Code, § 6363.

5. Administrative law and procedure 🔑330, 387

Statutes 🔑219

Administrative practice under a statute and its interpretation by officials charged with its administration are entitled to great weight in construction of statute, although final responsibility for interpretation of statute rests with courts, and administrative officer may not make a rule or regulation which alters or enlarges a legislative enactment.

6. Licenses 🔑19(3)

Where construction contractor served meals to its own employees and employees of subcontractors employed on its projects receipts from meals did not come within statute exempting from sales tax, employers serving meals exclusively to employees. St.1933, p. 2599, § 1 et seq., § 2 (e), as amended, St.1941, p. 1322.

Latham & Watkins, Los Angeles, for appellants.

Fred N. Howser, Attorney General, James E. Sabine & Irving H. Perluss, Deputy Attorneys General, for respondents.

SCHOTTKY, Justice pro tem.

The three above named actions were commenced by plaintiffs and appellants against defendants and respondents to recover taxes paid under the Retail Sales Tax Act of the State of California, Stats. 1933, p. 2599 as amended, for periods prior to July 1, 1943. The respondents having asserted that certain receipts of appellants were subject to the retail sales tax, the appellants paid the taxes, interest and penalties demanded, filed claims for refund, and after denial of the claims, commenced these actions. The three actions involving substantially the same facts, were consolidated for trial and presented to the Superior Court upon the pleadings and a written stipulation of facts. The trial court held that the appellants were liable for the tax and this appeal is from the judgment entered in accordance with such holding.

The material facts are that appellants are construction contractors who, during the years 1940, 1941 and 1942, were engaged in the construction of facilities for the United States War Department at Camp Roberts, San Miguel, California, Fort Ord, near Monterey, California, and Victorville Airport, Victorville, California. At each project the appellants provided mess and housing accommodations for the exclusive patronage of their own employees, and employees of subcontractors who were working on the project site. Said facilities were maintained for the convenience of the employers and employees and, in one case, because of a requirement in the prime contract with the United States. A fifty cent charge was made for each meal served, whether the employees of the appellants or employees of subcontractors.

The appellants, believing that they were not "retailers" of the meals served, failed to report the receipts from this activity and paid no sales tax on account thereof. In reaching said conclusion, the appellants relied upon Section 2(e) of the Retail Sales Tax Act, St.1941, p. 1322, the pertinent portions of which read: "'Retailer' includes every person engaged in the business of making sales at retail * * * except * * * employers or employee organizations serving meals exclusively to employees shall not be regarded as retailers of the meals served by them. * * *"

The issue to be determined upon this appeal is whether or not the amounts received by appellants as prime contractors on a construction project from the sale of meals exclusively to its employees and the employees of its subcontractors working on the project, were subject to sales tax.

Appellants' first contention is that Section 2(e) expressed a legislative policy to exclude from sales taxation receipts of the kind here involved. Appellants argue: "In declaring that policy and in defining the area of exclusion it must have been cognizant of the general nature of construction operations, and of the fact that large construction projects customarily involve the services, on the project, of subcontractors. It must further have been cognizant of the fact that many employers operate cafeterias or mess halls for the benefit of their employees. It is inconceivable that, in view of this situation, the legislature could have intended to draw a fine distinction between the employees of a prime contractor on the project and the employees of a subcontractor. What the legislature sought was the removal from the incidence of the sales tax of non-commercial operation of mess facilities by an employer for the benefit of employees, whether in a closely integrated manufacturing plant or on a large construction project. The respondents improperly seek to distort the legislative purpose; they seek an interpretation of Section 2(e), which is based upon a technical approach and which, in fact, thwarts the legislative purpose. It has been repeatedly stated that tax statutes shall be interpreted in a practical manner so as to effectuate the true legislative purpose."

Respondents in reply assert that appellants seek to draw from the plain and unambiguous language of Section 2(e) a construction which is not supported by its wording when appellants argue in effect that the statute made no distinction between persons employed by them and persons employed by other employers.

[1] Much has been written in many decisions upon the somewhat nebulous subject of legislative intent, but we do not believe that a court is justified in ignoring the plain words of a statute unless it clearly appears that the language used is contrary to what was, beyond question, the intent of the legislature. As stated in section 1858 of our Code of Civil Procedure: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted."

[2, 3] The employees of the subcontractors were not the employees of the appellant contractors, and since the exemption

from the sales tax applied only to employers "serving meals exclusively to employees" we are unable to agree with appellants that, when they provided a mess hall which served meals for a monetary consideration to their own employees and also to the employees of subcontractors, they were not subject to the sales tax. For, as said by our Supreme Court in Cypress Lawn Cemetery Association v. San Francisco, 211 Cal. 387, at page 390, 295 P. 813, at page 814: "Constitutional provisions and statutes exempting property from taxation are strictly construed. People v. Board of Directors, 174 Ill. 177, 51 N.E. 198. Grants of exemption from taxation cannot be allowed, unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the instrument by which the right is claimed. Pasadena University v. County of Los Angeles, 190 Cal. 786, 791, 214 P. 868."

[4] Appellants make the further contention that because the legislature in 1943, Stats.1943, p. 2453, enacted an amendment to the sales tax laws which in terms exempted from sales tax meals served by employers "to the employees engaged in work upon a particular project or undertaking", the legislature intended to clarify the existing statute, not to change it. They argue that the 1943 amendment was but the clarification of the existing law because appellants and other taxpayers were contesting the imposition of the tax at the time of enactment of Section 6363, Revenue and Taxation Code. While such a rule of construction has at times been utilized by the courts, the latest expression of our Supreme Court is found in People v. Santa Fe Federal Savings & Loan Ass'n, 28 Cal. 2d 675, 685, 171 P.2d 713, 718, where it was said: "Ordinarily, any substantial amendment of a statute indicates a legislative intention to change the meaning of the enactment rather than to interpret it. Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449; Young v. Three For One Oil Royalties, 1 Cal.2d 639, 36 P.2d 1065. The very fact of amendment evidences a desire to change the existing law. Loew's, Inc., v. Byram, 11 Cal.2d 746, 82 P.2d 1."

We believe that the 1943 amendment must be considered a change in the law rather than a clarification. When the legislature enacted the original sales tax statute it was, of course, aware that in all large projects there were subcontractors and employees of subcontractors. If it had intended to exempt from the sales tax an employer serving meals not only to its own employees but also to the employees of its subcontractors is could easily have said so. We are of the opinion that the 1943 amendment indicated a change in legislative policy and a desire on the part of the legislature to extend the exemption to include employers serving meals to the employees engaged in work upon a particular project.

Respondents also point out that the provisions of Section 2(e) with which we are concerned were first added to the Retail Sales Tax Act by Chapter 679, Statutes of 1939, and that on April 23, 1940 the State Board of Equalization issued its ruling that the board considered as retailers employers who served meals other than exclusively to their employees. The ruling was re-issued in 1941 and 1942. Respondents argue that the continuation over the period of this administrative practice, and its approval by the failure of the legislature to amend Section 2(e) during this period, is substantial support for respondents' position that the legislature intended the statutory exemptions to be granted only to employers serving meals exclusively to their employees.

[5, 6] The administrative practice under a statute and its interpretation by officials charged with its administration are entitled to great weight in the consideration of the proper construction of such statute, although it is also true that the final responsibility for the interpretation of the law rests with the courts and an administrative officer may not make a rule or regulation which alters or enlarges the terms of a legislative enactment. Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 156 P.2d 1; Whitcomb Hotel, Inc., v. California Employment Comm., 24 Cal.2d 753, 151 P.2d 233, 155 A.L.R. 405; California Drive-In Restau-

rant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028.

In view of the foregoing we conclude that the trial court correctly determined that the appellants did not come within the legislative exemption from the sales tax that was assessed against them and were not entitled to a refund of said taxes.

The judgments are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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93 Cal.App.2d 864

NOBLIT et ux. v. BLICKSHIRE HOTELS & MOTELS, Inc. et al.

Civ. 16954.

District Court of Appeal, Second District, Division 2, California.
Oct. 5, 1949.

Clarence Noblit and another sued Blickshire Hotels & Motels, Inc., and another to recover damages for conversion and forcible entry for defendants' action in entering a cottage occupied by plaintiffs and removing personalty therefrom.

The Superior Court of Los Angeles County, Mildred L. Lillie, J., rendered judgment for the plaintiffs, and defendants appealed.

The District Court of Appeal, McComb, J., reversed the judgment holding that plaintiffs failed to establish a cause of action without showing that the actions of the defendants were without cause and willful or malicious.

Landlord and tenant 🔑274(2), 277(1)

Where owner of auto court broke into cottage occupied by plaintiffs and removed personalty therefrom which was then placed in a store room because plaintiffs had refused to pay charge for occupancy of cottage, plaintiffs could not recover for either conversion or forcible entry in absence of showing that such acts were without cause and willful or malicious.

Siemon, Maas & Siemon, Bakersfield, for appellants.

Michael Motta, Los Angeles, for respondents.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for conversion and forcible entry.

The trial court found that:

(i) Defendants owned and operated the Lockwood Auto Court and that plaintiffs had occupied cottage F-9, consisting of three furnished rooms, in said court for approximately three years;

(ii) The lawful charge for the occupancy of said rooms was $19.50 per week;

(iii) On and after August 20, 1946, plaintiffs locked their rooms and went on a vacation without paying the rent for the use and occupancy of the property;

(iv) While plaintiffs were away defendants broke the lock, entered the premises and removed plaintiffs' property therefrom and placed the same in a storeroom on the premises; and that "said actions of defendants were with cause and for the reason that plaintiffs had refused and continued to refuse to pay the lawful charge for the occupancy of said cottage"; and that it was "untrue that the acts of defendants were willful or malicious in the premises."

Predicated upon the foregoing findings the court found that plaintiffs were damaged in the sum of $753.49, and gave judgment against defendants for this sum.

This is the sole question necessary for us to determine:

Do the foregoing findings disclose any actionable wrong committed by defendants?

This question must be answered in the negative. The trial court expressly found that in removing the lock from the rooms occupied by plaintiffs and storing their personal property in a storeroom such actions "were with cause and for the reason that plaintiffs had refused and continued to refuse to pay the lawful charge for the occupancy of said cottage" and that the actions of defendants were not willful or malicious.

Clearly if the actions of defendants were with cause and neither willful nor malicious plaintiffs have failed to establish a cause of action. A judgment should have been ordered for defendants.

The judgment is reversed with directions to the trial court to enter judgment in favor of defendants.

MOORE, P. J., and WILSON, J., concur.

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93 Cal.App.2d 844

CLARY v. RUPERT.

Civ. 16959.

District Court of Appeal, Second District,
Division 2, California.
Oct. 3, 1949.

Hearing Denied Dec. 1, 1949.

Philip V. Clary brought an action against E. H. Rupert and procured the levy of a writ of attachment on his property.

From an order of the Superior Court of Los Angeles County, Stanley Mosk, J., denying a motion to dissolve the attachment because of defendant's death, the administratrix of his estate appealed.

The District Court of Appeal, Moore, P. J., reversed the order, holding that defendant's death destroys the lien of an attachment on his property, notwithstanding a contrary statutory implication.

1. Attachment 🔑**184**

A defendant's death destroys lien of attachment on his property, notwithstanding statute implying contrary. Code Civ. Proc. § 542b.

2. Statutes 🔑**243**

Courts will not ignore a venerable rule of practice on mere implication of statute to contrary, but lawmakers' intention to deviate from ancient procedure must be unmistakably indicated.

3. Courts 🔑**90(1)**

In absence of definite statute altering a rule of practice, Supreme Court's decisions upholding rule must be followed.

◆

Victor A. Berry, Culver City, for appellant.

Richard K. Gandy, Robert G. Cockins, Santa Monica, Morgan W. Gordon, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Defendant Rupert having deceased three months after the filing of this action and the due levy of a writ of attachment upon his property, his administratrix moved to dissolve the writ by reason of such death. She now appeals from the order denying the dissolution.

[1-3] It has been the established law for over 80 years that the death of a defendant destroys the lien of an attachment upon his property. Turner v. Fidelity & Deposit Co., 187 Cal. 76, 84, 200 P. 959; Everett v. Hayes, 94 Cal.App. 31, 32, 270 P. 458; Harm v. Cunningham, 50 Cal. 365, 366; Hensley v. Morgan, 47 Cal. 622, 623; Myers v. Mott, 29 Cal. 359, 367, 89 Am. Dec. 49. No deviation from such holdings appears among this state's judicial decisions. Respondent urges that the legislature by the last three words of section 542b of the Code of Civil Procedure[1] has clearly implied that the lien of attachment is to continue after the death of the defendant. Courts will not ignore a venerable rule of practice upon a mere implication of a statute. An intention on the

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[1] "An attachment or garnishment on personal property, whether heretofore levied or hereafter to be levied, shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation of such attachment or garnishment, at the expiration of three years after the issuance of the writ of attachment under which said levy was made; and the property levied on shall be delivered to the defendant or his order or to his assignee or executor or administrator."

part of the lawmakers to deviate from a procedure hoary with age must be unmistakably indicated. The doctrine of stare decisis is too firmly entrenched to be thus eradicated. In the absence of a definite statute altering a rule, the decisions of the Supreme Court must be followed.

The order is reversed.

McCOMB and WILSON, JJ., concur.

93 Cal.App.2d 788

In re SELB'S ESTATE.

SELB v. MORRIS.

Civ. 7648.

Sac. 6006.

District Court of Appeal, Third District,
California.
Sept. 29, 1949.

Hearing Denied Nov. 21, 1949.

Edward C. Selb filed a petition for the issuance of letters of administration with the will annexed to which objections were filed by Bertha Elizabeth Morris, who also petitioned that letters of administration with the will annexed be issued to herself and later moved for allowance out of the funds of the estate of costs incurred in unsuccessful contest of will.

The Superior Court of Stanislaus County, B. C. Hawkins, J., entered orders appointing Bertha Elizabeth Morris administratrix with the will annexed and allowing the motion for costs.

On appeal by Edward C. Selb, the court, Schottky, J., pro tem, held that both orders were an abuse of discretion and reversed them.

1. Executors and administrators 🔑21(1)

Daughter who could take nothing from mother's estate because of unsuccessful contest of will, could not claim priority to issuance of letters of administration with the will annexed. Probate Code, § 422.

2. Executors and administrators 🔑21(1)

Where son predeceased testatrix, his son was not entitled to priority to issuance of letters of administration with the will annexed. Probate Code, § 422.

3. Executors and administrators 🔑21(1)

Where neither testatrix' daughter who had forfeited her rights under will because of an unsuccessful contest, nor grandson whose father had predeceased testatrix was entitled to priority in issuance of letters of administration with the will annexed, and public administrator had not applied for letters, appointment of daughter rather than grandson was an abuse of discretion. Probate Code, §§ 425, 427.

4. Appeal and error 🔑946

In a legal sense, discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reasons, all of the circumstances before it being considered.

5. Wills 🔑403

Where testatrix' daughter forfeited her rights under the will because of unsuccessful contest, the allowance to daughter of costs of such contest out of the assets of the estate was an abuse of discretion. Probate Code, § 1232.

◆

C. Ray Robinson, Merced, W. Eugene Craven and Margaret A. Flynn, Merced, for appellant.

Vernon F. Gant and Carlos J. Badger, Modesto, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order appointing respondent the administratrix with the will annexed of the estate of her mother, and another order allowing her the costs she incurred in an unsuccessful contest of the will.

Mary Elizabeth Selb died September 12, 1945, at the age of 93 years, leaving a will dated March 18, 1944, in which she named her son, Theodore Selb, executor. Probate of said will was contested by decedent's daughter, Bertha Elizabeth Morris, respondent here, on the ground that decedent was not of sound mind when she executed same and that she was under the undue influence of her said son. The cause was tried before a jury which returned a verdict that decedent was not induced to sign the alleged will by means of undue influence, but that at the time of its execution she was not of sound and disposing mind. An appeal was taken and this court reversed the judgment and ordered that the will be admitted to probate. 84 Cal. App.2d 46, 190 P.2d 277. Under the terms of the will any person contesting it forfeited any interest in the estate of decedent, and respondent here is in the position of a person who has no interest in the estate.

In conformity with the directions of this court the will was admitted to probate and the petition of respondent's brother, Theodore Selb, for letters testamentary was granted. However, he died before the issuance of such letters, and his son, the appellant, who is his executor and one of his heirs, filed a petition for the issuance to him of letters with the will annexed. Before the hearing on said petition a like petition was filed by respondent, who also filed objections to the appointment of appellant. Thereafter respondent made a motion for the allowance to her, out of the funds of the estate, of the costs incurred by her in her contest of the will, amounting to $413.27. The trial court heard all of these petitions and motions at the same time and thereafter made its orders that letters of administration with the will annexed be issued to respondent and that her cost bill be allowed.

Appellant makes two main contentions upon this appeal: I. Letters of administration cannot be issued to one who has an interest adverse to the estate and who is not entitled to succeed to any portion thereof. II. An unsuccessful contestant of a will cannot be allowed costs against the estate. We shall discuss these contentions in the order of their statement.

Under section 406 of the Probate Code, when the person named as executor of a will dies before letters testamentary are issued or before the administration of the estate is completed, letters of administration with the will annexed shall be issued. Section 409 provides that "Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators." And section 422, so far as pertinent here, provides:

"Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:

"(1) The surviving spouse, or some competent person whom he or she may request to have appointed.

"(2) The children.

"(3) The grandchildren."

It is by virtue of said subdivision (2) that respondent claims priority over appellant. Appellant argues that such priority is not available to respondent since she cannot, and is not entitled to, "succeed" to any portion of her mother's estate.

[1] Appellant, as grandson, does not succeed to any portion of Mrs. Selb's estate, either under her will or by succession, but takes through his father who was the only person entitled to succeed to her estate under her will. Therefore, the appellant succeeds through his father and not directly through his grandmother, Mrs. Selb. Respondent cannot claim priority under Section 422 for the reason that since she could not take under Mrs. Selb's will, she is not entitled to letters. In re Estate of Cook, 173 Cal. 465, 472, 160 P. 553, citing In re Estate of Crites, 155 Cal. 392, 101 P. 316.

In Re Estate of Sayers, 203 Cal. 753, 756, 265 P. 924, 926, the court cited the Cook and Crites cases and said: "One taking nothing at all under a will is not, under these sections [like sec. 422], entitled to letters."

[2] Respondent being eliminated, so far as priority is concerned, the next question is whether appellant was entitled to letters. It seems he, too, is eliminated as to

priority under section 422. He would be entitled to succeed under his father, but not under his grandmother, Mrs. Selb, for the reason his father died after his grandmother. It has been decided that under such circumstances he is not entitled to letters. In re Estate of Edson, 143 Cal. 607, 77 P. 451, and cases therein cited particularly the leading case of In re Estate of Wakefield, 136 Cal. 110, 68 P. 499, which is cited by both appellant and respondent and which applies to appellant. Those cases are cited in 11a Cal.Jur. sec. 210, p. 303. Therefore, it appears that the public administrator was entitled to priority under section 422; but since he did not apply, the question remains, which of two persons applying is entitled to letters when neither has priority?

Section 427 of the Probate Code reads: "Administration must be granted to any competent applicant, when the persons having priority fail to claim letters for themselves."

In neither petition for letters nor the obpections thereto was the competency of either applicant put in issue. Both claimed by virtue of "priority," and, as hereinbefore pointed out, neither is entitled on the basis of priority. There is no issue as to the general competency of either appellant or respondent.

Section 425 provides in part as follows: "When there are several persons equally entitled to administer, the court may grant letters to one or more of them * * *." Section 425 was section 1367 of the Code of Civil Procedure, and concerning it, in Re Estate of Olcese, 210 Cal. 262, 266, 291 P. 193, 195, the court said: "Had each one of the sisters applied for letters, the court would have been authorized to use its discretion in making an appointment (section 1367)."

In 1 Bancroft's Probate Practice 463, speaking of section 425 it is said: "The court is thus given an opportunity in such instances to exercise discretion in selecting its appointee."

The 1943 pocket part to the same work cites cases from other jurisdictions holding that as between applicants equally entitled, it rests in the discretion of the court to determine which applicant shall be appointed.

The question which we must here determine is: Did the trial court abuse its discretion in appointing respondent instead of appellant? As was said in the early case of Lybecker v. Murray, 58 Cal. 186, at page 189: "* * * Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion, governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be. * * * It must be exercised with the limitations above stated to promote substantial justice in the case."

In Fine v. Fine, 76 Cal.App.2d 490, at page 495, 173 P.2d 355, at page 358, the court said: "In determining the question as to whether an abuse of discretion occurred in this case, we have in mind the language employed in Clavey v. Lord, 1891, 87 Cal. 413, 25 P. 493, where the court said (87 Cal. at page 419, 25 P. at page 495): 'The only limitation that the law has placed upon the exercise of discretionary judicial power is that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is, that it must plainly appear to effect injustice.' See, also, Hale v. Hale, 1935, 6 Cal.App.2d 661, 663, 45 P.2d 246."

In Berry v. Chaplin, 74 Cal.App.2d 669, 672, 169 P.2d 453, 456, hearing in Supreme Court denied, the court said: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the order. [Cases cited.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Cases cited.]"

In both of the cases last quoted from a hearing was denied by the Supreme Court.

It should be borne in mind that respondent and Theodore Selb were the only children and heirs of decedent; that she was at the time of her death the owner of a farm in Missouri and property in California consisting of a home located on a five acre tract about five miles from Modesto, a small amount of cash and personal belongings located in the home. For about thirteen years prior to her death her son had resided with her on the home place, he having in 1921 suffered a permanent totally disabling industrial accident for which he was drawing compensation. By the terms of her will the farm in Missouri was devised to the son and daughter in equal shares, and respondent daughter was given $500 in cash to be raised from the property in California. The residue was left to the son. It would appear from the foregoing that the will was in no sense an unnatural one, but respondent contested it upon the grounds of undue influence and unsoundness of mind. The jury found against her on the first ground and this court determined that there was not sufficient evidence to justify a finding of unsoundness of mind. Under the terms of decedent's will respondent forfeited any interest in the estate by her contest.

[3, 4] We have, then, a situation where a daughter who, by reason of her contest of the will has no interest in the estate, has been appointed administratrix with the will annexed in preference to the son of a deceased son, when the entire estate of decedent will go to the estate of the deceased son. There is no issue raised as to the general competency of both applicants for letters, and the only question is whether the trial court abused its discretion in appointing respondent. We are convinced that, taking all the facts and circumstances of the instant case into consideration, there was such an abuse of discretion. As was said in Berry v. Chaplin, supra: "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." We believe that, taking into consideration the size and nature of the estate, the naturalness of the will of decedent, the unsuccessful contest of the will by the respondent, the fact that she had forfeited her interest in the estate, and the further fact that appellant was the son and administrator of the estate of the person to whose estate the entire estate would ultimately be distributed, it was unreasonable and unjust for the court to appoint respondent instead of appellant and thus permit her to direct and control the administration of the estate and receive the commissions and benefits that accrue to an administratrix. We do not believe that the term "judicial discretion" is broad enough to sustain such a determination, and we, therefore, conclude that such order should be reversed.

The final contention of appellant is that the trial court abused its discretion in awarding to respondent the costs of her unsuccessful contest of the will.

Section 1232 of the Probate Code, which is a virtual re-enactment of the former Code of Civil Procedure section 1720, reads as follows: "When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

In the case of In re Estate of Bump, 152 Cal. 271, at page 273, 92 P. 642, the trial court allowed the widow of decedent, an unsuccessful contestant of the will, her costs of said contest and an appeal followed. In affirming the order our Supreme Court said:

"Section 1720 of the Code of Civil Procedure provides that in probate proceedings in general the superior court 'may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.' We can conceive of cases in which the duty of a widow, or other person entitled to administration of an estate in case of intestacy, to contest the probate of an alleged will, might be as plain and urgent, under the circumstances known to such person, as would be the duty of an executor already appointed, or one nominated as executor, in a will offered for probate, or a legatee thereunder, to oppose a contest and endeavor to establish such will. The provision of the Code above quoted is very general in its terms, and applies as well to a party contesting a will as to one proposing it. It puts the entire matter of costs within the sound discretion of the court, and we think it must be held that such discretionary power extends to and includes the case of an unsuccessful contestant. It is proper to say, however, that such cases must be rare and the circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed, and that, as this court under its rules is sometimes compelled to sustain a discretionary order where it has grave doubts of its propriety, the trial court should use great caution and make such orders only in very extreme cases presenting great hardship, and where it appears that the contestant has acted in the utmost good faith throughout the proceeding.

"There is here no attempt to set forth the circumstances and have this court decide whether or not the discretion was abused. The case is presented upon the proposition that the power does not exist in any case, or under any circumstances, to make the costs of an unsuccessful contest payable out of the assets of the estate. The presumptions are all in favor of the action of the court below. The power exists, and in the absence of any showing to the contrary we must presume that it was properly exercised."

In Re Estate of Yoell, 160 Cal. 741, 743, 117 P. 1047, an order allowing costs to an unsuccessful contestant of a will was reversed, the court saying: "It is proper to add, in contemplation of the fact that the law (with but few restrictions) permits a person to dispose of his property by will in such manner as he sees fit, that another law which permits one to contest the will and perhaps lay bare the secrets of a testator's life, and to cloud his reputation after his death, and then permits him to recover all his costs, even when his efforts so to destroy the will have proved futile, is exceptional, in that it takes one man's property and bestows it upon another, when that other has been making an unsustained attack upon the testamentary act of the person whose estate is thus compelled to pay for the attack."

Also see In re Estate of Marcus, 14 Cal.App.2d 254, 257, 58 P.2d 385, 386, where the court quoted from the opinion in Re Estate of Bump, supra: "The circumstances must be peculiar indeed to justify such an order in favor of a contestant who has failed."

[5] It must be borne in mind that the will in the instant case provided that any person contesting it should forfeit any interest in the estate, and that to grant respondent the costs of her unsuccessful contests out of the assets of the estate would be contrary to the express terms of the will. In Re Estate of Bump, supra, the proposition presented was the power did not exist in any case or under any circumstances to make the costs of an unsuccessful contest payable out of the assets of the estate, and there was no contention that the court abused its discretion. Furthermore, the facts and circumstances in that case were quite different, and we are unable to agree with respondent that the trial court did not abuse its discretion in this case in making the order allowing her costs. Section 1232 of the Probate Code permits the court to order costs to be paid out of the assets of the estate "as justice may require." We are convinced that the order allowing costs to respondent was not only not required by justice, but that such an order was unjust under the facts and circumstances of the instant case, and that it must be considered an abuse of judicial discretion.

In view of the foregoing we conclude that the order appointing respondent administratrix with the will annexed should be and the same is hereby reversed with directions to grant letters of administration with the will annexed to appellant;

and that the order allowing respondent the costs she incurred in her contest of the will should be and the same is hereby reversed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER, J., dissenting.

CLEMENT v. RECLAMATION BOARD OF CALIFORNIA et al.

Civ. 7565.

District Court of Appeal, Third District, California.

Oct. 8, 1949.

Rehearing Denied Nov. 7, 1949.

Hearing Granted Dec. 1, 1949.*

Elden W. Clement sued the Reclamation Board of California, the Sacramento-San Joaquin Drainage District, the State of California, and others, to recover for damage to plaintiff's farm as result of flooding.

The Superior Court of Colusa County, C. C. McDonald, J., in effect directed a verdict for the defendants, and from a judgment for defendants, the plaintiff appealed.

The District Court of Appeal, Peek, J., reversed the judgment, holding that the plaintiff made out a case for the jury.

See also 200 P.2d 196.

1. Eminent domain 🔑307(2)

If situation presented is not one of such emergency character as would preclude drainage district from being held liable for unnecessary damage resulting from inadequate planning, construction, and maintenance of flood control project, and if plaintiff shows that district had an opportunity to exercise a deliberate choice of action, but that it followed a plan which caused unnecessary damages to his property, plaintiff has presented a case for jury.

2. Eminent domain 🔑307(2)

In action by farmer against Reclamation Board, drainage district, and state to recover for flood damage to farm from flooding, evidence that flooding would not have occurred if weir and training levees had not been constructed along river, and that prior to their construction numerous government officials predicted that result of their construction would be the formation of a delta with consequent diversion of water on farmer's land, required submission of case to jury.

3. Trial 🔑330(5)

Rule that when a case is submitted on different theories and jury returns a general verdict, it may not be reversed if one of such issues is supported by substantial evidence, was not applicable, where effect of instructions given was to preclude jury from considering any issue other than as instructed by trial court, and to require jury to return a verdict for defendants.

Earl D. Desmond and E. Vayne Miller, Sacramento, Harrison W. Call, San Francisco, & Hudson Ford, Colusa, for appellant.

Fred N. Howser, Attorney General, Robert E. Reed, Deputy Attorney General, Robert O. Curran, Henry Holsinger, C. C. Carleton, Spencer Burroughs, Sacramento, for respondents.

PEEK, Justice.

The present controversy arises out of the damage alleged to have been sustained by Clement as a result of the construction of the Colusa weir in the year 1932 as a part of the Sacramento River Flood Control Project.

The early history of flood control in the Sacramento valley shows that many of the orginal levees along the banks of the Sacramento river in the vicinity of the City of Colusa were erected and maintained by farmers some time prior to 1870. Progressively through the years the National Congress and the legislature of this state cooperated in endeavoring to work out a solution to their common problems in regard to flood control and reclamation. Their efforts culminated in the formation of the Sacramento-San Joaquin Drainage District with broad powers over all flood control matters relating to the Sacramento and San Joaquin rivers and their tributaries. Further reclamation work by individuals and districts was forbidden except as approved by that agency.

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* Subsequent opinion 220 P.2d 897.

During the early years of such development many breaks occurred in the banks of the levees so erected by the farmers. Two of these existed near the property of plaintiff, one approximately 400 feet wide and known as the "DeJarnatt Break" at a point approximately three miles south of the city of Colusa, and a second approximately 1000 feet wide known as the "Moulton Break" about twelve miles north of Colusa. At flood stage the waters of the Sacramento river passed through these breaks and flowed into the Sutter and Butte Basins to the east.

By the year 1932 the general over-all flood control project had been completed for all practical purposes from Colusa county south to the point where the river empties into the San Francisco Bay. In that year the Moulton and DeJarnatt Brakes were closed and what is known as the "Colusa Weir" was constructed. The Colusa weir is an opening or cut approximately 1650 feet in length in the east bank of the river levee and is surfaced with concrete. Levees referred to as "training levees" were built parallel to each other at the north and south ends of the weir and extended easterly at right angles to the river levee for a distance of approximately one mile, at which point the training levees were broadened out so that they were approximately one-half mile apart. The gradient flow from the weir to the end of the training levee was approximately nine feet per mile. The purpose of such levees was to train the water passing over the weir from the river into Butte Basin where it would fan out and thereby relieve the flow and pressure on the main river levees. The old levee at the point where the Colusa weir was constructed had an elevation of approximately 72 feet which elevation was reduced by the construction of the weir to approximately 64 feet.

The land of appellant herein is situated within the Butte Basin and consists of slightly more than 120 acres. It lies approximately one-quarter of a mile east of the Sacramento river levee and extends approximately one mile along the south training levee. Between plaintiff's property and said training levee is a strip of land approximately 80 feet wide which is owned by the state and through which runs a ditch caused by the excavation of dirt to build said levee. The northeasterly corner of plaintiff's land practically adjoins the east end of the south training levee. As the land is within the Butte Basin it always has been subject to flooding whenever water collected in that basin.

Appellant contends that such flooding was due to the over-all rise of the water in the basin and not from the direct flow of the water from the river, and although so situated he was able to farm his property until 1940. However, by reason of a delta which thereafter formed at the easterly end of said property he was precluded from continuing his farming operations. His contention is that the delta was caused by the manner in which the weir and training levees were planned and constructed. In particular, he contends that the gradient between the weir and the end of the training levees caused the water passing over the weir and between the training levees into Butte Basin to flow at a high velocity from the weir to the end of the training levees where the flow suddenly decreased due to the water having reached the ground elevation of Butte Basin. As a result of such decreased velocity the sediment and other foreign matter suspended in the water was deposited at the end of the south training levee thus forming a delta. He further contends that the delta caused the water flowing between the training levees to divide and flow around the easterly end of the south training levee upon his property. In addition, said waters flowed back toward the river through the ditch located upon the eighty foot strip of land owned by the state and situated between Clement's land and the south training levee, from whence it flowed to the south over and across plaintiff's land.

The record contains competent evidence that such flow would not have occurred if the weir and training levees had not been constructed, and that numerous government officials prior to its erection recognized and predicted that the result of the construction of the weir and the training levees would be the formation of a delta with the consequent diversion of water upon plaintiff's land.

Plaintiff's amended complaint is in two counts. The first alleges a taking of his property for a public use, and the second charges negligence in the construction of the weir, all of which resulted in the alleged damage to his land.

The cause proceeded to trial upon the issues presented by the pleadings, including not only the denial of the allegations of the complaint but the special defenses raised by the answers as well. At the conclusion of plaintiff's case motions for nonsuit by the individual defendants were granted, leaving only the State of California, the Reclamation Board of the State of California, and the Sacramento-San Joaquin Drainage District as defendants. The jury returned a general verdict for the defendants. Plaintiff's motion for a new trial was denied and the present appeal followed from the judgment entered upon the verdict so returned.

Appellant's primary contention is that the trial court erred in the giving of some fourteen instructions definitive of flood waters, and the "common enemy" doctrine in regard to such waters as applied to the facts in this case.

[1, 2] Assuming but not so deciding that the instructions so given might have been proper insofar as they related to flood waters, yet by reason of the manner in which the court coupled such instructions with its further charge relative to the "common enemy" rule as it related to the facts in the present case, the jury were in effect directed to return a verdict for defendants. In other words, under the instructions so given the jury was precluded form considering whether or not under the facts presented the situation was so extraordinary or was of such an emergency to warrant the application of said rule. Weinberg Co. v. Bixby, 185 Cal. 87, 96, 196 P. 25. Furthermore the jury was also precluded from determining whether the flood control project was so negligently or otherwise improperly planned and constructed or so negligently executed as to give plaintiff a just cause for damages. House v. Los Angeles County Flood Control District, 25 Cal.2d 384, 391, 153 P.2d 950, 953. As was noted at the outset, flood control of the Sacramento and San Joaquin rivers has been a problem for more than seventy years, during which time numerous state and federal agencies have been created to study and report on the problem. Some agencies made independent surveys, others worked in cooperation with one another but all were seeking a solution of their common problems. The plans which resulted from such lengthy studies and deliberations have in turn been the source of much legislation and litigation. It would therefore appear that the instant case presents a problem very similar to that relating to the flood control of the Los Angeles river, which was involved in the House case, supra. Furthermore, plaintiff herein by the allegations of his complaint has brought himself squarely within the rules approved by the Supreme Court in the case, which are (1) if the situation presented is not "one of such emergency character as would preclude the defendant district from being held liable for *unnecessary* damage resulting from the alleged inadequate and negligent planning, construction and maintenance of its flood * * *." control project, and (2) if plaintiff by his pleadings, and as in this case the evidence in support thereof, showed the district to have had an opportunity to "exercise a deliberate choice of action" in the manner of the planning, construction and maintenance of the project but that it followed a plan which caused unnecessary damage to his property, then plaintiff had presented a case sufficient to warrant consideration by the jury.

Such conclusion, the court states, "does not make the public agency, in undertaking its flood control program, an insurer against all possible damage which thereby might be inflicted on private property of United States v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, but it merely requires that the damage to the individual, on whom the sovereign power justifiably makes demands in the public interest, not exceed the necessities of the particular case due to a failure to use reasonable care and diligence. In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and damnum absque injuria are not applicable when in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; cited with approval in Archer v. City of Los Angeles, supra, 19 Cal.2d [19], at page 24, 119 P.2d [1], at page 4."

[3] Respondents, however, argue that since the case was submitted upon different theories and since the jury returned a general verdict, the same may not be reversed if any one of such issues is supported by substantial evidence. While respondents' argument might be entirely proper under certain conditions it does not obtain in the present case, since, if our conclusion concerning the effect of the attacked instructions is correct, it necessarily follows that the jury was wholly precluded from considering any issue other than as instructed by the trial court and hence had no discretion other than to follow the direction of the court and return a verdict for respondents. For this reason respondents' argument is without support.

Lastly respondents say that in any event neither the state nor its subdivisions named herein as defendants are liable and in support thereof cite certain federal cases and reports to the effect that the power of Congress pursuant to the commerce clause is paramount and that the federal government retained control of the project. Admitting the supremacy of the federal government under the commerce clause, we fail to perceive in what manner such supremacy serves to relieve the state from liability for damages caused by flood control projects in which its agencies participated as in the present case.

In support of such contention respondent relies upon two California Cases, Cory v. City of Stockton, 90 Cal.App. 634, 266 P. 552, and Brandenburg v. Los Angeles County Flood Control District, 45 Cal.App.2d 306, 114 P.2d 14. Suffice it to say that the cases so cited arose upon demurrer and the decisions therein held that the allegations contained in the pleadings were insufficient to give rise to a cause of action. In the instant case, as previously noted, the allegations in plaintiff's complaint and evidence in support thereof presented a proper case for submission to the jury within the rule laid down in the House case, supra.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

93 Cal.App.2d 801

In re HARTMAN.

PEOPLE v. HARTMAN et al.

Civ. 3954.

District Court of Appeal, Fourth District, California.

Sept. 29, 1949.

John Wesley Hartman, a minor person, was charged with the offense of involuntary manslaughter and adjudged to be a ward of the court and committed to the probation officer and placed upon probation.

From the orders entered by the Superior Court of Imperial County, Elmer W. Heald, J., John W. Hartman and his parents Walter J. Hartman and Mrs. Walter J. Hartman appeal.

The District Court of Appeal, Griffin, Acting P. J., affirmed, holding that the evidence justified the commitment and that there were no irregularities in the proceedings, and that the findings of the court were sufficient.

1. Infants 🔑16.14

Where minors charged with the commission of a homicide were declared to be wards of the court, the order so declaring was appealable and was properly taken by the parents of the wards. Pen.Code, §§ 187, 192, 245; Welfare and Institutions Code, §§ 700(m), 580.

2. Infants 🔑16.6

Where probation officer filed a verified petition for commitment of minor wards for committing the offense of involuntary manslaughter under section 192, that the officer in his petition made reference to other sections did not invalidate the petition where the petition contained a statement of the acts claimed to have been committed by the ward. Pen.Code, §§ 187, 192, 245; Welfare and Institutions Code, §§ 700(m), 720 et seq., 826, 827.

3. Statutes 🔑225.1

The statutes respecting proceedings to declare a person a ward of the juvenile court, commitment, and other disposition of the wards, must be read in harmony with the statutes respecting suspension of prosecutions of minors under 18 and the necessity of a copy of the accusation accompanying the certification, notification of the probation officer, and the petition and the filing thereof. Welfare and Institutions Code, §§ 720 et seq., 826, 827.

4. Infants 🔑16.14, 16.15

In proceeding to commit a minor as a ward of court for the commission of the offense of involuntary manslaughter, that no citation was issued and served upon minor's parents in compliance with the statute did not require a reversal where parents employed counsel for purpose of defending the minor, appeared in court throughout the entire proceedings, and were present when the order was made making the minor a ward, and the objection to lack of service of citation was made for the first time on appeal. Welfare and Institutions Code, § 726.

5. Infants 🔑16.8

Evidence justified orders committing minors as wards of the court for commission of the offense of involuntary manslaughter where the minors met for the purpose of chasing Mexicans away from an orchard and negligently handled and fired rifles with reckless disregard for the others, and if permitted to return to their homes without some other supervision might further engage in such conduct. Pen. Code, §§ 192, 245; Welfare and Institutions Code, §§ 700, 701.

6. Infants 🔑16.10

In proceeding to commit minors as wards of the court for committing the offense of involuntary manslaughter juvenile court need not specifically find that the wards were guilty as charged and if the facts established and found were sufficient to support the petition and order making the minors wards of the court, that was all that was required. Welfare and Institutions Code, §§ 700, 701.

7. Infants 🔑16.11, 16.15

In proceeding to commit minors as wards of the court for the offense of involuntary manslaughter the judge has a broad discretion and his judgment will not be disturbed without some adequate showing justifying a different conclusion. Welfare and Institutions Code, §§ 700, 701.

8. Infants 🔑16.10

In proceeding to commit minors as wards of the court for the offense of involuntary manslaughter where the probation officer summarized his evidence and made his recommendation and the judge acted only after careful consideration and made 10 pages of "oral findings" no more specific written findings were necessary. Welfare and Institutions Code, § 735.

Edgar B. Hervey, San Diego (M. M. Sattinger, Calexico, Henry F. Walker, Los Angeles, of counsel), for appellants.

Don C. Bitler, District Attorney, Charles F. Sturdevant, Deputy District Attorney, El Centro, for respondent.

GRIFFIN, Acting Presiding Justice.

John W. Hartman, aged 14, and two other minors, were originally charged by Grand Jury indictment with the crime of involuntary manslaughter in that they did, on June 11, 1948, kill one Jose Inez Estrada, aged nine years. The case was transferred to the juvenile court for hearing and after taking evidence the juvenile court declared all of the minors wards of the court. Hartman was placed in the custody of his mother and step-father.

A verified petition was signed by the probation officer alleging in detail the acts committed and that such acts violated sections 245, 187 and 192 of the Penal Code, and that said minors were persons coming within the provisions of section 700 (m) of the Welfare and Institutions Code.

After hearing, three orders were made: 1. An order adjudging the minor to be a ward of the court under section 700 subdivision (m) of the Welfare and Institutions Code; 2. On order entitled Commitment to Probation Officer; and 3. An order entitled Order of Probation. John W. Hartman and his parents Walter J. Hartman and Mrs. Walter J. Hartman appealed from these orders.

The evidence shows that the ward's father owned a 20-acre grapefruit grove located about three-fourths of a mile north of the Mexican border in Imperial County; that constant marauding of the grove by Mexican Nationals caused a loss of approximately one-half of its crop, and warning signs, both in English and Spanish, were posted in an effort to prevent the trespassing; that nevertheless the trespassers continued to take fruit from the grove and eventually, after the date of the indictment, the owner dug up one-half of the orchard nearest the border. The Hartmans and the adjoining owner, on many occasions, ran Mexicans out of the orchard. On June 11, 1948, at about 3:30 p. m., the minors John W. Hartman, William Mains, William Angione, and four other minors were at the Hartman residence. They discussed the stealing of the fruit by the Mexicans and armed themselves with various weapons. The three wards here involved each had a 22 caliber rifle. Another boy had a 410 gauge shotgun and others had BB air rifles, all loaded. They set out to search the grove for trespassers. They spread out and each walked between separate rows of trees toward the south. During the course of the search an unidentified Mexican was found sitting on the ground outside of the fence which enclosed the grove. He had no grapefruit in his possession. He was questioned by the boys and told to leave. He walked off in a southeasterly direction toward a melon dump located about 1200 feet to the southeast where cull melons were normally dumped. As he walked away several shots were fired in his general direction by the boys with the 22 caliber rifles. Shortly thereafter, a second Mexican with a sack of grapefruit was found near the south edge of the grove. He was questioned and ordered to leave. He also walked toward the melon dump and as he did so several shots were fired from the 22 caliber rifles by the same three boys, in his general direction. A third Mexican, aged 17, was then found hiding in the grove with a sack of fruit. He wanted to retain it but the boys took it from him and ordered him to leave. After he walked a distance of about 30 meters the boys ordered him to hurry. They fired several shots in his direction with the 22 caliber rifles, some of them hitting near his feet. The boys then moved south but out of the orchard and toward the melon dump. Upon reaching a point approximately 25 yards south of the south edge of the grove they saw several Mexicans along the road near the dump. According to the boys' story these people moved out of the dump and proceeded northerly into a flax field and toward the boys and the grove. Several shots were fired from the 22 caliber rifles in the general direction towards this group of people, who immediately scattered and ran down into the bed of a stream which was a short distance south of the road. The boys continued on towards them to chase them away. Upon reaching the road they discovered the body of Estrada, in an easterly direction from that point.

He had been struck and killed by a 22 caliber bullet apparently from the rifle of Angione.

According to the testimony, Estrada had come to the melon dump to obtain melons which were usually dumped there as feed for cattle. The trucks had not arrived at that time and Estrada and two other boys were playing in the vicinity of a row of sunflowers when Estrada was shot and killed. This row of flowers was near the body but between it and the orchard and was about as high as his head when he was standing. The other boy with him was struck in the arm and wounded by another bullet evidently fired from Angione's gun.

[1] The first point argued by counsel for appellants is that the appeal taken by the parents and ward was taken by the proper parties, that it was timely, and that the orders appealed from were appealable. The question of the timely appeal has been disposed of by denying the motion to dismiss the appeal. Hearing denied by the Supreme Court July 14, 1949. No contention is made by respondent that the mother and father are not proper parties and entitled to appeal. See In re Le Van, 93 Cal.App.2d 7, 207 P.2d 1066; Sec. 580, Welfare and Institutions Code; In re Matter of Hill, 78 Cal.App. 23, 26. Likewise, respondent does not raise the point as to the appealability of the orders. An order declaring a minor a ward of the juvenile court is appealable and any subsequent order may be appealed from as from an order after judgment. Sec. 580, Welfare and Institutions Code.

[2, 3] It is next said that there were irregularities in the proceedings because the probation officer filed a petition containing reference to sections 245 and 187 of the Penal Code, as well as section 192 of that code. No authority is cited limiting the probation officer in his statement of facts in a verified petition. Since the petition contained a statement of the acts claimed to have been committed by said ward, the specification of the sections of the Penal Code denouncing those acts as crimes thereunder is not repugnant to the provisions of sections 826-827 of the Welfare and Institutions Code. These sections must be read in harmony with sec. 720 et seq. of the same code.

[4] It is next contended that no citation was issued and served upon the ward's parents, in compliance with sec. 726 of the Welfare and Institutions Code; that since there was no waiver of appearance entered in the minutes nor any written waiver of service of citation filed with the clerk, as required by section 726 of the code, the court lacked jurisdiction to hear and determine the petition. Respondent contends that, since both parents appeared with counsel and testified or were present during the entire proceedings without objecting to lack of service, they waived service of any such citation.

It has been held that where there was no showing that a citation was not issued it will be presumed that the statute was followed. Moore v. Superior Court, 22 Cal. App. 156, 161, 133 P. 990. The minutes of the court show that when the minor appeared in the Superior Court for arraignment under the indictment he appeared through counsel and moved to transfer the action to the juvenile court. The mother, Minnie W. Hartman, was sworn and examined as to the minor's age. At the first hearing in the juvenile court, according to the minutes, all persons were excluded from the courtroom except the minors and their parents, and this order was invoked throughout the hearing. After the petition was filed by the probation officer and during the hearing, the father, according to the minutes, was sworn and examined. According to the reporter's transcript, counsel for the ward asked Mrs. Hartman to take the stand and then asked that she be excused from testifying due to her ill health. The request was granted. At the beginning of the hearing the trial judge asked the mother and father of each of the minors to be seated in the jury box so they could hear the evidence and what he had to say in his determination of the issues. He then ordered the minors made wards of the court. He informed them that parents should be more alert as to what their boys were doing and that mere boys, under no circumstances, should have deadly weapons placed in their possession and allowed to go out uncontrolled because that is a dangerous thing to do and many times results in just what happened in this case, that is, "somebody being killed", and that it could have been a much greater tragedy. The court then, in the presence of their parents, committed the boys to the supervision of the probation officer, to be placed on probation, and to remain in the homes of their respective parents and subject to their supervision. In the court's order the parents were designated by name. The minors were not to own nor carry any firearms, cross the international border line, nor drive a car without the parents being present, and were to make restitution to the parents of the Mexican boy for funeral and medical bills.

There is no question, from reading the entire record, that the parents employed counsel for the purpose of defending the minor son; that they appeared in court at every hearing and stayed through the entire proceedings and were present when the order was made making them wards. No objection was made as to service of citation at any time during the hearing and the question is now raised for the first time on appeal. Although the minutes of the court do not directly state that the parents waived notice of the hearing, it would be a strained construction to hold that these parents could now object to jurisdiction because of the failure to serve such citation on them and that the failure to do so prejudiced them in any manner. In Re Schultz, 99 Cal.App. 134, 277 P. 1049, it was held that the voluntary appearance of the mother being undisputed, the failure of the minutes to note a waiver of service was not prejudicial.

[5] It is next claimed that the orders of the court are not supported by the evidence, i. e., that there was no showing of evil design, intent or culpable negligence sufficient to support a charge of involuntary manslaughter; that the minors intended no harm, but sought to prevent further trespass and theft of grapefruit by the advancing group; that the killing was the result of accident or misfortune, or that the minor was justified in thus endeavoring to protect his father's property under the theory of lawful resistance; that since the undisputed evidence shows that the boy had no criminal tendencies or past record of misbehavior and came from a highly respected parentage with proper home surroundings, no order is sustainable which would declare him a ward of the court, and that the failure of the court to dismiss the proceedings under sec. 737 of the Welfare and Institutions Code was an abuse of discretion.

[6, 7] Under the petition, as filed, it was not necessary for the juvenile court to specifically find that the ward was guilty of involuntary manslaughter as charged. If the facts established and found were sufficient to support the petition and order making him a ward of the court, that is all that is required. The court might well have believed, as found, that such minor was a person coming within the provisions of sec. 700 or sec. 701 of the Welfare and Institutions Code in this, that these minors met for the purpose of chasing Mexicans away from the locality of the orchard, armed themselves with rifles so to do, negligently and carelessly handled and fired the rifles with reckless disregard for others, and without due caution and circumspection, and violated sec. 245 or sec. 192 of the Penal Code, as alleged, and if permitted to return to their homes without some other supervision, they might further engage in such conduct. The judge has a broad discretion in relation to these matters and his judgment will not be disturbed without some adequate showing justifying a different conclusion. There was adequate evidence to support the orders made by the court.

[8] Counsel for the ward argues that the findings, as made, are not sufficient under sec. 735 of the Welfare and Institutions Code, citing In re Edwards, 208 Cal. 725, 284 P. 916; In re Hill, 78 Cal.App. 23, 247 P. 591; In re Spiers, 15 Cal.App.2d 487, 59 P.2d 838; and In re Brodie, 33 Cal.App. 751, 166 P. 605. The written findings do not specify in detail what particular acts the minor was guilty of committing although the entire proceedings were reported. The probation officer summarized

the evidence and made his recommendation and the judge acted only after a careful consideration of the entire proceedings. He did make 10 pages of "oral findings", as reflected by the reporter's transcript. Under the circumstances no more specific written findings were necessary. In re Ortiz, 74 Cal.App.2d 810, 813, 169 P.2d 664. The course taken by the minors was most unfortunate, to say the least. Nevertheless, the essential elements of the petition were established. By the wards' conduct a life was taken and it does not appear that the minors were dealt with harshly or that the court placed an unbearable stigma upon them, as argued. It appears that this ward was given every consideration and privilege and the court was within its rights in exercising control over him.

Orders affirmed.

MUSSELL, J., concurs.

HARD v. PLUMAS COUNTY et al.

Civ. 7598.

Sac. 5976.

District Court of Appeal, Third District, California.

Sept. 27, 1949.

Hearing Granted Nov. 21, 1949. *

Chester Hard sought an injunction to restrain the Board of Supervisors of the County of Plumas and others from proceeding to repair and resurface three miles of county roadway on the ground that the Road Commissioner was not a registered civil engineer.

The Superior Court, Plumas County, J. O. Moncur, J., gave judgment to defendants, and the plaintiff appeals.

The District Court of Appeal, Thompson, J., on rehearing, adopted the opinion in 208 P.2d 701, with certain modification, and held that the Board of Supervisors had authority to employ a road commissioner to supervise work of repairing roads regardless of whether the commissioner was a licensed and registered civil engineer, and affirmed the judgment.

1. Highways 🔑93

County board of supervisors had authority to employ road commissioner to supervise work of repairing county roads at cost in excess of $3,000 regardless of whether commissioner was registered as licensed civil engineer provided board determined party selected was qualified and competent. Streets and Highways Code, § 2006.

2. Highways 🔑112

That road commissioner, appointed by county board of supervisors and found by board to be qualified and competent to handle road work of county, was not a registered and licensed civil engineer did not affect statutory authority of board to have work of repairing and resurfacing county road at a cost in excess of $3,000 done by day labor under supervision of road commissioner. Streets and Highways Code, §§ 1071–1073, 2006.

3. Highways 🔑93, 96(1)

"Road commissioner" is a mere employee under immediate supervision of county board of supervisors, his duties are prescribed by statute and he is not necessarily expected to lay out, design or construct roads, bridges, etc., for which the scientific training and skill of a civil engineer are required. Streets and Highways Code, §§ 1074, 2006; Business and Professions Code, §§ 6701, 6704, 6730, 6731.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Road Commissioner".

4. Licenses 🔑40

For county road commissioner, who was not a registered civil engineer, to supervise work of repairing and resurfacing three miles of county roadway did not constitute practice or offering to practice "civil engineering" without a license in violation of Business and Professions Code. Streets and Highways Code, §§ 1074, 2006; Business and Professions Code, §§ 6701, 6704, 6730, 6731.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Civil Engineering".

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* Subsequent opinion 220 P.2d 2.

Gardiner Johnson & Thomas E. Stanton, Jr., San Francisco, for appellant.

Frank H. McAuliffe, Dist. Atty., Quincy, Fred N. Howser, Atty. Gen., McAllister & Johnson and Walter C. Frame, Sacramento, for respondents.

THOMPSON, Justice.

Upon rehearing, the opinion of this court which was filed July 26, 1949, 208 P.2d 701, 702, with certain modifications is adopted and rendered as follows:

Chester Hard, a citizen and taxpayer of the County of Plumas, sought an injunction to restrain the Board of Supervisors and other officers from proceeding to repair and resurface three miles of county roadway at a cost in excess of $3,000, under the supervision of a Road Commissioner appointed pursuant to the provisions of Section 2006 of the Streets and Highways Code, Stats. Ex.Sess.1947, ch. 11, sec. 1, p. 3788, for the reason that said commissioner is not a registered civil engineer. The trial court sustained defendants' demurrer to the complaint without leave to amend the pleading, and rendered judgment that plaintiff take nothing by his complaint. From that judgment this appeal was perfected.

The appellant asserts in his opening brief that: "*The sole issue to be decided is whether section 1075 of the Streets and Highways Code authorizes a county board of supervisors to have county road work done under the supervision and direction of an unregistered person appointed as road commissioner pursuant to the proviso to section 2006 of that Code.*" (Italics appear in brief.)

The complaint alleges that, on December 2, 1947, the Board of Supervisors of Plumas County, by resolution duly adopted, appointed E. G. McLain Road Commissioner of that county, and determined that he is "qualified and competent to handle the road and highway work of said county;" that McLain is not a licensed or registered civil engineer; that the cost of the proposed work of repairing and resurfacing three miles of roadway in that county will exceed the sum of $3,000; that, unless restrained, the board of supervisors will purchase materials and perform the work by day labor under the supervision of said road commissioner without first adopting plans and specifications therefor, and without advertising for bids on the contract.

It will be observed that while the complaint alleges that plans and specifications for the proposed repairs were not adopted, and that bids for a contract therefor were not advertised, the appellant relies solely on one stated issue on appeal as to whether such repairs of a roadway in the county may be performed under the supervision of a duly appointed road commissioner who has been determined by the board to be "qualified and competent to handle the road and highway work of the county", in spite of the fact that he is not a registered and licensed civil engineer. The appellant asserts that it is unlawful to perform such road work except under the supervision of a licensed and registered civil engineer. Streets and Highways Code, sec. 1075.

We assume from the foregoing statement in appellant's brief that he has waived the question as to whether a contract for the road work, which will cost in excess of $3,000, was advertised for bids pursuant to Sections 1071–1073 of said code.

[1] We are of the opinion the statutes of California authorize the board of supervisors of a county to employ a road commissioner to supervise such road work in the county, regardless of whether he may be a licensed and registered civil engineer, provided it is first determined by the board, pursuant to Section 2006 of the code, that he is "qualified and competent to handle the road and highway work of the county." The complaint in the present case alleges that was done.

Section 2006, which was adopted in 1947, and pursuant to which the road commissioner in this case was appointed on December 2, 1947, after having been determined by the board to be "qualified and competent to handle the road and highway work of the county", reads:

"The board of supervisors of each county shall, prior to January 1, 1948, appoint a single road commissioner for all road districts in the county. The road commissioner shall be a registered civil engineer *except that an unregistered person may be employed as road commissioner if approved by the board of supervisors as qualified and competent to handle the road and highway work of the county.* Nothing herein shall preclude one such person from serving two or more counties. The county surveyor may be appointed, if a registered civil engineer, *or if found by the board of supervisors to be properly qualified.* The road commissioner shall at all times be under the direction and supervision of the board of supervisors.

"Each county shall furnish evidence to the State Controller that it has complied with the provisions of this section.

"After January 1, 1948, neither the State Controller nor any other state officer shall make any allocations or payments to any county from the Highway Users Tax Fund until such county has complied with the requirements of this section." (Italics added.)

It will be observed this section of the code *requires* the appointment of a road commissioner, and notice of compliance therewith to the State Controller before funds may be allocated or payments made from the Highway Users Tax Fund. The statute specifically provides that the road commissioner so appointed may be either a registered civil engineer, or other "unregistered person." A clearer authorization to appoint as such road commissioner an *unregistered person* who is found by the board to be qualified and competent to handle the work could scarcely be expressed. To reinforce that conclusion the statute further provides that *a county surveyor* may be appointed as such road commissioner, "if a registered civil engineer," or "if found by the board of supervisors to be properly qualified", even though he may not be a licensed or registered civil engineer.

The appellant assumes that Section 1075 of the Streets and Highways Code contains the only authorization for the board of supervisors to perform county road work by day labor, and that it may be done under that section without adopting plans and specifications and without first advertising for a contract for bids therefor. He relies on that section of the code and assumes such work may be done without bids, regardless of the cost therefor, provided only that the county has employed a "competent engineer" under whose supervision the work is to be performed. That section reads in part:

"In any county employing a competent engineer as road commissioner, the board may have any work upon county highways done under the supervision and direction of such engineer. Such work may be done:

"(a) * * *

"(b) * * *

"(c) By purchasing the material and having the work done by day labor."

The foregoing section is based on former section 2640 of the Political Code, which specifically provided that where the proposed work or repairs exceeded a cost of $2,000, plans and specifications therefor must be first adopted. The last-mentioned proviso is now required by Sections 1071 to 1074, inclusive, of the Streets and Highways Code, which provide that where the cost exceeds $3,000 the board of supervisors shall adopt plans and specifications and advertise for bids. But if the board determines that the "bids are too high, and that the work can be done more cheaply by day labor. * * * the board shall reject the bids and order the work to be done *by the road commissioners* * * *." Sec. 1073. Or the board may then advertise for new bids. Since it is not an issue in this case, it is unnecessary for us to determine whether the board of supervisors may perform work on public highways, under section 1075 of the Streets and Highways Code, under the supervision of a duly appointed *licensed engineer,* by "day labor" without adopting plans and specifications and submitting the proposed work to competitive bidders as provided by sections 1071 to 1074, inclusive, of said code.

In view of our conclusion that the work may be done by the board of supervisors by day labor, independently of Section

1075, it is immaterial whether or not the language of that section which reads, "In any county employing a competent engineer as road commissioner, the board may have any work upon county highways done under the supervision and direction of such engineer", also includes an unregistered road commissioner who has been found to be qualified and competent. Since Section 1073 authorizes the board to do the work under supervision of the road commissioners by day labor, and Section 2006, adopted in 1947, authorizes the appointment of an unregistered person as such road commissioner when he has been found to be qualified and competent, we conclude that the court properly determined in this case that the complaint fails to state a cause of action in that respect.

[2] The appellant argues that it is contrary to the provisions of Section 6730 of the Business and Professions Code, and unlawful, for a road commissioner to superintend the work on highways or roads if he is not a registered civil engineer because he is thereby practicing civil engineering without a license so to do. That section provides in part: "* * * It is unlawful for any person to practice or offer to practice as a civil engineer in this State, unless such person has been duly registered as required by the provisions of this chapter or specifically exempted therefrom."

Section 6704 of the last-mentioned code provides that: "Any person practices civil engineering when he professes to be a civil engineer or is in responsible charge of civil engineering work."

[3, 4] The articles and chapter of that code respecting civil engineers contain several specific exemptions from the requirment regarding the registration of civil engineers, among which county road commissioners are not mentioned. Architects, surveyors, employees of civil engineers, and certain contractors are specifically exempted from that act. The term "civil engineer" is defined as "one who practices or offers to practice civil engineering in any of its branches." Bus. & Prof. Code, sec. 6701. It is defined in Funk & Wagnall's New College Standard Dictionary as "A professional engineer trained to design and build roads, bridges, tunnels, harbors, canals, docks, irrigation systems and other public works." See, also, Bus. & Prof. Code, sec. 6731. We may concede that a road commissioner who is not a registered engineer is not necessarily trained, skilled or scientifically proficient in laying out, designing or constructing roads, bridges, structures or public works. But we do not assume a road commissioner is presumed or expected to perform such scientific work. A road commissioner is a mere employee and under the immediate direction and supervision of the board of supervisors. Sts. & Hy. Code, sec. 2006; Couts v. County of San Diego, 139 Cal.App. 706, 712, 34 P.2d 812. If the board of supervisors proposes to lay out, design or construct public roads, bridges or structures requiring plans and specifications and special scientific knowledge or skill, we assume it is authorized by law to employ engineers, surveyors or other proficient workmen for that purpose. But such employment will in no way conflict with the duties of the road commissioner as prescribed by statute. The policy of authorizing a road commissioner to perform such duties as are prescribed by our statutes is within the province of the legislature. We conclude that the road commissioner of Plumas County, under the circumstances disclosed by the pleadings in this case, is neither practicing nor offering to practice civil engineering, and that he is qualified and competent to perform the duties prescribed by law, regardless of the fact that he is not a registered civil engineer.

Since the question of the regularity of adopting plans and specifications and advertising for a contract for bids for repairing and resurfacing the three miles of roadway in Plumas County is not an issue on this appeal, and we are satisfied the duly appointed and qualified road commissioner is authorized by law to perform the work, the judgment should be affirmed. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.

93 Cal.App.2d 849

LEWIS v. SOUTH SAN FRANCISCO YELLOW CAB CO. et al.

No. 14107.

District Court of Appeal, First District, Division 1, California.

Oct. 4, 1949.

Hearing Denied Nov. 28, 1949.

Feodora Lewis sued the South San Francisco Yellow Cab Company (a partnership), Walter Ryan, First Doe, Second Doe, and Third Doe, for injuries allegedly resulting when plaintiff a passenger in defendant's taxicab, alighted therefrom because of fear of being attacked and assaulted by taxicab driver and stepped into a depression and fell.

The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment for defendant after granting defendant's motion for a non-suit and plaintiff appealed.

The District Court of Appeal, Bray, J., affirmed the judgment because of divergence between complaint and proof.

1. Carriers 🔑280(1)

A carrier of persons for reward must exercise the utmost care and diligence for the safety of its passengers consistent with the character and mode of conveyance adopted and the practical operation of the carrier business.

2. Pleading 🔑430(1)

Generally a rather wide divergence in the evidence from the allegations of a cause of action is permitted but where an entirely separate set of facts constituting an entirely different cause of action from that pleaded appears, the trial court should grant a non-suit. Code Civ.Proc. § 471.

3. Trial 🔑165

On motion for non-suit, the court must find all the facts stated by plaintiff to be true and give plaintiff the benefit of every reasonable inference therefrom.

4. Pleading 🔑430(1)

Where gravamen of plaintiff's pleaded cause of action against taxicab company was that wrongful conduct of driver caused plaintiff to fear attack by driver, causing her to flee when taxicab was stopped, and to step into a depression and fall, and her proof was that plaintiff was injured when she left taxicab to avoid attention of a male companion plaintiff had invited to ride with her, and plaintiff failed to request permission to amend complaint to conform to proof, non-suit was properly granted. Code Civ.Proc. § 471.

5. Pleading 🔑387

A party must recover if at all according to his pleadings, rather than upon some other cause which may be developed by the proof. Code Civ.Proc. § 471.

6. Pleading 🔑430(1)

Where plaintiff's pleadings and proof are not in agreement, a material variance is presented and defendant is entitled to a non-suit even though the objection might have been obviated by amendment, and even though the testimony was admitted without objection. Code Civ.Proc. § 471.

◆

E. C. Mahoney, Burlingame, for appellant.

Hoge, Pelton & Gunther, San Francisco, Harry N. Grover, San Francisco, Leo V. Killion, Reginald M. Watt, San Francisco, for respondents.

BRAY, Justice.

From a judgment entered after order granting defendants' motion for a nonsuit, plaintiff appeals.

The sole question presented is whether there was any evidence to support the allegations of plaintiff's complaint.

Complaint.

While the defendants set forth in the complaint were the South San Francisco Yellow Cab Company, a partnership, Walter Ryan and three Does, answers were filed by Walter Ryan, doing business as South San Francisco Transit Company, and Hughlan T. Phillips, "sued as 1st Doe" (actually he was sued as 3rd Doe). No point is made of these discrepancies and hereafter they will be disregarded.

The complaint, after alleging operation by defendants of a line of cabs for transportation of passengers for hire, states that at a certain time plaintiff entered one of defendants' cabs "and was received by defendants as a passenger of said cab for the journey she intended to make. That instead of following her instructions, and disregarding her protests, defendant, Third Doe, drove the cab to a secluded spot west of El Camino Real, in San Bruno, and made improper suggestions and advances to plaintiff. That plaintiff then and there became alarmed at this wrongful conduct of said defendant and believed that she was in danger of being attacked and assaulted by said defendant. That she then and there prevailed upon said defendant to stop the cab, which he did, and she immediately alighted therefrom and started across a field to get away from defendant's threatened assault and search for help. That it was a very dark night and a short distance from said cab plaintiff stepped into a depression and fell to the ground and as a result thereof plaintiff broke most of the bones in her left foot." She then alleges that "plaintiff's injury was the proximate result of said defendant's wrongful conduct" and sets forth the extent of the injury, together with allegations of damage resulting therefrom.

A reading of the complaint shows that its gravamen is that the wrongful conduct of the cab driver caused plaintiff to fear that she was in danger of being attacked by him, causing her to flee from his threatened assault, as a result of which she was injured. Now, let us see if there are any facts to support this issue.

Facts.

Plaintiff was the only witness on the question of liability. She testified that she was a waitress employed in San Francisco. On a day early in September, 1946, after attending an evening picture show, she found, on arriving at the Greyhound Bus Depot, that she had just missed the bus to San Bruno, where she resided. She then decided to take a bus to South San Francisco and a taxicab from there to her home. She arrived at the bus station in South San Francisco about 12:00 midnight. She then went to the defendants' cab stand and stated to defendant Phillips, hereafter referred to as the driver, whom she knew, that she wanted a cab to take her to her home in San Bruno. He said he would be right back and she waited for him. In a few minutes he returned having with him a sailor, whom she had seen a lot of at one time but whom she had not seen for a year or more. The sailor asked her if she wanted to go out that night, "and I said no that I was going home and I said 'If you want to ride along with me, that is all right.' So, I guess the cab driver—I gave him my money as we walked out the door." She paid the driver $1 as fare. Plaintiff sat in the front seat between the driver and the sailor. There was another sailor and a girl in the back seat. They got off at Lindenville, which was about a mile from plaintiff's home. The sailor had his arms around her and was kissing her, to which plaintiff objected. When the cab was about two blocks from her home the driver made a U-turn and said he "wasn't taking me home." At first plaintiff thought he was joking. When she told him to turn back as she wanted to go home he "just kept laughing and driving on." At Sneath Lane he stopped the cab and said he "wasn't going to drive any further and told me to get out with the sailor." The sailor had not said anything about driving up there. After the cab stopped plaintiff told them she "had to go to the bathroom" and the driver said that she could stay "here." She said "No, I will be back," got out of the cab, started running behind it, and fell into a ditch or culvert, breaking her foot. She crawled out to where the ground was level. The driver and the sailor heard her, did all they could to render assistance, and took her to the hospital. Plaintiff thought the driver was "crazy" for stopping and saying he was not going to drive any further. The driver made no advances towards plaintiff during the evening, nor did he use any amorous terms towards her. He remained in the driver's seat when she left the cab. He did suggest that she go out and have a good time with the sailor. The allegation in the complaint to the effect that the driver made advances towards her or that she was in fear of being attacked by the driver was not true. She testified that in these allegations she meant the sailor, not the driver. The driver made improper suggestions but not for himself. Plaintiff had worked for defendant cab company as a despatcher before the accident, and then again some time afterward, before she filed suit she worked for it about two months. Plaintiff's testimony shows very definitely that, contrary to the allegations of her complaint, she was not injured through fear of an attack by the taxi-driver, but through desire to avoid the attentions of the friend she had invited to ride with her.

[1] In her opening brief plaintiff relies principally on Terrell v. Key System, 69 Cal.App.2d 682, 159 P.2d 704. There, a passenger was pushed off a moving train in the East Bay during a brawl by other passengers, receiving injuries. After setting forth the rule that a carrier of persons for reward must exercise the utmost care and diligence for the safety of its passengers consistent with the character and mode of conveyance adopted and the practical operation of the carrier business, the court held that the passenger "was entitled under his contract of carriage to be where he was and to be protected from the unprovoked assaults of his fellow passengers by the carrier's exercise of the high degree of care required of it to carry him safely." 69 Cal.App.2d 689, 159 P.2d page 707. Had plaintiff here pleaded a cause of action based on the carrier's failure to protect her from her fellow passenger, her testimony, if believed, would have supported it. But she did not so plead. She charged, not a failure to so protect her, but a direct attack by the cab driver, which she admitted at the trial did not occur. While she alleged and proved a disregard of her instructions by the driver, such disregard was not the cause of her injuries. The cause was either her fear of an attack by her fellow passenger or her desire not to accept his attentions.

[2, 3] Generally, a rather wide divergence in the evidence from the allegations of a cause of action is permitted, but where, as here, an entirely separate set of facts constituting an entirely different cause of action from that pleaded appears, the trial judge should grant a nonsuit. On a motion for nonsuit, the court must find all the facts stated by plaintiff to be true, and give her the benefit of every reasonable inference therefrom. In so doing we reasonably cannot find in her rather peculiar story any support for the cause of action as pleaded. "The plaintiff must recover, if at all, upon the cause of action alleged, and not upon some other which may appear from the proofs." Bailey v. Brown, 4 Cal.App. 515, 517, 88 P. 518, 519. "Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof." Code Civ.Proc. § 471; see also Von Goerlitz v. Turner, 65 Cal.App.2d 425, 150 P.2d 278.

[4-6] It is doubtful if the court could have allowed the complaint to be amended for the reason that such amendment probably would have stated a new cause of action. Lambert v. McKenzie, 135 Cal. 100, 67 P. 6. In any event, the court properly granted the nonsuit as the plaintiff failed to request permission to amend her complaint to conform to the proof. As said in Von Goerlitz v. Turner, supra, 65 Cal. App.2d at page 431, 150 P.2d at page 281: "It is the well-established rule that the allegations of a complaint and the proof thereof must be in agreement. This rule is based upon the fundamental proposition that a party must recover, if at all, according to his pleadings, rather than upon some other or different cause which may have been developed by the proof. When such is the case there is presented a material variance, and the defendant is properly entitled to a nonsuit *even though the objection might have been obviated by amendment.* [Citing cases.]" (Emphasis added.) "Unless plaintiff obtained leave to so amend his complaint as to conform to the proofs, the defendant may have his nonsuit, though the testimony was admitted without objection." Bailey v. Brown, supra, 4 Cal.App. at page 517, 88 P. at page 519.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concuur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

93 Cal.App.2d 854

HAGAN v. ALLEN et al.

Civ. 17006.

District Court of Appeal, Second District, Division 2, California.

Oct. 4, 1949.

Hearing Denied Nov. 28, 1949.

Action by J. A. Hagan, doing business as the El Rey Cheese Company, against E. E. Allen and others for breach of warranty in sale of steam generator, wherein defendants filed a counterclaim for the contract price.

The Superior Court of Los Angeles County, Pat R. Parker, J., of the Superior Court of Mono County, presiding under designation of the Chief Justice as Chairman of the Judicial Council, entered a judgment in favor of defendants, and plaintiff appealed.

The District Court of Appeal, Moore, P. J., held that lack of a license to install steam equipment did not preclude recovery of contract price for sale thereof and that the evidence sustained the material findings and affirmed the judgment.

1. Licenses ⊶39.43

Contract to construct and deliver a steam generator to buyer's place of business constituted a "sale" of generator and did not contemplate installation thereof by seller and where buyer, upon being informed that contractor was not licensed to install steam equipment, took full responsibility for installation, lack of such license did not preclude recovery of contract price for generator. Business and Professions Codes, § 7031.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Sale".

2. Appeal and error ⊶171(1)

The theory upon which a case has been tried must be adhered to in reviewing court.

3. Appeal and error ⊶882(3)

Where buyer predicated action for breach of warranty in sale of steam generator and defense to counterclaim for contract price upon the validity of contract, he could not for the first time on appeal challenge its legality on ground that seller was not licensed to install steam equipment and hence could not recover on counterclaim. Business and Professions Codes, § 7031.

4. Appeal and error ⊶1071(5)

That particular findings were self-contradictory, unsupported by the evidence and inconsistent with other uncontroverted findings was immaterial, where such findings were not necessary to the judgment.

5. Sales ⊶441(1)

In action for breach of warranty in sale of steam generator, evidence sustained finding that seller told buyer that a steam separating tank must be installed to insure production of dry steam required by buyer.

6. Sales ⊶441(1)

In action for breach of warranty in sale of steam generator, evidence sustained finding that buyer was told that apparatus must be operated by an expert and exactly as delivered.

7. Sales ⊶441(2)

Finding that seller did not expressly warrant steam generator was not error, where record was devoid of any evidence which would support a finding of an express warranty.

8. Sales ⊶441(2)

Evidence that seller told buyer steam generator would not produce desired results unless a steam separator was also installed and installed generator only upon buyer's assurance that he would build and attach a separator established that generator was sold without implied warranty, since both parties contemplated the use of additional equipment.

9. Appeal and error ⊶110

Order denying motion for new trial was not appealable.

◆

Earl Curtis Peck, Los Angeles, and Jesse A. Hamilton, Los Angeles, for appellant.

Vetran Ricca and Henry W. Wyatt, Los Angeles, for respondents.

MOORE, Presiding Justice.

The questions for decision are: whether respondent contracted to install a steam generator and whether the evidence supports the findings.

Appellant manufactures cheese. Respondent fabricates steam generators. On August 2, 1946, respondent through its president Allen contracted to construct and deliver a steam generator to appellant's place of business. At the same time respondent advised appellant that a steam separating tank should be attached to the steam generator to insure the delivery of dry steam under usual working conditions; that an expert would be required to set the controls initially but anyone thereafter could operate it. In response to such statements appellant informed respondent that he and his employees would "build and attach the steam separating tank." Respondent built the generator and on August 9, 1946, delivered it to appellant's place of business. After the generator had been installed appellant changed the controls and adjustments and did not attach a steam separating tank. On discovering such conditions respondent instructed appellant that the controls and adjustments must not be changed and that the separating tank must be attached in the absence of an expert to operate the generator. From appellant's refusal to follow respondent's advice, his damage resulted and this action was commenced to recover damages for spoiled cheese and loss of profits allegedly due to breach of warranty. Respondent counterclaimed for the price of the generator.

[1] Appellant asserts that because respondent was not licensed to install steam equipment the latter was precluded from recovering on its counterclaim the contract price of the generator, citing sections 7031 of the Business and Professions Code.[1] Thereby appellant overlooks the fact that respondent's claim was not based upon services rendered in installing the generator, but upon the contract price for the equipment delivered. Allen informed appellant that his company had no contractor's license and appellant thereupon took full responsibility for the installation. There is no proof that by their contract the parties contemplated that respondent should install the equipment nor may such an inference be drawn from the testimony of Allen, to wit: "We proceeded to help in the installation of the job." The effect of the contract was the sale of a steam generator and nothing more. Rutherford v. Standard Engineering Co., 88 Cal.App.2d 554, 562, 199 P.2d 354.

[2, 3] Furthermore, there is nothing in the record to indicate that the contract violated the Contractor's State License Act other than appellant's assertions on this appeal. It is the rule where a case has been tried on one theory, that theory must be adhered to in the reviewing court. To allow a litigant after an unsuccessful trial to change his position and adopt a different theory on appeal would be unfair to the trial court and to opposing counsel. Blanc v. Connor, 167 Cal. 719, 726, 727, 141 P. 217; Marra v. Aetna Construction Co., 15 Cal.2d 375, 379, 101 P.2d 490; Mathews v. Pacific Mutual Life Insurance Co., 47 Cal.App.2d 424, 428, 118 P.2d 10. Therefore, having predicated his complaint and his defense to the counterclaim upon the validity of his contract appellant may not for the first time on appeal challenge its legality.

[4] Appellant contends that findings 3, 4, 5, 6, 7 and 8 are self-contradictory, unsupported by the evidence and inconsistent with other uncontroverted findings. Such contention is well taken. But from a reading of the record of the trial it is readily apparent that the findings referred to except the second paragraph of finding 4 are not necessary to the judgment. In addition, all of finding 15 falls into the same category. Since such findings are superfluous, an attempted justification of them would serve no purpose.

[5] Appellant also contends that finding 11 that "defendant told plaintiff's manager

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[1] "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

that a steam separating tank must be installed to insure the production of the dry steam required by plaintiff" is unsupported by the evidence. On the contrary the direct testimony of Allen discloses that he so stated to appellant on August 1 and again on August 11, 1946. He was corroborated by witnesses Oxley and Wartenberg. The finding is therefore supported by substantial evidence.

[6] Appellant's next contention is that there is no evidence to support finding 16 that appellant was told that the apparatus must be operated by an expert and exactly as delivered. The testimony of Allen is to the contrary: "Q. Mr. Allen, did you tell Mr. Hagan that this generator of your's would have to be operated by an expert? A. It would have to have an expert to set the controls and after that anyone could operate it provided they left it alone." Such testimony is ample support for the finding. Rinker v. McKinley, 65 Cal.App.2d 109, 110, 149 P.2d 859; Crawford v. Southern Pacific Company, 3 Cal.2d 427, 429, 45 P.2d 183.

[7] Appellant's final contention is that the court erred in finding there was no express warranty made by respondent and in not finding at least an implied warranty. No testimony is indicated in the record which would have supported a finding of an express warranty. The second paragraph of finding 4 is a clear and definite declaration that respondent made no warranties as alleged by appellant. The record is devoid of evidence that could be so construed.

[8] Assuming, as appellant contends, that there is in the record some evidence from which the court could have found that an implied warranty was made, there is also in the record the testimony of Allen that he had told appellant that the installed equipment would not produce the desired results unless there was also installed a steam separator. Such testimony completely negates the assertion that a warranty of any kind was intended by respondent. Moreover, it is a clear showing that respondent knew the equipment was insufficient, so informed appellant, and installed it only after appellant's assurance that it would suffice. Appellant had on the premises a separator which had been formerly used and which he assured respondent would be incorporated into the new system. Since both parties contemplated the use of additional equipment, it cannot be said that respondent warranted or that appellant expected the apparatus which was installed adequately to perform without assistance.

[9] Plaintiff's appeal from the order denying his motion for a new trial being nonappealable is dismissed. Judgment affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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93 Cal.App.2d 866

HAMILTON v. WATERS et al.

Civ. 16979.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1949.

As Modified on Denial of Rehearing Oct. 24, 1949.

Hearing Denied Dec. 1, 1949.

Gene Hamilton sued J. E. Waters and others to recover damages allegedly suffered by plaintiff for wrongful eviction from rented premises.

Judgment was rendered in favor of defendants Waters and Lewis Sherman Jones in the Superior Court of Los Angeles County, Stanley N. Barnes and Charles E. Haas, JJ., and the plaintiff appeals.

The District Court of Appeal, Wilson, J., affirmed, holding that plaintiff's action constituted a collateral attack on the unlawful detainer judgment and could not be maintained and that respondents were not liable for alleged unlawful means in enforcing a writ of possession by a marshal in absence of active participation therein.

1. Judgment ⚷518

Contention of tenant respecting irregularities in procedure in an unlawful detainer action wherein final judgment was rendered for landlord and which was not appealed from, constituted a collateral attack on such judgment in tenant's action to recover damages allegedly suffered by reason of wrongful eviction and could not be maintained.

2. Execution ⚷455

An action for damages cannot be maintained against parties involved in the enforcement of an execution regularly issued upon a valid judgment.

3. Landlord and tenant ⚷311, 318(1)

Where respondents had a valid final judgment for possession of rented property, they were entitled to a writ of enforcement to oust tenant from the premises, and to have such writ executed by a marshal and if he used excessive force or unlawful means in enforcing the writ, the respondents were not responsible therefor in absence of active participation therein.

◆

Gene Hamilton, in pro. per.

Jones & Hoyt and Irving I. Bass, Los Angeles, for respondents.

WILSON, Justice.

Appeal from judgment in favor of defendants Waters and Jones following the sustaining of a demurrer to the second amended complaint without leave to amend.

Respondents Waters, through their attorney respondent Jones, filed an action for unlawful detainer against appellant in the municipal court of Los Angeles. Judgment was rendered in favor of the plaintiffs from which an appeal was taken to the appellate department of the superior court. The appeal was dismissed. Judgment having become final, a writ of possession was issued and delivered to the marshal of the municipal court for enforcement pursuant to which possession of the premises was delivered to the plaintiffs. Defendant in that action, appellant here, then filed the instant case in the superior court against respondents Waters and Jones and the marshal to recover damages alleged to have been suffered by reason of her eviction. Demurrers to the second amended complaint were sustained without leave to amend as to all defendants except the marshal. Judgment was rendered in favor of the demurring defendants from which comes this appeal.

[1, 2] 1. Appellant alleges that she was not served with a 30-day notice of termination of tenancy or a three-day notice to pay rent or quit and that summons and complaint in the unlawful detainer action were not served upon her. Insofar as this action for damages is concerned such contentions have been disposed of by the judgment of the municipal court and the dismissal of the appeal therefrom. Her only relief, if such allegations be true, is by an action in equity to set aside the judgment. The instant cause is a collateral attack on a valid, final judgment. An action for damages cannot be maintained against respondents by reason of the enforcement of an execution regularly issued upon a valid judgment. White v. Adams, 52 Cal. 435, 437. A judgment of a court of general jurisdiction cannot be attacked in a collateral proceeding. In re Estate of McNeil, 155 Cal. 333, 340, 100 P. 1086; Hogan v. Superior Court, 74 Cal.App. 704, 708, 241 P. 584.

[3] 2. Appellant alleges acts of undue force and violence on the part of the marshal in ejecting her and her property from the premises. Since respondents had a valid, final judgment for possession of their property they were entitled to a writ of enforcement to oust appellant from the premises and to have such writ executed by the marshal of the court. If he used excessive

force or unlawful means in enforcing the writ respondents are not responsible therefor in the absence of active participation therein.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 1

BRADY v. BRADY.

Civ. 17066.

District Court of Appeal, Second District, Division 2, California.

Oct. 5, 1949.

Ethel Brady sued Charles W. Brady for divorce.

From an order of the Superior Court of Los Angeles County, W. Turney Fox, J., modifying an order for payment of alimony awarded plaintiff by an interlocutory decree granting her a divorce, she appealed.

The District Court of Appeal, McComb, J., affirmed the order, holding that the trial court had jurisdiction to modify and reduce the alimony awarded by the decree, as amended by an order increasing the alimony pursuant to the parties' oral stipulation, and did not abuse its discretion in reducing the amount of alimony because of a change in the parties' condition.

1. Divorce 🔑245(1, 4)

The Superior Court had jurisdiction to modify and reduce alimony awarded wife by interlocutory divorce decree, as amended by order increasing alimony pursuant to parties' oral stipulation, as amendatory order was not award of alimony predicated on property settlement and payments made after such order, pursuant to decree as modified, constituted merely alimony payments. Civ.Code, § 139.

2. Divorce 🔑236

An order predicated on stipulation of parties to wife's divorce suit as to amount of alimony to be awarded her, without settling parties' property rights, does not constitute award predicated on property settlement. Civ.Code, § 139.

3. Divorce 🔑286

On review of order reducing alimony awarded wife by interlocutory decree granting her divorce, as amended by order predicated on parties' oral stipulation, only question for appellate court is whether there is any substantial evidence supporting trial court's decision. Civ.Code, § 139.

4. Divorce 🔑245(3)

Evidence supported trial judge's finding of such change in parties' condition as to warrant reduction of alimony awarded wife by divorce decree, as amended by subsequent order, from $75 per month to $40 per month. Civ.Code, § 139.

◆

George H. Pratt, for Los Angeles, for appellant.

Voorhees, Stewart & Voorhees, Grace A. Voorhees, Los Angeles, for respondent.

McCOMB, Justice.

From an order modifying a previous order for the payment of alimony decreed originally in an interlocutory decree of divorce, plaintiff appeals.

Facts: On March 20, 1940, an interlocutory decree of divorce was entered in favor of plaintiff which contained the following provisions:

"It Is Hereby Further Ordered, Adjudged and Decreed that Defendant pay unto Plaintiff as alimony for her support and maintenance, Sixty ($60.00) Dollars per month, effective February 1, 1940, payable Thirty ($30.00) Dollars on the 1st day of February and Thirty ($30.00) Dollars on the 15th day of February 1940, and Thirty ($30.00) Dollars on the 1st and Thirty ($30.00) Dollars on the 15th respectively of each and every month thereafter.

"It is Further Ordered that if Defendant herein shall receive by way of salary, bonus, wages, commission or by way of any other income, a sum of money or moneys worth in excess of One Hundred Eighty ($180.00) Dollars per month, then one-half (½) of all such excess in money or moneys worth shall be payable to Plaintiff at the same time and in the same manner as Defendant is herein required to pay plaintiff alimony of $60.00 per month. * * *

"(d) That on August 1, 1940, defendant Charles W. Brady shall render unto the plaintiff herein a full, true and accurate accounting of the condition of said copartnership and he shall semi-annually thereafter render unto plaintiff, Ethel Brady, an account of the financial condition of said copartnership, which shall reflect a statement of assets and liabilities, as well as a profit and loss statement."

On October 22, 1941, pursuant to an oral stipulation of the parties an order was made modifying the foregoing provisions to provide that the alimony be increased from $60.00 per month to $75.00 per month, and that the portion of the interlocutory decree requiring defendant to pay plaintiff one half of his earnings in excess of $180.00 per month be stricken from the decree. Defendant was released from his obligation to render an accounting to plaintiff as provided in paragraph (d), supra.

On October 14, 1948, after the hearing of an order to show cause why the alimony should not be reduced, the trial court ordered it reduced from $75.00 per month to $40.00 per month.

[1, 2] *Questions: First: Did the trial court have jurisdiction to modify and reduce the alimony ordered by the interlocutory decree of divorce as amended by the order of October 22, 1941, predicated upon the stipulation of the parties?*

This question must be answered in the affirmative. Section 139 of the Civil Code * provides that where in a decree for divorce the court awards alimony to the wife for her support, the court may from time to time modify its order. In the instant case the award to plaintiff in the first two paragraphs of the interlocutory decree of divorce was exactly what it was denominated by the trial judge, an award of alimony, and therefore subject to the power of the trial court, pursuant to the provisions of section 139 of the Civil Code, to modify it at any time upon a proper showing.

The fact that this provision was subsequently modified by stipulation of the parties did not constitute the modification an award of alimony predicated upon a property settlement. An order predicated upon a stipulation of the parties as to the amount of alimony to be awarded to a wife which does not settle the property rights of the parties does not constitute an award predicated upon a property settlement. (Smith v. Superior Court, 89 Cal.App. 177, 189, 264 P. 573; Smith v. Smith, 94 Cal.App. 35, 40, 270 P. 463. Therefore after the order of October 22, 1941, was made the payments pursuant to the provisions of the interlocutory decree as modified constituted merely payments of alimony, and the trial court had jurisdiction upon a proper showing to modify the same at a subsequent date.

In the present case the property rights of the parties were settled by order of the court in subsequent provisions of the interlocutory decree of divorce and not by stipulation of the parties.

[3, 4] *Second: Did the trial court abuse its discretion in reducing the amount of alimony plaintiff was to receive?*

This question must be answered in the negative. On review of an order reducing alimony the only question for an appellate court is whether there is any substantial evidence supporting the decision. (Leupe v. Leupe, 21 Cal.2d 145, 152, 130 P.2d 697.)

In the instant case plaintiff testified that she had inherited property from her mother. A portion of this property had been sold for $6,185, which she had received together with a note secured by a mortgage in the principal sum of $11,500, and she still retained 1400 acres of land in Montana which had been leased and from which she received an unspecified income. In addition there was testimony that defendant was suffering from an ulcer and from heart disease which materially affected his ability to work. This evidence clearly supported the trial judge's finding that there had been a change in the condition of the parties which warranted a reduction in the amount of alimony defendant had been paying plaintiff.

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* Section 139, Civil Code reads: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects."

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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94 Cal.App.2d 166

PEOPLE v. RODGERS.

Cr. 727.

District Court of Appeal, Fourth District, California.

Oct. 14, 1949.

Clyde Rodgers was convicted of manslaughter, resulting from the commission of an unlawful act in the driving of a vehicle without gross negligence and was granted probation, and from the judgment of the Superior Court, of Imperial County, L. J. Mouser, J., and from orders denying his motions for new trial and in arrest of judgment, he appealed.

The District Court of Appeal, Griffin, J., held that refusal to give a requested instruction on proximate cause was not error and affirmed the judgment and order denying a new trial and dismissed the appeal from order denying motion in arrest of judgment.

1. Indictment and information ⚷189(8)

Manslaughter committed in the driving of a vehicle without gross negligence as defined in subdivision 3(b) of § 192 is a "misdemeanor" and an "included offense" under charge of manslaughter as defined in subdivision 3(a), involving commission of an unlawful act, not amounting to felony, with gross negligence, etc. Pen.Code, § 192, subd. 3(a, b).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Misdemeanor" and "Included Offense".

2. Automobiles ⚷346

Contributory negligence of decedent is not a defense to charge of manslaughter committed in the driving of a vehicle. Pen. Code, § 192, subd. 3(a, b).

3. Criminal law ⚷829(3)

Where jury was sufficiently instructed that defendant's own unlawful acts must be the proximate cause of death, refusal to give requested instructions that if negligent act of decedent was the sole proximate cause of death, defendant would not be guilty of manslaughter committed in the driving of a vehicle, was not error. Pen. Code, § 192, subd. 3(a, b).

4. Criminal law ⚷1023(12)

Order denying motion in arrest of judgment was not appealable.

◆

Harry W. Horton; Reginald L. Knox, Jr., El Centro, for appellant.

Fred N. Howser, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

[1] Defendant was charged with the offense of manslaughter, i. e., violating sec. 192, subdivision 3(a), Penal Code. The jury returned a verdict finding defendant guilty under subdivision 3(b) sec. 192, Penal Code, a "misdemeanor" (an included offense). It further found that the act causing death was done "without gross negligence". Defendant was granted probation.

The only question presented in the briefs on this appeal involves certain given and refused instructions.

Defendant offered one which, in effect, would have told the jury that if it found that deceased was driving his vehicle at such a slow rate of speed as to impede or block normal traffic and such reduced speed was not caused by any of the exceptions enumerated, and if it found that such reduced speed had a causal connection with the happening of the accident and without which the accident would not have happened, then the jury must find defendant not guilty. In another instruction, refused as covered, the jury would have been told that if the accident was proximately caused by the conduct of the deceased, the defendant could not be guilty of the offense charged.

The trial judge did give an instruction to the effect that if it be a fact that decedent was guilty of negligence which was a contributing cause of his death, it was no defense if the *defendant's own* conduct was the *probable cause* of the death and if it constituted manslaughter. Counsel for defendant argues that this last instruction may be sound, as far as it goes, but nowhere did the court instruct the jury that if the conduct of the *decedent* was the *proximate cause* of his own death, the jury would be precluded from finding the defendant guilty.

[2] It has been repeatedly held that contributory negligence is not available as a defense or excuse for crime. People v. McKee, 80 Cal.App. 200, 205, 251 P. 675; People v. Leutholtz, 102 Cal.App. 493, 498, 283 P. 292; People v. Collins, 195 Cal. 325, 351, 233 P. 97; 40 C.J.S., Homicide, § 62b, pages 927-928; and cases cited.

Any instruction which would cause a jury to believe that the defendant was not guilty if the decedent was also negligent would be contrary to the law enunciated. The first of defendant's proffered instructions might well fall within this classification and it was so regarded in a similar instruction refused in People v. Marconi, 118 Cal.App. 683, 687, 5 P.2d 974.

The court did specifically instruct the jury in the language of sec. 192 Penal Code that "To constitute the kind of manslaughter charged in this case the death of a human being in question must be the proximate result of the commission of an unlawful act not amounting to a felony, or of the commission of a lawful act, which might produce death, in an unlawful manner * * *."

This was followed by a proper instruction that in order "To find defendant guilty * * * you must find from the evidence that his conduct not only was of a kind described as essential to constitute * * * manslaughter, * * * but *must* find also that it was a *proximate cause* of the death involved in this case." (Italics ours.) Then follows the usual definition of proximate cause. (See Caljic, Instruction No. 312, pp. 278–279.)

As a part of the instructions the trial court read the specific allegations of the information charging that the death of the deceased was the proximate result of the driving of the vehicle by said defendant and that the jury was to decide all questions of fact presented by the allegations of the information. Sec. 192 of the Penal Code was read to the jury, which section recites that the death must be the *proximate result* of the commission of an unlawful act, etc.

[3] The jury was sufficiently instructed that defendant's own unlawful act *must* be the proximate cause of the death. There was no legal requirement to negatively state the proposition, that is, that if the negligent act of the decedent was the sole proximate cause of his death, the defendant would not be guilty. See People v. Marconi, supra. Although an instruction to this effect might well have been given, People v. Lett, 77 Cal.App.2d 917, 921, 177 P.2d 47, no prejudicial error resulted.

[4] The attempted appeal from the order denying motion in arrest of judgment is dismissed. People v. Okada, 14 Cal.App.2d 660, 664, 58 P.2d 967.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., concurs.

In re PAYNE'S ESTATE.

JAMES v. SPENCER et al.

Civ. 17005.

District Court of Appeal, Second District,
Division 1, California.

Oct. 3, 1949.

Rehearing Granted Oct. 27, 1949.

Subsequent Opinion 210 P.2d 916.

Cora James petitioned for probate of a purported will of Christianna E. Payne, deceased, and E. A. Spencer and Elsie Butler filed objections and introduced a prior will.

The Superior Court of Los Angeles County, John J. Ford, J., rendered a judgment rejecting probate of the later instrument and ordered the prior instrument admitted, and petitioner appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment and reversed the order with directions, and held that probate of the later instrument was properly denied on ground of undue influence.

1. Wills ⚷386

Trier of facts is sole judge of credibility and weight of evidence in a will contest, and while all evidence should be examined by reviewing court, it is not weighed; and all evidence favorable to respondent must be accepted as true; and if evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

2. Wills ⚷166(1)

Evidence justified refusal to probate purported will on ground of undue influence.

◆

Ivan J. Johnson III, Miller & Sinclair, Loren Miller, Harold J. Sinclair, Los Angeles, for appellant.

David W. Williams, Matthews & Williams, Los Angeles, for respondents.

DRAPEAU, Justice.

Christianna E. Payne died November 16, 1947. At the time of her death she had no living relatives or next of kin. Her last will and testament dated October 20, 1947 was presented for probate. Objections were filed upon the grounds of unsound mind and undue influence.

After trial of these issues, the Court found that the testatrix was of sound and disposing mind and memory, but that the will was made while she was physically and mentally feeble and should be denied probate because of undue influence.

During the trial it developed that the decedent had made a prior will, dated September 17, 1945. This will was introduced in evidence, and admitted to probate. The Clerk's transcript contains a copy of the petition for probate thereof, but the Reporter's transcript shows no testimony in support of the allegations of the petition. Therefore, the matter will have to be returned to the probate court to prove that will.

The issues of unsoundness of mind and undue influence were well tried. The decedent was a little, old lady, 83 years of age. All her life she had been frugal and industrious. For many years she was employed in a bank. Her only son died about two years before she did. This was a great shock to her, from which she never entirely recovered. And as she approached the end of her day she became more and more enfeebled, mentally and physically. She was alone in the world, dependent upon kindly neighbors, friends, and her church for human companionship, and someone to look out for her.

The 1945 will appointed her attorney executor, and left her property to several persons, with $200 to her church for a memorial. These beneficiaries were friends who were taking care of her and her property. The estate consisted of two parcels of real property and nearly $5000 in cash.

The 1947 will appointed another person, not mentioned in the previous will, executrix, and left the entire estate to her. This lady appears as proponent of that will, and two of the beneficiaries under the 1945 will appear as contestants.

On the issue of undue influence the record shows the following: Proponent lived across the street from the decedent. Proponent was a real estate saleslady. Until decedent entered General Hospital in Los Angeles, September 3, 1947, there had been a casual acquaintance between them. Decedent spent three days in the hospital and went home. She was readmitted on October 4, 1947. During the three days she was at home she found a roomer there whom she feared and disliked. She also said she was afraid of the people in her house.

Proponent called on decedent at the hospital several times. She found decedent in an unhappy state of mind. Decedent thought that the beneficiaries in her then will (the 1945 will) had caused her to be placed in the hospital, and that they were attempting to get her property away from her. And she was afraid to go home.

Proponent arranged to have decedent go to a room in the home of a lady living next door to decedent's house, and across the street from proponent's house. From that time on proponent took charge of decedent and decedent's affairs. After decedent left the hospital the second time, proceedings were commenced in the Superior Court to have her declared incompetent and for letters of guardianship. These proceedings were instituted by a sister of a deceased daughter-in-law. Decedent requested proponent to take decedent to the court hearings in this matter, and that proponent be appointed her guardian.

At the request of decedent, proponent secured a lawyer to prepare the will under attack. This lawyer had not previously done any legal work for decedent. Proponent also called in a doctor other than the one who had been attending the patient. Prior to the time decedent went to the hospital, her affairs had all been attended to by one of the beneficiaries of the 1945 will. Thereafter proponent collected rentals from decedent's houses and paid decedent's bills.

[1, 2] The court found against the proponent on the issue of undue influence, and the evidence substantially supports the finding. As stated in Re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384, 387, "The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case." While all of the evidence should be examined by a reviewing court, it is not to be weighed. All of the evidence favorable to the respondent must be accepted as true, and if the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed. In re Estate of Teel, supra. From the testimony in this case the judge was empowered to draw the inferences: (a) That there was a confidential, fiduciary relationship between proponent and decedent; (b) that the decedent was feeble in mind and body; and (c) that the proponent controlled and directed the testamentary act. See In re Estate of Brown, 89 Cal.App.2d 496, 200 P.2d 888.

The judgment rejecting probate of the will dated October 20, 1947 is affirmed; the order admitting the will dated September 17, 1945 to probate, and for letters testamentary, is reversed; and the matter is remanded to the Superior Court for further proceedings, with power to admit to probate the latter will, upon proof of the due execution thereof.

DORAN, J., concurs.

WHITE, Presiding Justice.

I concur. I am satisfied that the evidence in the case at bar entitled the trial court to find that a confidential relationship existed between the testatrix and appellant, coupled with activity on the part of the latter in the preparation of the will, and from which a presumption of undue influence arose. This I say because, notwithstanding appellant's admission that the testatrix told her, "You get in touch with Attorney Williams, because whenever I want any legal matters taken care of he is the one that takes care of them," appellant nevertheless called another attorney of her own selection to prepare the will, and admitted that she knew in advance that the attorney she contacted was going to prepare the will so that it would leave her sole beneficiary thereunder. Appellant also paid the attorney in question for his services in preparing the will, had talked with the testatrix about making a new will, and was present at its execution. Attorney Williams, above referred to, had been the attorney for the testatrix since 1940. These and other evidentiary facts not necessary to here narrate, in my opinion, make the question of undue influence in the case at bar one of fact for determination by the trier of fact.

94 Cal.App.2d 169

PEOPLE v. WINN.

Cr. 810.

District Court of Appeal, Fourth District, California.

Oct. 14, 1949.

John D. Winn was convicted in the Superior Court of Tulare County, Glenn L. Moran, J., for willful abandonment and nonsupport of his wife, and he appealed.

The District Court of Appeal, Barnard, P. J., affirmed and held that references to a prior conviction on argument were not prejudicial, and that the evidence supported the conviction as against a plea of double jeopardy.

1. Criminal law ⚷1037(1)

Objections to references in argument of prosecuting attorney to prior convictions may not be raised for the first time on appeal. Pen.Code, § 1025.

2. Criminal law ⚷371(1)

Where husband was tried for abandonment and nonsupport of a continuing nature, matter of a former conviction for nonsupport was material on question of continuing intentional abandonment. Pen. Code, §§ 270a, 1025.

3. Criminal law ⚷1171(1)

Where husband convicted for nonsupport of wife was tried a second time, and jury was advised that he was not being tried for former crime, but that previous occurrences were material only as tending to prove an abandonment which had continued after release, and defendant's counsel referred to prior conviction throughout the trial, references by district attorney to prior conviction in opening statement and closing argument were not prejudicial. Pen.Code, §§ 270a, 1025.

4. Criminal law ⚷198

Where defendant was convicted of abandonment that occurred in 1945 and was released, prior conviction was not a bar to subsequent prosecution for abandonment and nonsupport during year following release. Pen.Code, § 270a.

5. Husband and wife ⚷305

Fact that wife was supported by third parties is no defense to prosecution of husband for abandonment and nonsupport. Pen.Code, § 270a.

6. Husband and wife ⚷313

Evidence supported conviction for abandonment and nonsupport of wife. Pen. Code, § 270a.

◆

Jamison & Jamison, Porterville, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 270a of the Penal Code, it being alleged that from February 18, 1948, to February 1, 1949, he wilfully abandoned his wife and left her in a destitute condition, and refused and neglected to provide her with necessary food, clothing, shelter and medical attention although he had sufficient ability to provide and earn the means therefor. A prior conviction for a similar offense was also charged. The defendant pleaded not guilty but admitted the prior conviction. A jury found him guilty and a judgment was pronounced sentencing him to imprisonment. He has appealed from the judgment and from an order denying his motion for a new trial.

The defendant and his wife were married in 1920. In 1934, Mrs. Winn suffered a stroke and has never completely recovered her health. In June, 1945, while they were living in Porterville, Mrs. Winn desired to go to Colorado to see her daughter, believing that the change in climate would benefit her health. The defendant consented to this trip, telling her he would come after her or send her money for the return trip. After she left, the defendant gave up their apartment and sold such household effects as they had. Some six months later, the defendant having failed to answer her letter or send her any money, Mrs. Winn returned to Porterville. Subsequently, defendant pleaded guilty to a violation of section 270a from July 15, 1945, to January 30, 1946. He was sentenced and served time in a penal institution, from which he was discharged on February 18, 1948.

Following his discharge the defendant returned to Porterville but made no effort to re-establish his home. He did not go to see his wife and has contributed nothing to her support since June, 1945. During the time here in question Mrs. Winn has lived with and has been supported by their daughter and son-in-law. The daughter's attempts to obtain financial assistance for Mrs. Winn from the defendant were unsuccessful.

It is first contended that the district attorney was guilty of prejudicial misconduct in referring to the defendant's prior conviction in his opening statement and in his closing argument, in violation of section 1025 of the Penal Code; and that the court erred in stating in the presence of the jury, in connection with ordering that the exhibits be left with the jury for its perusal, "In the criminal file No. 6674 I am going only to leave a certified copy of the minutes." This file was the one relating to the defendant's prior conviction.

[1-3] The defendant's main defense was that he had served a sentence on the charge of failure to support his wife, had been discharged, and that he could not be further prosecuted for this offense. At the beginning of the proceedings he moved to dismiss on the ground of double jeopardy and introduced into evidence the certificate of discharge and release dated February 18, 1948. By stipulation, the entire file in the prior proceeding was introduced into evidence. The defendant's counsel in his opening statement referred to the prior conviction and to the release. He also brought out these facts when the defendant was on the stand, and referred to them in his argument to the jury. Not only was the matter of the prior conviction referred to and relied on by the defendant throughout the trial but the references thereto by the district attorney were not objected to, and the objection may not be raised for the first time on appeal. People v. Calliham, 81 Cal.App.2d 928, 185 P.2d 342. Under these circumstances, no possible prejudice appears. Moreover, the offense in question was one of a continuing nature and the matter of the former conviction was material on the question of an intentional abandonment which had continued. People v. Peete, 28 Cal.2d 306, 169 P.2d 924. The jury was carefully admonished that the defendant was not being tried for the former crime, that he was being tried for his acts between February 18, 1948 and February 1, 1949, and that the occurrences prior thereto were material only insofar as they tended to prove an abandonment which had continued thereafter.

[4] It is next contended that the defendant was thus twice placed in jeopardy for the same offense since the only abandonment occurred in 1945. Section 270a covers not only wilful abandonment but also a refusal or neglect to provide a wife with the necessaries of life. While the original abandonment occurred in 1945 this was of a continuing nature and the evidence sufficiently shows a continuance thereof after the defendant's release on February 18, 1948. Abandonment and nonsupport was here proved from February 18, 1948 to February 1, 1949, and the fact that this was a different offense from that covered by the previous conviction appears beyond question. The prior conviction was not, and could not be, a bar to the present action. People v. Majado, 22 Cal.App.2d 323, 70 P.2d 1015.

Finally, it is contended that the evidence is not sufficient to sustain the verdict and judgment. In this connection, it is argued that instead of showing an abandonment the evidence shows that Mrs. Winn left his home against his wishes; that the evidence shows that Mrs. Winn was not destitute since she was being supported by her daughter and son-in-law; and that the evidence shows that the defendant had not the ability to provide for his wife's support.

While the defendant testified that his wife left his home in 1945 against his wishes there was ample evidence to the contrary, and this conflict was decided by the jury adversely to him. Not only was the evidence as to the prior conviction conclusive with respect to the original abandonment, but the evidence clearly discloses that this abandonment was intentionally continued after the defendant was released from confinement.

[5] The fact that Mrs. Winn had been supported in the meantime by her daughter and son-in-law is immaterial and no defense. People v. Martin, 100 Cal.App. 435, 280 P. 151. Moreover, there is evidence that the daughter and son-in-law were, and had been, unable to furnish Mrs. Winn with medical attention which she needed, and further evidence that the son-in-law was without a job at the time of the trial.

[6] While the defendant testified that he had been without the means to support or assist his wife during the period in question his evidence is unsatisfactory, to say the least. He testified that during that year he had earned only $609.72 and that he needed all of this for his own support. Also, that he was unable to do heavy work because "I have a strained back, and my nerves is shot." He did not state how much money he earned during any particular period. There is evidence that he worked as a fruit picker and doing other work with fruit, and as a carpenter. He may have earned several hundred dollars in some months, during which he could have met this legal obligation. He made no attempt to do so at any time. There is no evidence that he had any trouble in supporting his wife prior to 1945, and no evidence of any change in his condition since then. There is no evidence that he had any difficulty in obtaining employment during the period in question, and under the conditions existing in that community it may fairly be inferred that he should have earned much more than an average of $50 a month. He testified that he had been living in a hotel and it could reasonably be inferred that the expense of so doing would have enabled him to do something for his wife under a more domestic mode of living. There was evidence that the defendant was an experienced fruit picker and had been foreman of picking crews, as well as a carpenter. The jury saw and observed him and was in a better position than is this court to judge as to the extent of his claimed disability. The defendant admitted that during this period he knew where his wife was living, that he knew her condition, and that he had not contributed "one dime" to her support. At one time during the period he promised his daughter to meet her at a certain place a week later and contribute something toward the support of his wife. He did not keep the appointment and his daughter was unable to find him. The evidence, with the reasonable inferences therefrom, supports the implied finding of the jury that the defendant either had the ability to provide something for his wife's support or was able to earn the means therefor. It rather clearly appears that the defendant's failure to contribute anything toward his wife's support was due to his own attitude, and to his mistaken belief that his former conviction relieved him of any further responsibility in that regard, rather than to any disability on his part within the meaning of this statute.

The judgment and order are affirmed.

GRIFFIN, J., concurs.

93 Cal.App.2d 858

PEOPLE v. STONE et al.

Cr. 2094.

District Court of Appeal, Third District, California.

Oct. 4, 1949.

Hearing Denied Oct. 31, 1949.

H. B. Stone and others were convicted in the Superior Court of Placer County, Lowell L. Sparks, J., of conspiracy to commit abortions, and the judgment on defendants' appeal was affirmed by the District Court of Appeal.

The named defendant moved the District Court of Appeal to recall and quash its remittitur, on ground that the admission of certain evidence was erroneous.

The District Court of Appeal, Thompson, J., denied the motion, holding that the evidence was properly admitted, but that even if the admission had been error, the admission was merely a mistake of law and that therefore motion for recall of remittitur was not the proper remedy.

1. Abortion ⚷9
Conspiracy ⚷45

In prosecution for abortions and conspiracy to commit abortions, evidence that medical instruments and soap which could be used in committing abortions, were found in place of business where defendants operated, was properly admitted.

2. Criminal law ⚷1193

The alleged erroneous admission in prosecution for abortion and conspiracy to commit abortion of evidence that medical instruments and soap which could be used in committing abortion, were found in place of business where defendants operated, was merely a "mistake of law" and not a "mistake of fact," and did not require recall and quashal of a remittitur after affirming conviction of conspiracy to commit abortions. Pen. Code, § 1265.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Mistake of Fact" and "Mistake of Law".

3. Criminal law ⚷1193

A motion for recall of a remittitur after affirmance of a conviction is not a proper remedy to correct a mere mistake of law, even thought one exists. Pen. Code, § 1265.

4. Criminal law ⚷673(4)

Where three defendants were jointly charged and tried together on indictment charging abortions and conspiracy to commit abortions, evidence, if competent against any one of the three defendants, was admissible, and if evidence was not competent against one of other defendants, it was his duty to request trial court to confine its application to defendant against whom it was competent.

5. Criminal law ⚷1193

Ordinarily, when a court has jurisdiction to render a judgment which is not the result of fraud, imposition or prejudicial mistakes of fact, a remittitur which has been duly issued thereon after an affirmance of the judgment, may not be recalled or quashed to correct mere errors of law or procedure. Pen.Code, § 1265.

6. Criminal law ⚷1193

Except where there is a lack of jurisdiction to pronounce judgment, or where fraud, imposition or prejudicial misapprehension of the facts has resulted in an erroneous judgment, a reviewing court lacks jurisdiction for further proceedings after remittitur has been duly issued. Pen.Code, § 1265.

7. Criminal law ⚷1193

Where court lacked jurisdiction to pronounce judgment because a pending motion for a new trial had not been disposed of, or for other adequate reasons, such as fraud or imposition on the court, the extraordinary remedy of a recall of a remittitur may be granted by a reviewing court after affirmance of judgment. Pen.Code, § 1265.

◆

H. V. Stone, in pro per.

Fred N. Howser, Attorney General, Doris H. Maier and Gail A. Strader, Deputies Attorney General, for respondent.

THOMPSON, Justice.

The defendant, H. V. Stone, appearing in proper person, moved this court to recall and quash a remittitur after the judgment of conviction of conspiracy to commit abortions had been affirmed on appeal.

It is contended the remittitur should be recalled because the judgment is invalid on account of the admission in evidence of medical instruments and Dorex soap solution "without complete knowledge of all the circumstances, and causing a mistake as to the facts of the case." It is also asserted that the opinion which was rendered by this court on appeal is likewise erroneous for the same reasons. No fraud or imposition on the court is alleged. No evidence was adduced in support of the motion to recall the remittitur. After conviction of the defendants, who were jointly indicted and tried for conspiracy to commit abortions and for actual commission of said abortions, and a new trial was denied, the judgment was affirmed by this court on appeal, People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333, and motions for rehearing and for hearing by the Supreme Court were denied.

[1, 2] The defendants H. V. Stone and his wife, Marie Stone, together with Dr. W. H. Jordan, were jointly indicted and tried for conspiracy to commit abortions, and for the actual commission of several different alleged abortions. They operated together in commission of the abortions at the office of Dr. Jordan in Roseville. The medical instruments and a large quantity of Dorex soap were taken from the place of business where the defendants operated, and received in evidence, over the objections of the defendants at the trial. There was evidence by at least two women upon whom abortions were committed, that they consulted with both Dr. and Mrs. Stone about the abortions which were committed and that Mrs. Stone actually performed the operations with the use of Dorex soap which was injected into the uterus, although H. V. Stone was subsequently acquitted of those charges of abortion. The instruments and soap were sufficiently connected with the perpetration of the crimes charged. They were competent evidence in the trial of conspiracy and the actual commission of the abortions, in spite of the fact that Dr. Stone was afterward acquitted of the charges of abortion. He was, however, convicted of the crime of conspiracy to commit them. The evidence shows that he consulted with his wife about performing the abortions on Esther Gonzales and Mrs. McClatchy, each of whom testified that Mrs. Stone used an instrument with which she injected into the uterus a solution of the Dorex soap. Both the record of the trial and the opinion of this court disclose the fact that the issue of the competency of the medical instruments and of the Dorex soap was fully understood and properly determined, and that neither the trial court nor this court misapprehended the facts. Neither court was misled or mistaken in that regard. If either court erred in regard to the admission of that evidence, which we do not concede, clearly it was a mistake of law and not one of fact. That issue was also presented and determined adversely to this defendant in the motion for new trial and in the applications for rehearing and for hearing by the Supreme Court.

[3] The motion for recall of the remittitur is not the proper remedy to correct a mere mistake of law, even though one exists. We are convinced the petitioner in this case has misapprehended the proper functions of the extraordinary proceeding to recall and correct mistakes contained in a remittitur. No fraud or imposition on the court is alleged. There was no attempt by affidavits or otherwise to prove that the court was mistaken as to the facts. The record of the case was before the court, and the facts were fully presented and considered at the trial. The court clearly had jurisdiction to pass upon the issue in question and to render the judgment which was affirmed on appeal.

[4] Moreover, the three defendants were jointly charged and tried together on nine counts of the indictment. If the challenged evidence was competent against either defendant it was entitled to be admitted. If the evidence was not competent against any one of the codefendants, which we do not concede, it was his duty to ask the court to confine its application to the other defendants, which was not done, as our opinion clearly states.

We conclude that the medical instruments and the Dorex soap were properly admitted in evidence, that the court had jurisdiction to determine their competency and to render the judgment in this case, and that neither court was deceived or misled regarding the facts in relation thereto.

It follows that this court has no authority, under the circumstances of this case, to recall or quash the remittitur. Much less have we the right, on this proceeding, to set aside the judgment and grant a new trial. That would amount to a circumvention of the statutes, and lead to a multiplicity of trials and endless litigation. It would defeat the orderly statutory procedure and due process in criminal trials. Where the court has jurisdiction to render the judgment complained of and it does not affirmatively appear that it was the result of fraud, imposition or misapprehension of facts, the recall of a remittitur is not the remedy for mistakes which may occur regarding the application of the law.

[5] Ordinarily, when a court has jurisdiction to render a judgment which is not the result of fraud, imposition or prejudicial mistakes of facts, a remittitur which has been duly issued thereon may not be recalled or quashed to correct mere errors of law or procedure. People v. Murphy, 71 Cal.App. 176, 235 P. 51; People v. Egan, 81 Cal.App.2d 769, 185 P.2d 82; Ellenberger v. City of Oakland, 76 Cal.App.2d 828, 174 P.2d 461; Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006; Municipal Bond Co. v. City of Riverside, 138 Cal.App. 267, 279, 32 P.2d 661; 8 Cal.Jur. 639, sec. 613; 4 Ten-Year Supp. 1031, sec. 613; 3 Am.Jur. 712, sec. 1210; 5 C.J.S., Appeal and Error, § 1996, page 1560; 84 A.L.R. 595, note.

[6] Except when a lack of jurisdiction to pronounce judgment, or where fraud, imposition or prejudicial misapprehension of the facts have resulted in an erroneous judgment, a reviewing court lacks jurisdiction for further proceedings after the remittitur has been duly issued. Section 1265 of the Penal Code provides in that regard: "After the certificate of the judgment has been remitted to the court below, the appellate court *has no further jurisdiction* of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted." (Italics added.)

[7] It is true that, in a proper case, where the court lacked jurisdiction to pronounce judgment because a pending motion for new trial had not been disposed of, or for other adequate reasons such as fraud or imposition on the court, the extraordinary remedy of a recall of remittitur may be granted. In re Rothrock, 14 Cal.2d 34, 92 P.2d 634; 23 Cal.Law Rev. 354, 356; 84 A.L.R. 595, note. The note in said California Law Review contains the following statement in that regard: "It would appear from these cases that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision. It is perhaps worthy of note that in the principal case the court said 'that a mistake of law on the part of counsel, or the members of this court, no matter how honestly made,' would not of itself furnish sufficient ground for the recall of a remittitur."

In the heading to the note which appears on that subject in 84 A.L.R. page 595, it is said: "Where an appellate court has rendered a decision which was induced by fraud practiced on the court, and the case has been remanded, the remittitur will be recalled and the decision of the court changed, and the judgment corrected so as to conform to the right of the case."

In the Murphy case, supra, a motion to annul a judgment on account of alleged errors of procedure at the trial was denied. The appellate court said that the motion would not lie after affirmance of an appeal, for mere errors of law occurring prior to to rendering of judgment. And in the Egan case, supra, upon motion to recall a remittitur and to set aside an order dismissing an appeal from a judgment of conviction of the crime of murder upon the alleged grounds of inadvertence and defective proceedings, the order of dismissal was affirmed. The appellate court said that no petition for hearing or rehearing of the decision had been made, and that no fraud or imposition upon the court was alleged, and that the motion to recall the remittitur would not lie, under such circumstances. The inference is that the granting of said motion under such circumstances would conflict with the procedure provided by statute for setting aside a judgment. The court concluded that feature of the case by saying [81 Cal.App.2d 769, 185 P.2d 85]: "* * * The statute and rules reasonably regulating the right of appeal might just as well be repealed if any such rule were to be adopted. A remittitur may be recalled only where the judgment sought to be recalled was secured by fraud or imposition on the court. Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006."

The foregoing language appears to fit the situation in the present case, except that there is much less reason for recalling the remittitur in this case because both petitions for rehearing and for hearing in the Supreme Court after the judgment was affirmed on appeal were denied. The same issue was determined on those applications adversely to this defendant.

In the case of Haydel v. Morton, 28 Cal.App.2d 383, 82 P.2d 623, 624 (hearing denied), after a decision had been rendered on appeal and a hearing thereon was denied by the Supreme Court, the remittitur issued. A subsequent motion to recall the remittitur was denied. The motion was made on the grounds of alleged improvidence of the court and false suggestions of counsel which misled the court in rendering the decision, resulting in a miscarriage of justice. The court said:

"The basis of this motion is that said judgment was improvidently granted by this court upon a false suggestion by appellant; under a mistake as to the facts of the case, and through the inadvertence of the court. That the decision results in a miscarriage of justice due to the error of this court.

"A motion to recall the remittitur is an extraordinary remedy that is only exercised in cases of fraud or imposition practiced upon the court or upon the opposite party or where a judgment is improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case. (Citing authorities.)"

In denying the motion to recall the remittitur in the last-mentioned case the court properly held that the record disclosed no evidence that the decision was improvidently rendered by the court, or that it was the result of fraud or imposition, and that, if the decision had been so rendered, the proper remedy was to raise that question on a petition for rehearing or for hearing by the Supreme Court, which were waived by failure to apply therefor in the usual manner provided by law. In the present case the defendants' petitions for rehearing and for hearing were denied.

Nor is the case of In re Rothrock, supra, upon which this defendant relies, in conflict with what we have previously said with respect to the limitation of the rule regarding the remedy of recalling a remittitur. In that case the remittitur was recalled on the apparent theory that the trial court lacked jurisdiction to pronounce the judgment of conviction of the defendant of the crime of murder because he had orally interposed a motion for new trial which had not been determined but was still pending. The Supreme Court said that upon appeal to the district court, "The direction to enter judgment of conviction was predicated upon the mistaken belief, expressed in the opinion, that no motion for new trial had been made." [14 Cal.2d 34, 92 P.2d 635] In that case it appears that the trial judge stated "it was his purpose to grant the motion for new trial" when it was submitted. While the motion for new trial was made, it was continued for argument and submission on account of pressure of other pending cases in court. There was subsequently a change of counsel for the defendant. The pending motion for new trial was overlooked by counsel and the court. It was never determined. Judgment of conviction was inadvertently rendered while the motion for new trial was still pending. Based on that state of the record the Supreme Court properly said:

"* * * In the present case, the motion for new trial was duly made; the court did not pass thereon within the time provided by section 1191 of the Penal Code; petitioner, having been prejudiced by the failure to have the motion determined, is now entitled to a new trial under section 1202 of said code. * * *

"The motion to recall the remittitur is granted. The remittitur * * * is recalled. * * *"

The cause was then remanded to the trial court with directions for a new trial.

For the foregoing reasons the motion for recall of the remittitur in this case is denied. Defendant's motion to be released on bail to be fixed by this court is also denied.

ADAMS, P. J., and PEEK, J., concur.

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94 Cal.App.2d 140

F. BRUCE MAIDEN & CO. v. LIPPOW.

Civ. 14043.

District Court of Appeal, First District,
Division 2, California.
Oct. 14, 1949.

Action by F. Bruce Maiden & Company against L. Lippow on two written agreements for broker's commission and bonus.

The Superior Court, Contra Costa County, Hugh H. Donovan, J., gave judgment for plaintiff on the first agreement but gave judgment for the defendant on the second agreement, and the plaintiff appealed.

The Court, Nourse, J., held that the court erred in holding that bonus contract was without consideration and in refusing to admit in evidence such contract, and reversed the judgment.

1. Brokers 🔑43(3)

An agreement signed by property owner to pay broker a $3,125 bonus in addition to commission on consummation of sale of property upon the terms laid down or upon terms to which property owner might agree, was a sufficient memorandum of an agreement to pay within the code. Civ.Code, § 1624, subd. 5.

2. Brokers 🔑8(2), 71

In action by broker for commission under one contract and for bonus on consummation of sale under another contract which was executed concurrently with the contract providing for commission holding that bonus contract was without consideration and exclusion of evidence that the two instruments were one contract, and refusing to admit bonus contract in evidence was erroneous. Civ.Code, § 1614.

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Irving M. Liner, Oakland, for appellant.

Hoey, Hoey & Fenstermacher, Martinez, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on two written agreements, both executed at the same time. Neither agreement was pleaded in haec verba or incorporated by reference in the complaint. Judgment was given plaintiff on the first agreement, but the trial court refused to admit evidence of the second agreement and gave judgment thereon to defendant. This ruling is the pertinent issue on plaintiff's appeal from that portion of the judgment.

The facts are undisputed and may be stated briefly. The first agreement was the common contract for a broker's commission on the sale of defendant's real property for $175,000. It called for payment to plaintiff of the sum of $5,625 as commission for the production of a buyer ready, able and willing to purchase on the stipulated terms. The second contract, executed by defendant alone at the same time, reads in part: "Under even date herewith I have given you an option to sell the Travelers Hotel at Martinez, California, for the sum of $175,000.00 upon certain terms * * *.

"It is now mutually agreed between us that if said sale is consummated upon the terms laid down in said contract, or upon any other terms to which I may later agree, *I will at the time of consummation of said sale, and not otherwise,* pay you the *addi-*

tional sum of $3,125.00." (Emphasis added.)

[1] Under well settled rules of law the broker was entitled to his commission under the first contract when he produced a purchaser ready, able and willing to buy under the terms specified. Hence, the obligation of respondent under that contract was not dependent upon a consummation of the sale. This is not true of the second contract. There the seller was obligated to pay the broker only upon consummation of the sale "upon the terms laid down" or upon other terms to which the seller might agree. Since it was "subscribed by the party to be charged" it was a sufficient "memorandum" of an agreement to pay under the terms of section 1624, sub. 5 of the Civil Code.

[2] This second contract is open to the interpretation that the seller agreed to pay something in the nature of a bonus if the broker was successful in consummating a sale. Since the evidence is that the sale was consummated on terms agreed to by the seller and that the broker produced the ultimate purchaser, it was error for the trial court to refuse to admit the second contract in evidence and to deny appellant the right to make his proof in relation to it.

There was further error in this respect when the trial court found that the second contract was without consideration. If the writing itself was not sufficient evidence of consideration under the presumption found in Civil Code, section 1614, the court should not have rejected appellant's offer of proof.

It was also error to refuse to admit evidence that both instruments formed one contract or transaction. Section 1642 of the Civil Code reads: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Appellant offered to prove everything called for by the code section. The authorities are in accord that under those circumstances both agreements are admissible and that evidence tending to show that they come within the terms of the code section should be admitted. 6 Cal. Jur. p. 301; People v. Ganahl Lumber Co., 10 Cal.2d 501, 75 P.2d 1067; 12 Am.Jur. p. 781.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

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94 Cal.App.2d 85

PEOPLE v. NASWORTHY et al.

Cr. 2138.

District Court of Appeal, Third District, California.

Oct. 7, 1949.

Hearing Denied Nov. 3, 1949.

Grover Hulan Nasworthy and Alvin Charles Knuthson were convicted in the Superior Court of Butte County, Harry Deirup, J., for conspiracy to commit the crime of pandering by procuring a female to become an inmate of a place wherein prostitution was encouraged or allowed and to commit acts injurious to public morals by procuring such female to engage in indiscriminate sexual intercourse for compensation, and they appealed.

The District Court of Appeal, Adams, P. J., modified the judgments and affirmed them as modified, holding that the indictment was sufficient and that evidence that acts which the female was induced to commit were committed in defendant Nasworthy's taxicab sustained conviction of conspiracy to pander by inducing her to become an inmate of a place in which prostitution was encouraged or allowed.

1. Conspiracy 🔑27

The crime of conspiracy is not completed by mere agreement with unlawful object in view, but there must be an overt act intended to effect object of conspiracy. Pen.Code, §§ 182, 184, 1104.

2. Conspiracy 🔑43(5)

A defect in one count of criminal conspiracy indictment because of failure to charge commission of overt act intended to effect object of conspiracy is not necessarily fatal if there was but one conspiracy, though objects thereof were manifold. Pen.Code, §§ 182, 184, 1104.

3. Indictment and Information ⚷125(5½)

All objects of criminal conspiracy may be made subject of one charge in indictment therefor. Pen.Code, § 182.

4. Indictment and Information ⚷125(5½)

To do all things enumerated in the different subdivisions of Penal Code section defining criminal conspiracy amounts to single offense only, and such section permits framing of indictment charging conspiracy to do or commit any or all of illegal acts referred to therein. Pen.Code, § 182.

5. Conspiracy ⚷23

The gist of criminal offense of conspiracy is the conspiracy, which is single, though object thereof is to commit several crimes. Pen.Code, § 182.

6. Conspiracy ⚷43(5)

An indictment charging in first count conspiracy to commit crime of pandering by inducing female to become inmate of place wherein prostitution was encouraged or allowed, and in second count conspiracy to commit acts injurious to public morals by procuring such female to engage in indiscriminate sexual intercourse for compensation, charged but one conspiracy and in second count an overt act pursuant thereto, so that charge as whole was not insufficient for failure to charge overt act, regardless of whether first count failed in such respect. Pen.Code, §§ 182, 184, 1104; Gen.Laws, Act 1906.

7. Conspiracy ⚷48

Defendant's proposed instruction to jury that first and second counts of indictment, charging, respectively, conspiracy to commit crime of pandering by procuring a female to become inmate of place in which prostitution was encouraged or allowed and conspiracy to commit acts injurious to public morals by procuring her to engage in indiscriminate sexual intercourse for compensation, charged that defendant committed one or the other of two offenses, not two separate offenses, was properly refused as not dealing with such counts as charging but one offense of conspiracy. Pen.Code, § 182; Gen.Laws, Act 1906.

8. Conspiracy ⚷48
Criminal law ⚷1172(1)

An instruction to jury that indictment in two counts charging, respectively, conspiracy to commit crime of pandering by inducing female to become inmate of place wherein prostitution was encouraged or allowed and conspiracy to commit acts injurious to public morals by procuring her to engage in indiscriminate sexual intercourse for compensation, charged three separate and distinct offenses, and that jury must state finding as to each charge in separate verdict, was erroneous, but not fatally defective, where jury was given separate verdict on each count and returned verdicts of conviction, sustained by evidence, for conspiracy to commit crime under both counts. Pen.Code, § 182; Gen. Laws, Act 1906.

9. Criminal law ⚷1184

On appeal from convictions on two counts of indictment, charging, respectively, conspiracy to commit crime of pandering and conspiracy to commit acts injurious to public morals by procuring female to engage in indiscriminate sexual intercourse for compensation, appellate court, holding that indictment charged but one conspiracy, may modify trial court's judgment on verdicts, so as to adjudge that defendants were found guilty of conspiracy to commit felony of pandering and order their punishment by imprisonment in state prison for term prescribed by law. Pen.Code, § 182; Gen.Laws, Act 1906.

10. Conspiracy ⚷47

Proof that a woman was induced to become inmate of house of prostitution was unnecessary to sustain convictions of conspiring to commit crime of pandering by procuring her to become inmate of place wherein prostitution was encouraged or allowed, but evidence that she committed acts induced by defendants in one defendant's taxicab, wherein practice of prostitution was shown to have been encouraged and allowed, sustained conviction of such conspiracy. Pen.Code, § 182; Gen.Laws, Act 1906.

11. Indictment and Information ⚷159(1)

The trial court had power to allow prosecution to amend indictment for criminal conspiracy without resubmitting case to grand jury where amendment did not change nature or character of offense charged or prejudice defendant's substantial rights. Pen.Code, §§ 182, 1008.

12. Criminal law ⚷620(2)

Joinder for trial of charges against two men for conspiracy to commit crime of pandering and charge against one of them for commission of lewd acts with minor female, named in conspiracy count of indictment, on same evening in which acts charged therein were shown to have been committed, was not abuse of trial court's discretion, as there was common element of substantial importance in commission of conspiracy and lewd acts charged and all involved one set of circumstances. Pen. Code, §§ 182, 288a.

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Jack M. McPherson, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Chico, for appellants.

Fred N. Howser, Attorney General, by Gail A. Strader, Deputy Attorney General, for respondent.

ADAMS, Presiding Justice.

Defendants were convicted on two counts of an amended indictment charging violation of section 182 of the Penal Code. The first count reads:

"The said Grover Hulan Nasworthy and Alvin Charles Knuthson did, on or about the 17th day of November, 1948, at Butte County, State of California, and before the filing of this Indictment, wrongfully, wilfully and unlawfully conspire to commit the crime of pandering, as set forth in Act 1906 of the Statutes and Amendments of 1911 [Gen.Laws, Act 1906] State of California as follows:

"That the said Grover Hulan Nasworthy and Alvin Charles Knuthson as a part of said conspiracy and in pursuance thereof, did then and there, by device or scheme, to-wit: By promising financial gain to a female person, one Billie Joyce Giffin, conspire to procure the said Billie Joyce Giffin by inducing, persuading and encouraging her to become an inmate of a place in which prostitution is encourage— or allowed within this State. * * *".

The second count reads:

"The said Grover Hulan Nasworthy and Alvin Charles Knuthson on or about the 17th day of November, 1948, at Butte County, State of California, and before the filing of this Indictment, did wrongfully, wilfully and unlawfully conspire to commit acts injurious to the public morals as follows, to-wit:

"That as a part of said conspiracy and in pursuance thereof, the said Grover Hulan Nasworthy and Alvin Charles Knuthson did, then and there, entice, encourage and procure one Billie Joyce Giffin, an unmarried female person, to engage in indiscriminate sexual intercourse, for compensation, with other persons and to engage in gratifying the sexual lusts, passions and desires of other persons, * * *."

In a separate indictment, defendant Nasworthy was charged with a violation of section 288a of the Penal Code, which action was consolidated with the conspiracy action over the objection of defendant Knuthson.

Objections to the indictment were raised by general and special demurrer, by motions to quash, in arrest of judgment, and for new trials. All were denied.

As grounds for reversal appellants urge that count one is insufficient to charge a violation of section 182 of the Penal Code, in that it charges no overt act; that it was error to permit the jury to find defendants guilty and to sentence them on both counts, because the indictment charges but one conspiracy with two or more objects, and that the district attorney should have been required to elect between the two; that the court erred in refusing to give an instruction proposed by defendants that but one conspiracy was charged, and in giving an instruction that the two counts charged different offenses.

[1] As for the first ground, section 184 of the Penal Code provides that no agreement amounts to a conspiracy, unless some

act, besides such agreement, is done to effect the object thereof, by one or more of the parties; and section 1104 provides that: "Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence." It is doubtful whether count one does charge the commission of an overt act. If the second paragraph of the first count be considered as charging an overt act, it charges that the parties conspired to procure Miss Giffin to become an inmate of a place in which prostitution is encouraged, etc. No act beyond the conspiracy stage is alleged. The general rule in California as stated in the code sections aforesaid is discussed in 5 Cal.Jur., sec. 4, pp. 498–499, and in 3 Cal.Jur. 10-Yr.Supp., p. 735, where it is said that the crime of conspiracy is not complete by the mere agreement with an unlawful object in view; that there must be an overt act, which is intended to effect the object of the conspiracy. The same rule which prevails in California is applied under the federal statute defining conspiracy. In Marino v. United States, 9 Cir., 91 F.2d 691, 113 A.L.R. 975, it was said that an overt act is something apart from the conspiracy, and is an act to effect the object of the conspiracy. As for the necessity of alleging and proving an overt act, also see Hyde v. United States, 225 U.S. 347, 359, 32 S.Ct. 793, 56 L.Ed. 1114, 1123, Ann.Cas.1914A, 614; People v. Daniels, 105 Cal. 262, 264, 38 P. 720; People v. Johnson, 22 Cal.App. 362, 365, 134 P. 339, 340, citing the Daniels case.

[2-4] However, the second count does charge the overt act of enticing, engaging and procuring the Giffin girl to engage in indiscriminate sexual intercourse, etc.; and the alleged defect in the first count is not necessarily fatal to the case if there was, in fact, but one conspiracy, though its objects were manifold. The charge is that the two alleged conspirators violated section 182 of the Penal Code. The gist of the charge is conspiracy; and it has been said in numerous cases that all the objects of such a conspiracy may be made the subject of one charge. In People v. Johnson, supra, while there were two conspiracy counts in an indictment, defendant was found guilty of but one. By demurrer it had been asserted that the indictment charged two offenses, contrary to section 954 of the Penal Code; but the court said: "In this case the indictment neither charged two offenses, nor does it appear that the acts which were described in the first count were different from those described in the second. To do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to [a single] offense only, and it is quite plain that the district attorney might have joined in one count of his indictment all of the matters which were made the subject of the two counts. That he did choose to separate them and state with more particularity the charge in the way which is exhibited by the indictment did not violate any of the rules of criminal pleading, or any of the specific provisions of section 954 of the Penal Code."

In People v. Gilbert, 26 Cal.App.2d 1, 7, 78 P.2d 770, 774, the court said: "The trend of judicial decisions in this state is to the effect that to do all of the things enumerated in the different subdivisions of section 182 of the Penal Code amounts to a single offense only. People v. Johnson, 22 Cal.App. 362, 364, 134 P. 339. The language of that section is inclusive and elastic enough to permit the framing of an indictment charging conspiracy to do or commit any or all of the illegal acts referred to therein. People v. MacPhee, 26 Cal.App. 218, 220, 146 P. 522."

[5] It is said in 15 C.J.S., Conspiracy § 47, p. 1073, that the gist of the offense of conspiracy is the conspiracy "which is single, although the object is to commit several crimes." Also see In re Nichols, 82 Cal.App. 73, 78–79, 255 P. 244; People v. Marks, 83 Cal.App. 370, 376, 257 P. 92; Tramp v. United States, 8 Cir., 86 F.2d 82, 83; Williams v. United States, 6 Cir., 3 F.2d 933, 934; People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506; People v. Welch, 89 Cal.App. 18, 23, 264 P. 324.

[6] If, then, as appellants urge and the above cited cases hold, there is but one conspiracy charged, and an overt act in pursuance thereof is charged in the second count, it cannot be said that the charge as a whole is insufficient for failure to charge an overt act, and it becomes immaterial whether or not count one fails in this respect.

[7, 8] As for the alleged error of the trial court in failing to give appellants' proposed instruction and in giving the one which it did give, the proposed instruction reads: "The charges contained in Count I and Count II of the indictment do not charge two separate offenses, but in effect charge that the defendants committed one or the other of such offenses. If you find that the defendants committed an act or acts constituting one of the crimes so charged, you then must determine which of the offenses charged was thereby committed. To support a verdict of guilt you must all agree as to the particular offense committed, and if you find the defendants guilty of one of said offenses, you must find them not guilty as to the other."

The instruction given states: "Three separate and distinct offenses are charged against the defendants. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration and you must state your finding as to each of the three charges in a separate verdict, uninfluenced by the mere fact that your verdict as to another charge is in favor of, or against, the defendants. The two defendants who are charged jointly may be convicted or acquitted upon either or both of the offenses charged against them jointly, and the defendant charged separately may be convicted or acquitted, depending upon the evidence and the weight you give to it, under the court's instruction. If you do not agree upon a verdict upon any *any* of the charges, you must render a verdict upon any charge upon which you do agree."

While the instruction given by the court is inconsistent with the cited cases holding that a conspiracy charged under section 182, supra, is single, it cannot be said that the instruction offered by defendants is consistent therewith, since it does not deal with counts one and two as charging but one offense. We therefore conclude that the court did not err in refusing to give that instruction; and while the instruction given is erroneous in advising the jury that each alleged offense should be considered separately, such error is not fatal to the case. A separate verdict on each count was given to the jury, and both returned as found. The evidence is ample to sustain defendants' conviction of a conspiracy to commit a crime, and the only remedy to which defendants are entitled as far as the conspiracy is concerned is that they should be dealt with as having been convicted of but one conspiracy, instead of two.

[9] In People v. Scott, 24 Cal.2d 774, 783, 151 P.2d 517, 522, where a defendant had been convicted of three counts of rape, and it was determined on appeal that all of his acts constituted but one offense, the Supreme Court modified the judgment to read: "whereas the said Aaron Scott has been found guilty of the crime of rape, a felony, as defined and prescribed in subdivisions 1, 3, and 4 of section 261 of the Penal Code being separate statements of the same offense, it is therefore ordered, adjudged and decreed that the said Aaron Scott be punished by imprisonment in the state prison of the State of California at San Quentin for the term prescribed by law." And as so modified the judgment and order denying a new trial were affirmed. Similarly in the instant case the judgment may be modified to adjudge the conspirators to have been found guilty of the crime of conspiracy, and to be punished by imprisonment in the state prison as prescribed by law.

[10] Appellants also argue that the evidence does not show the object of the conspiracy to be a crime, to wit, a violation of the pandering act, because in order to sustain a conviction for that offense, it is necessary for the proof to show that a woman was induced to become an inmate of a house of prostitution, while the evidence here merely shows that the acts which she was induced to commit were committed in

Nasworthy's taxicab. However, the statute does not limit the place to a house of prostitution, but encompasses any other place in which prostitution is encouraged or allowed. In People v. Jan You, 26 Cal. App. 148, 146 P. 63, 64, a similar contention was made, but the court said that the offense is complete where one procures a female person "to enter any place in which prostitution is encouraged or allowed." In the case before us it clearly appears that the practice of prostitution in the taxicab of defendants was not only encouraged, but allowed and consummated. Also the evidence shows that defendants tried to induce Miss Giffin to go to and remain in a hotel room for the purpose of prostitution.

[11] Appellants also urge, as grounds for reversal, that it was error for the trial court to allow the prosecution to amend the indictment without resubmitting the case to the grand jury. We are of the opinion that the amendment did not change the nature or character of the offense charged, to wit: conspiracy, nor prejudice the substantial rights of the defendants; and that, under the provisions of the Penal Code, sec. 1008, it was within the power of the court to allow the amendment. See People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333; People v. O'Moore, 83 Cal.App.2d 586, 590, 189 P.2d 554; People v. Sibelo, 61 Cal. App. 92, 94, 214 P. 462.

[12] Finally, appellants urge that Knuthson was prejudiced by being jointly tried with Nasworthy on the charge that the latter violated section 288a. The act charged against Nasworthy alone was but one of the various incidents connected with the events of the evening of November 17, 1948, which the evidence shows were participated in by the defendants and Miss Giffin. We find no abuse of discretion in joining the charges for trial. There was a common element of substantial importance in the commission of the conspiracy charged, and the act with which defendant Nasworthy was charged; they all involved one set of circumstances. See People v. Burton, 91 Cal.App.2d 695, 205 P.2d 1065; People v. Bennett, 93 Cal.App.2d 549, 209 P.2d 417; People v. Jordan, 24 Cal.App.2d 39, 55-56, 74 P.2d 519; People v. Flores, 62 Cal.App.2d 700, 705, 145 P.2d 318.

Appellants do not contend that the evidence is insufficient to sustain the verdicts. It doubtless is ample for that purpose, and as it is salacious in the extreme it is unnecessary to review it here.

The judgments of the trial court are modified to provide that: "Whereas the said Grover Hulan Nasworthy and Alvin Charles Knuthson have been found guilty of the crime of conspiracy to commit a felony, to wit: pandering, it is ordered, adjudged and decreed that the said Grover Hulan Nasworthy and the said Alvin Charles Knuthson be, and each of them is to be, punished by imprisonment in the state prison of the state of California for the term prescribed by law." As so modified the judgments and the orders denying the motions for a new trial and in arrest of judgment are, and each of them is, affirmed.

PEEK and THOMPSON, JJ., concur.

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94 Cal.App.2d 8

MILTON KAUFFMAN, Inc., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17206.

District Court of Appeal, Second District, Division 3, California.

Oct. 5, 1949.

Hearing Denied Dec. 1, 1949.

Proceeding in prohibition by Milton Kauffman, Inc., and another, petitioners, to restrain the Superior Court in and for the County of Los Angeles from adjudging petitioners in contempt for refusing to comply with an order permitting inspection and copying of writings.

The order was entered in a cause wherein Thorson Homes, Inc., sought to recover from petitioners the profits realized in a venture for the construction of housing projects. The

District Court of Appeal, Vallée, J., denied the writ on the ground that the pleadings and affidavits of Thorson Homes, Inc., had made out a prima facie showing of a joint adventure and a right to an accounting, so that granting of motion for inspection was not an abuse of discretion.

1. Discovery 🔑97(1)

Under constitutional right to be secure against unreasonable searches and seizures, one seeking inspection of documents must show that person against whom order is sought has the writings to be inspected in his possession, must identify the writings desired, and must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. Code Civ.Proc. § 1000; Const. art. 1, § 19.

2. Discovery 🔑81

Statute authorizing inspection of documents is remedial in character and is to be liberally construed. Code Civ.Proc. § 1000.

3. Discovery 🔑80

Statute relating to inspection of documents was designed to assist a party to an action to discover material facts even though the writings evidencing such facts are in possession of adverse party. Code Civ.Proc. § 1000.

4. Discovery 🔑107

Under statute relating to inspection of documents, noncompliance with an order of inspection may not be based on technical grounds. Code Civ.Proc. § 1000.

5. Discovery 🔑81

Under statute relating to inspection of documents, applicable rules must be applied liberally, irrespective of the relationship of the parties, and the right of inspection should be encouraged. Code Civ. Proc. § 1000.

6. Appeal and error 🔑961

All intendments are in favor of the validity of an order for inspection of documents and order will not be disturbed unless it clearly amounts to an abuse of discretion. Code Civ.Proc. § 1000.

7. Discovery 🔑97(1)

Under statute relating to inspection of documents, party seeking inspection need not first establish his right to an accounting but need only by his pleadings and affidavits make a prima facie showing that he is entitled to an accounting. Code Civ. Proc. § 1000.

8. Discovery 🔑97(1)

Complaint and affidavits alleging that parties had agreed to engage in a venture for the construction of housing projects from which profits would be shared equally, sufficiently alleged existence of a joint venture to entitle affiant to an inspection of books and records. Code Civ.Proc. § 1000.

9. Joint adventures 🔑1.10

A joint venture may be formed by parol agreement or it may be inferred from acts and declarations of the parties.

10. Corporations 🔑379

A corporation cannot enter into a partnership but it may, under a joint venture with others, transact any business which is within scope of its legitimate powers and thereby become liable on account of the fiduciary relation assumed.

11. Joint adventures 🔑1.1, 5(1)

Resemblance between partnership and joint venture is so close that rights as between adventurers are governed practically by same rules that govern partners and joint adventurer may sue in equity for an accounting of profits flowing from joint venture. Civ.Code, §§ 2401(4), 2413, 2414.

12. Joint adventures 🔑4(1)

Joint adventurers are fiduciaries with duty of disclosure and with rights and obligations similar to those of a partner in matter of inspection of books, and otherwise. Civ.Code, §§ 2401(4), 2413, 2414.

13. Joint adventures 🔑1.15

Whether relation of joint adventurer existed was primarily question of fact for trial court to determine from facts and the inferences to be drawn therefrom.

14. Joint adventures 🔑5(2)

Party alleging existence of venture for construction of housing projects with an equal sharing of profits made prima facie showing that parties were joint adventurers and upon a further prima facie showing that he had not received his share of the profits, established prima facie that he was entitled to an accounting.

15. Joint adventures 🔑5(2)

One who sues his co-adventurer for profits or for an accounting, has burden of showing that there are profits to be distributed, that he is entitled to a share of such profits, and that such share has been received by his co-adventurer.

16. Joint adventures 🔑5(2)

Where there has been a distribution of profits with the acquiescence of joint adventurers, burden is on one who sues another for an accounting to show that there still remain profits in which he is entitled to share, which have not been divided.

17. Joint adventures 🔑5(1)

Where plaintiff had made a prima facie showing of the existence of a joint adventure for construction of houses and of a failure to distribute profits, determination of the existence of profits required an accounting, and requiring an inspection of documents in that connection was not an abuse of discretion. Code Civ.Proc. § 1000.

18. Discovery 🔑96, 97(6)

Where writings of which inspection is sought contain material evidence, all that is required in notice and order is identification by description that can be reasonably understood by adverse party. Code Civ. Proc. § 1000.

19. Discovery 🔑93

Inconvenience or trouble to which one may be put in being required to permit inspection and copying of writings is not a valid objection to granting of the remedy. Code Civ.Proc. § 1000.

Overton, Selig & Wilson and Paul Overton, Los Angeles, for petitioners.

No appearance for respondent.

Vaughan, Brandlin & Wehrle and J. R. Vaughan, Los Angeles, for real party in interest.

VALLÉE, Justice.

Petition by Milton Kauffman, Inc., and Milton Kauffman for a writ of prohibition to restrain respondent from adjudging them in contempt for refusing to comply with an order permitting inspection and copying of certain writings in their possession. Charles E. Thorson, the real party in interest, has demurred to the petition on the ground that it "does not state sufficient facts to constitute a cause for issuance of a writ of prohibition."

Petitioners are the principal defendants in an action pending in the superior court of the county of Los Angeles entitled, "Charles E. Thorson, plaintiff, v. Milton Kauffman, Inc., No. 554987." Milton Kauffman, Inc., is a corporation. Milton Kauffman is president of Milton Kauffman, Inc. Charles E. Thorson, referred to as "plaintiff", filed in action No. 544987 a notice of motion under Code of Civil Procedure section 1000 for an order permitting inspection and copying of certain writings in the possession of petitioners. His motion was predicated upon an amended complaint (no answer having been filed) and three affidavits, two of his own, and one by his attorney. The motion was opposed by an affidavit of Milton Kauffman. Plaintiff's motion was granted and an order made. Petitioners were cited for contempt for refusing to comply with the order. Hearing on the citation was about to proceed, the judge stating that he would adjudge petitioners in contempt regardless of whether the order was good or not, when this proceeding was instituted.

The amended complaint contains three causes of action. The first cause of action alleges that in 1942 and 1943 plaintiff was engaged, through the medium of Thorson Homes, Incorporated, in the purchase of lands, construction of houses and improvements thereon and sale to the general public. While so engaged plaintiff caused Thorson Homes, Incorporated, to hire Milton Kauffman and one Dawson to assist in the construction of houses for Thorson Homes, Incorporated. In June of 1945 an oral agreement to engage in a venture for the construction of housing projects was entered into between plaintiff and Kauffman, the profits to be shared equally, as a result of which plaintiff transferred to Kauffman one-half of the shares in Thorson Homes, Incorporated. Milton Kauffman was made a director and secretary of Thorson Homes, Incorporated. The venture was financed and carried on through the medium of Thorson Homes, Incorporated, continuously from October, 1945, to April, 1947, was highly profitable, and valuable assets were acquired. In the early part of 1946, it was proposed by Kauffman, and agreed to by plaintiff, that some of the housing projects of the venture be carried on through the medium of Milton Kauffman, Inc., which had been incorporated in November, 1945, with equal participation by plaintiff and Milton Kauffman in the profits thereof. Thereafter, using the assets of the venture between plaintiff and Milton Kauffman standing in the name of Thorson Homes, Incorporated, and acting through the medium of Milton Kauffman, Inc., the venture acquired eight tracts of land, being tracts 13151, 13993, 13968, 14637, 14066, 14513, 13913 and 13014. Sixteen hundred and eighty-two houses were constructed on these tracts. The approximate net profit per each house constructed was $800 in the form of cash and purchase contracts. As the net profits in each housing project successively were realized, the profits, including plaintiff's share, were reinvested progressively in succeeding tracts, no part of said net profits having been paid to plaintiff except the sums due plaintiff on tracts 13151 and 13993 as determined by defendant Milton Kauffman, and the sum of $13,084.73 on partial account of sums due plaintiff as to the other tracts. Defendants have refused to fully and fairly account for the profits except as to tracts 13151 and 13993 and have refused to permit plaintiff to examine the books, documents and records pertaining to the venture. The other defendants now hold money and contracts which are the property of the venture between plaintiff and Milton Kauffman, as to which plaintiff is the owner of one-half. The prayer of the first cause seeks an accounting and a share of the net profits.

The second cause of action seeks recovery of net profits alleged to be due under a letter agreement dated August 6, 1947, between Milton Kauffman, Inc., and plaintiff, by which Milton Kauffman, Inc., agreed to pay plaintiff specified percentages of the profits made by Milton Kauffman, Inc., from the construction of dwellings on tracts 13151, 13993, 13968, 14066 and 14637 after certain deductions and upon conditions set forth. It alleges with respect to tracts 13151 and 13993 that defendant corporation paid to plaintiff, after a determination thereof, the sums "so found to be due by defendant"; that thereafter at specified times the defendant corporation completed the construction and sale of a number of houses in tracts 13968, 14066, and 14637, and made net profits of specified amounts, of which certain sums are due plaintiff under the written agreement, but which defendant corporation wrongfully refuses to pay. The prayer asks a judgment for specific amounts against defendant corporation. The third cause of action alleges that the remaining defendants (mostly lending institutions) hold moneys in constructive trust for the use and benefit of plaintiff.

Plaintiff's affidavits incorporated by reference the first and second causes of action alleged in the amended complaint, identified the writings set forth in the notice of motion, stated that they were in the possession of petitioners, showed in detail their relevancy and materiality for the purpose of establishing the disbursements, receipts and profits from tracts 13968, 14637, 14066, 14513, 13913 and 13014, the fact that profits from tracts 13968, 14637 and 14066 were reinvested progressively in tracts 14513, 13913 and 13014, and their relevancy and materiality for the purpose of establishing the other allegations of the amended complaint. In a supplemental affidavit, plaintiff set forth verbatim a letter dated September 24, 1948, from Milton Kauffman, Inc., to plaintiff, reading as follows:

"Confirming our conversation of September 24, 1948 among yourself, Don Wilson, Vice President of this Corporation, Mr. McClure and Mr. Lilly of the accounting firm of Donovan, Schuenke and McClure, you were delivered a statement of Tract 14637 (Prince Tract) showing a balance due you in the amount of $13,654.00 and you were shown working papers prepared by our accountants which will be supported by a typewritten report in the next few days, showing that your share of profit in Tract 13968 (Dilley Tract) will be $43,658.93 of which $17,456.52 is represented by deferred notes which will pay off over the next five-year period leaving the sum of $26,202.41 which amount will become due.

"From the above-mentioned sums is deducted the sum of $24,045.80 which represents the amount advanced by us on your account, a transcript of which was given to you, of which $13,654.06 has been applied towards the amount due you on the Prince Tract as noted above, and the remainder applied towards the amount becoming due on Tract 13968, leaving a net amount to become due of $15,810.67.

"As per our agreement and understanding we pay you this amount in the following manner:

"$5,000.00 on October 24, 1948
"5,000.00 on November 24, 1948
"$5,810.67 on December 24, 1948
and on January 24, 1949, we will pay you that portion of deferred contracts received by us for your account on Tract 13968 by December 30, 1948.

"As to the amount reflected by deferred contracts, we will issue you a statement every six months commencing June 30, 1949, reflecting the status of those accounts and will remit to you at those times any portion collected for your credit."

The only affidavit filed in opposition to the motion was one by Milton Kauffman in which he stated that he never at any time agreed to enter into a joint venture with plaintiff for the building of housing projects, or for any other purpose; that plaintiff never contributed any money, or anything of value, for the acquisition, subdivision or construction of any of the houses in any of the tracts referred to in plaintiff's first cause of action; that Milton Kauffman, Inc., never received any consideration for the letter of August 6, 1947, referred to in the second cause of action; that plaintiff "is not now, nor ever has been, a shareholder, director, officer or employee of said Milton Kauffman, Inc." No answer, either by way of denial or explanation, was made by Kauffman or by the defendant corporation with respect to the letter of September 24, 1948, contained in plaintiff's supplemental affidavit, or to the alleged fact that payments have been made to plaintiff under the agreement of August 6, 1947.

The notice of motion asked for, and the order granted, inspection and copying of all books, documents and records relating to tracts 13968, 14637, 14066 and 14513, showing all disbursements, receipts and profits therefrom; all corporate records pertaining to said tracts; the share certificate book of Milton Kauffman, Inc.; records showing salaries paid to, withdrawals by, and loans to its officers and directors during the period involved; copies of tax returns of Milton Kauffman, Inc., and Milton Kauffman covering the period; all records of financial transactions during the period between Milton Kauffman, Inc., and Milton Kauffman, relating to tracts 13968, 14637, 14066 and 14513.

Petitioners claim the order requires them to "lay bare for inspection and copying * * * all of [their] personal, secret, confidential and private papers" in violation of the constitutional guaranties against unreasonable searches and seizures, and that the affidavits in support of the motion fail to show that the records sought to be inspected contain evidence material to the issues presented by the pleadings. They argue that the sole purpose of the motion is to require an accounting in order to determine the "extent" of plaintiff's recovery, and under such circumstances the court should require the moving party "to first establish his right to an accounting." Plaintiff Thorson rests his case upon the proposition that a sufficient showing of the existence of a joint venture was made to entitle him to fully and completely inspect all books, documents and records in the possession of petitioners in which he has a common interest with them.

[1-6] Code of Civil Procedure section 1000 in part provides: "Any court in which an action is pending, or a judge or justice thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission

to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein." A party has a constitutional right to be secure against unreasonable seizures and searches. Const. Art. I, sec. 19. Hence, the courts have declared that one seeking inspection must (1) show that the person against whom the order is sought has the writings to be inspected in his possession, (2) identify the writings desired, and (3) clearly show that they contain competent and admissible evidence which is material to the issues to be tried. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 396, 159 P.2d 944; Kullman, Salz & Co. v. Superior Court, 15 Cal.App. 276, 286, 114 P. 589. Section 1000 is remedial in character and is to be liberally construed. The modern tendency in the administration of justice is to relax the rules which relate to the inspection of writings to the end that the trial of actions may be expedited and justice be more efficaciously and speedily administered. The statute was designed to assist a party to an action to discover material facts even though the writings evidencing such facts are in the possession of the adverse party. It is a wholesome aid to the proper administration of justice. The obtaining of inspection of writings in a case where it appears that the rights of a party may depend upon its proper exercise, should not be regarded "as a game" having fixed rules "that must be literally and punctiliously observed." Refusal to comply with an order of inspection based on technical objections does violence to the spirit and intent of the statute. An inspection such as that ordered here may greatly facilitate the trial and relieve the court from much detail. The applicable rules must be applied liberally, irrespective of the relationship of the parties, and the right of inspection should be encouraged. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944; Union Trust Co. v. Superoir Court, 11 Cal.2d 449, 81 P.2d 150, 118 A.L.R. 259; Ex parte Clarke, 126 Cal. 235, 58 P. 546, 46 L.R.A. 835, 77 Am.St. Rep. 176; Austin v. Turrentine, 30 Cal. App.2d 750, 87 P.2d 72, 88 P.2d 178; Kullman, Salz & Co. v. Superior Court, 15 Cal. App. 276, 114 P.589; Iroquois Hotel & Apartment Co. v. Iroquois Realty Co., 126 App.Div. 814, 111 N.Y.S. 172; Annotations: 58 A.L.R. 1263; 88 A.L.R. 504; 15 L. A. Bar Asso. Bulletin, 62, 64; Federal Rules of Civil Procedure, Rule 34, 28 U.S. C.A. and cases decided thereunder. "At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance." Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 53 S.Ct. 736, 737, 77 L.Ed. 1449, 88 A.L.R. 496. All intendments are in favor of the validity of the order and it will not be disturbed unless it clearly amounts to an abuse of discretion. Maclay Rancho Co. v. Superior Court, 81 Cal.App. 471, 474, 254 P. 287.

[7] The contention of petitioners that inspection may not be had until the moving party has first established his right to an accounting is not tenable. The statute does not so limit the right. The same contention was made and rejected in Austin v. Turrentine, 30 Cal.App.2d 750, 760, 87 P. 2d 72, 88 P.2d 178. It is sufficient if the moving party by his pleadings and affidavits makes a prima facie showing that he is entitled to an accounting. Austin v. Turrentine, supra, 30 Cal.App.2d at pages 762–764, 87 P.2d 72, 88 P.2d 178; Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114, 115, quoted from with approval in Union Trust Co. v. Superior Court, 11 Cal.2d 449, 461, 81 P.2d 150, 118 A.L.R. 259, and in Austin v. Turrentine, supra, 30 Cal.App. at page 762, 87 P.2d 72, 88 P.2d 178.

The rule relied upon by plaintiff Thorson is stated in 27 C.J.S. Discovery, § 71(2), page 106, thus: "Production and inspection will be granted of all books and documents in which the parties have a common interest. A production of inspection of books and papers may also be had where applicant has a special interest or right in them. Thus, in an action between partners, production and inspection of the partnership books will be ordered almost as a matter of course when such production and inspection is sought by one of the partners. * * * Production will be required of the books of an employer at the instance of his employee, where the employee is to be paid by a percentage of the profits or business done by the employer, even though the employee has since become his competitor in business, and notwithstanding the employee had had prior opportunity to inspect them. * * *" See also, Union Trust Co. v. Superior Court, 11 Cal.2d 449, 461, 81 P.2d 150, 118 A.L.R. 259; Austin v. Turrentine, 30 Cal.App.2d 750, 764, 87 P.2d 72, 88 P.2d 178; Ex parte Clarke, 126 Cal. 235, 241, 58 P. 546, 46 L.R.A. 835, 77 Am.St.Rep. 176; Annotation: 118 A.L.R. 269.

[8-14] The facts alleged in the amended complaint and stated in the affidavits of the plaintiff were sufficient to warrant the court in concluding for the purpose of the motion that plaintiff and petitioners were joint adventurers. 30 Am.Jur., pp. 680–685, secs. 7, 8, 10, 16; Parker v. Trefry, 58 Cal.App.2d 69, 74, 136 P.2d 55; Huffeld v. Wadley, 89 Cal.App.2d 171, 200 P.2d 564; Annotations: 48 A.L.R. 1058; 63 A.L.R. 909; 138 A.L.R. 968. A joint venture or undertaking may be formed by parol agreement or it may be inferred from the acts and declarations of the parties. Nelson v. Abraham, 29 Cal.2d 745, 749, 177 P.2d 931. While a corporation has no power to enter into a partnership, it may, under a joint venture with others, transact any business which is within the scope of its legitimate powers and thereby become liable on account of the fiduciary relation thus assumed. Keyes v. Nims, 43 Cal.App. 1, 9, 184 P. 695. The relationship between joint adventurers is a fiduciary one. Nelson v. Abraham, 29 Cal.2d 745, 750, 177 P.2d 931. The resemblance between a partnership and a joint venture is so close that the rights as between adventurers are governed practically by the same rules that govern partners. Accordingly, a joint adventurer may sue in equity for an accounting of the profits flowing from the joint venture. Keyes v. Nims, 43 Cal.App. 1, 10, 184 P. 695. "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business" with exceptions not pertinent here. Civil Code, sec. 2401, subd. 4. A partner has a right at all times of access to, and to inspect and copy, the partnership books. Civ.Code, sec. 2413. It is the duty of a partner to render on demand true and full information of all things affecting the partnership to any partner. Civ.Code, sec. 2414. A fortiori a joint adventurer has the same rights and obligations. The parties are fiduciaries with a duty of disclosure. Elsbach & Sons, v. Mulligan, 58 Cal.App.2d 354, 368, 136 P.2d 651. Whether the relation of joint adventurers existed was primarily a question of fact for the trial court to determine from the facts and the inferences to be drawn therefrom. Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138. Having made a prima facie showing that the parties were joint adventurers and that he has not received his share of the profits plaintiff established prima facie that he is entitled to an accounting. Austin v. Turrentine, 30 Cal.App.2d 750, 764, 87 P.2d 72, 88 P.2d 178; 14 Cal.Jur. 765, sec. 7; cf. Butler v. Union Trust Co., 178 Cal. 195, 198, 172 P. 601; Champagne v. Passons, 95 Cal.App. 15, 28, 29, 272 P. 353; Peardon v. White, 65 Cal.App. 463, 224 P. 263.

[15-17] The next question is whether the evidence sought to be elicited from the documents is "competent and admissible evidence which is material to the issues to be tried." One who sues his coadventurer for profits or for an accounting, has the burden of showing that there are profits to be distributed, that he is entitled to a share of such profits, and that such share has been received by his coadventurer. Where there has been a distribution of profits with the acquiescence of the joint adventurers, the burden is on the one who sues another for an accounting to show that there still remain profits in which he is entitled to share which have not been divided. 30 Am.Jur. 711, sec. 63. A sufficient showing was made from which the court could reasonably infer that the parties were engaged in a joint venture. In order to determine the rights of the

respective parties, it is necessary to ascertain whether there are any profits to be disturbed among the coadventurers. Obviously, this can only be done by taking an accounting of the various transactions in which the parties were engaged. Such accounting is necessary not only, as petitioners point out, to determine the "extent" of plaintiff's recovery, but is vital to establish the very issues presented by the complaint. Having set forth sufficient facts to establish, at least for the purpose of the motion, a right to an accounting, the court did not abuse its discretion in granting plaintiff's motion for an inspection of all writings pertaining to the venture. A sufficient showing was made that plaintiff has a right to an accounting with respect to tracts 13968, 14637 and 14066 as evidenced by the letter of August 6, 1947. If, as stated in the supporting affidavits, which statement was not disputed, the profits from these tracts have been reinvested progressively in tracts 14513, 13913 and 13014, then manifestly plaintiff also has a right to an accounting with respect to those tracts. It will be noted that the order only lists writings pertaining to tracts 13968, 14637, 14066 and 14513. It should be observed that if petitioners had a meritorious defense or answer to any of the verified statements set forth in plaintiff's affidavits, it was incumbent upon them to set it forth in opposing affidavits. Their silence, in this regard, was a matter for the consideration of the trial court in passing upon the motion.

[18] There was no denial of the facts set forth in plaintiff's affidavits showing that the writings sought to be inspected are in the possession of petitioners or that they contain relevant and material evidence. It fairly appears that all of the writings, which by the order plaintiff may inspect and copy, are material, relevant and competent in a determination of the disbursements, receipts and profits of the joint venture and in a determination of plaintiff's share of the profits. When the writings contain material evidence, all that is required in the notice and order is that they be identified by a description that can be reasonably understood by the adverse party. Union Trust Co. v. Superior Court, 11 Cal.2d 449, 458, 81 P.2d 150, 118 A.L.R. 259; McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 397, 159 P.2d 944. The writings are so described in the notice and order. In view of what has been said, petitioners' contention that the order is too broad in scope and is violative of their constitutional right to be secure against unreasonable searches and seizures, is without merit.

[19] Petitioners suggest, as one of the reasons why the writ should issue, the fact that inspection was ordered of many writings and that they will be put to great inconvenience and trouble in complying with the order. Inconvenience or trouble to which one may be put in being required to permit inspection and copying of writings does not constitute a valid objection to the granting of the remedy. 27 C.J.S., Discovery, § 79, page 116.

Demurrer sustained. Alternative writ discharged. Peremptory writ denied.

SHINN, P. J., and WOOD, J., concur.

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94 Cal.App.2d 161

SWANSON v. HILDERBRAND et al.

Civ. 4034.

District Court of Appeal, Fourth District, California.

Oct. 14, 1949.

Iver W. Swanson filed a petition for a writ of mandate against A. L. Hilderbrand, Commissioner of Finance of the City of Fresno, and the City of Fresno, to compel respondents to make progress payments under a public works contract.

The District Court of Appeal, Griffin, J., granted the writ, and held that the contract had been legally awarded.

1. Municipal corporations 🔑336(1)

Where charter provided that public works contracts in excess of certain sum should be awarded to lowest responsible bidder, and invitation for bids recited that city commission reserved right to reject any or all bids or to award contract in any manner it considered would serve best interests of city, city was not obligated to award contract to lowest bidder merely because he was such a bidder.

2. Municipal corporations ⚿336(1)

Where charter required award of public works contracts to lowest responsible bidder, and bid schedule provided that unit price bids should govern over totals, and one bidder appeared as lowest bidder on reading of grand totals at opening of bids, city commission could thereafter on checking bids and discovering error in totals, award contract to bidder whose unit prices were in fact lowest in absence of fraud in reception or award of bids.

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Gilbert L. Jones, Daniel S. Lane, Roy A. Weaver, Richard B. Daley, Stockton, for petitioner.

Thompson & Thompson, Pasadena, James D. Garibaldi, Los Angeles, for respondent A. L. Hilderbrand.

C. M. Ozias, City Atty., Fresno, for respondent City of Fresno.

GRIFFIN, Justice.

Petitioner represents by his verified petition, and the undisputed facts show, that the respondent City of Fresno, by and through its commissioners and in compliance with sec. 56 of its charter, and after proceedings duly taken, advertised for bids for the construction of Section One, Jensen Avenue Collector Sewer, and pursuant to the advertisement for bids, submitted to the bidders plans and specifications, bid forms, and instructions which, among other things, contained the following: "* * * Proposals will be opened and read publicly at the time and place indicated in the 'invitation for bids'. Bidders or their authorized agents are invited to be present * * *."

The bid schedule separately designated 29 different unit items on which bid prices were to be separately stated. Then followed a place for the total of all these separate unit bid prices. Following the bid schedule is a statement: "Above amounts given in the above bid schedule will be subject to verification by the owner. In case of variation between the unit price bid and totals shown above, the unit price will be considered his bid;" that the bidder will "accept as full payment therefor the unit prices named in the bid schedule forming a part hereof". This was signed by petitioner.

On April 28, 1949, the City Commission, according to its minutes, proceeded to publicly open and examine the bids of approximately 12 different bidders whose bids were submitted on like forms and each separately itemized the unit bids. According to the minutes of May 19, the City Clerk, at the time of the opening of the bids, asked if the unit prices should be read in addition to the total amount of the bid indicated and that no protest was registered against reading only the bid totals. All bids were then read according to the grand total indicated, without regard to the individual unit totals. According to the grand totals, as read, Steve P. Rados, Inc., had a low bid of $497,160.20, and the grand total of petitioner's bid indicated $591,799.64. Thereafter all bids were referred to the Public Works Department for checking and report. After checking by that department it was discovered that a correct addition of petitioner's bid, according to unit price bid, was $491,799.60, and that there was an error in addition of the unit bid items of $100,000, which corrected figures resulted in making petitioner's bid lowest, according to the unit price indicated.

The City Commission then, on May 12, made a correction in its minutes of April 28, indicating that the Commission "proceeded to publicly open, examine and declare * * *" all the bids above mentioned.

On May 12, the clerk read a protest from Steve P. Rados, Inc., against awarding the contract to petitioner because of the illegality of the proceedings. This protest was referred to the City Attorney for his legal opinion and on May 19 he rendered his opinion that the bid of petitioner in the corrected amount was the "lowest and best bid submitted" and was legal in form and recommended acceptance of it and rejection of all others. On roll call it was so ordered by the Commission. Finance Commissioner Hilderbrand voted "no" and indicated his affirmative vote might affect his official bond. Under the City charter, Section 58, payment of claims against the city are made by warrants drawn on the City Treasurer by the Commissioner of Finance.

On June 23 the contract to complete the work was authorized and as signed recited that the City Commission found petitioner's bid was the "lowest and best bid and proposal" and that petitioner agreed to perform the work in accordance with the "following unit prices bid" and the Commission agreed to pay "the unit prices for the work performed". On September 29th, at the instance of Commissioner Hilderbrand, the minutes of April 28 and May 19 were corrected to show that the clerk read the total amount of the petitioner's bid as $591,799.64, and that the later checking and verification of totals and extensions, by the Public Works Department, showed an error in addition and extension as indicated, making the true bid $491,799.60. The clerk was directed to make the correction accordingly.

Petitioner entered into the performance of the week and filed a progress estimate of $3,597.75, which report was, on September 15, approved by the Commission and the respondent, Commissioner of Finance, was authorized and directed to pay that amount to petitioner. The Finance Commissioner refused to make such payment for the reasons stated.

In its return the respondent, City of Fresno, admits the allegations of the petition and after reciting the undisputed facts above mentioned, alleges that the construction of the sewer and the performance of the contract are matters of great public and general interest to the people of Fresno; that a termination of the contract would result in a great loss and expense to it and delay in the construction of the work, and that inability of petitioner to perform by reason of not being able to receive the progress payments when due, would affect the completion of the contract and impair the health and welfare of the inhabitants of the city, and it asks that the writ be granted as prayed.

Commissioner Hilderbrand, in answer to the petition, denies the regularity of the award of the contract and denies that petitioner was the lowest bidder. He concedes that mandamus is a proper remedy in this action to test the question presented. He contends that since the instructions to bidders recited that "proposals will be opened and read publicly" and that since only the total bid was read, and that since the lowest total bidder left the Commissioners' room believing that he was the lowest responsible bidder, it was a matter of considerable consternation to him to later read that another bidder had been awarded the bid and contract. He stresses the fact that he does not charge any fraud, actual or constructive, on the part of anyone, and especially alleges that what was done in every instance was done in good faith. He, however, claims that to preserve "fair play" all bids received should have been rejected and the project readvertised for bids. He frankly states that no cases have been found which would be helpful to this court in deciding the matter.

[1] Section 56 of the Charter of the City of Fresno, with respect to public works contracts, provides in part that contracts in excess of $1,000 should be awarded to the "lowest responsible bidder". The invitation for bids recited: "The City Commission reserves the right to reject any and/or all bids, or award the contract in any manner it considers that the best interests of the city will be served." Such a municipality is not necessarily obligated to award such a contract to the lowest bidder, merely because he is the lowest bidder.

In West v. City of Oakland, 30 Cal.App. 556, 159 P. 202, it was held (quoting from the syllabus) that "The term 'lowest responsible bidder' means the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work; and, where by the use of these terms the council has been invested with discretionary powers as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts in the absence of direct averments and proof of fraud."

[2] There is no affirmative showing by respondents that any of the bids rejected were submitted by the lowest responsible bidder. However, the undisputed facts clearly indicate, as admitted, that no fraud was practiced in the reception or awarding of the bids; that the error was but an erroneous addition or calculation of certain specified and designated totals of unit prices which were set forth in the bid as called for and that all of these bids were and remained subject to check and report by the Department of Public Works. Therefore, when the claimed lowest bidder left the Commissioners' room he was not legally entitled to believe that the contract must be awarded to him but the determination of that question remained with the City Commission to be later decided, in its broad discretion, after receiving the report of the department of public works. The proposal and form of bids indicate that the contract was to be let and paid according to unit price bids. These unit price bids were separately stated. The mere erroneous addition of those totals in no way affected the legality of the proceedings in accepting petitioner's separate unit bid and awarding the contract accordingly.

Since the City Commission has found that the work has been done in accordance with the progress report and the money is due and has been ordered paid, and since there is no contention that funds are not available for this purpose, petitioner is entitled to a writ of mandate directing respondents to pay said claim in the sum of $3,597.75.

Let the writ issue accordingly.

BARNARD, P. J., concurs.

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94 Cal.App.2d Supp. 975

PEOPLE v. SMITH.

Cr. A. 2529.

Appellate Department, Superior Court,
Los Angeles County, California.

Oct. 4, 1949.

Robert E. Smith was convicted by the Municipal Court of the City of Los Angeles, Philbrick McCoy, J., for serving intoxicating liquor to an obviously intoxicated person, and he appealed.

The Superior Court, Appellate Department, Per Curiam, affirmed the judgment, holding that police officers' testimony that person served by defendant was intoxicated in witnesses' opinions was admissible and that the evidence supported the trial court's conclusion that such person was obviously intoxicated.

1. Criminal law 🔑457

In prosecution for serving intoxicating liquor to obviously intoxicated person, police officers' testimony that person served by defendant was intoxicated in witnesses' opinions was admissible. Gen.Laws, Act 3796, § 62.

2. Intoxicating liquors 🔑161

To convict person of serving intoxicating liquor to obviously intoxicated person, state must prove that person served was intoxicated and that his condition was obvious. Gen.Laws, Act 3796, § 62.

3. Criminal law 🔑457

Whether a person was intoxicated when served with intoxicating liquor, in alleged violation of statute, is matter of fact, concerning which a witness may give opinion based on his observation of such person. Gen.Laws, Act 3796, § 62.

4. Criminal law 🔑448(11)

In prosecution for serving intoxicating liquor to obviously intoxicated person, a witness should not be permitted to state his conclusion that such person's intoxication was obvious. Gen.Laws, Act 3796, § 62.

5. Intoxicating liquors 🔑236(15)

Evidence supported conviction of serving intoxicating liquor to an obviously intoxicated person. Gen.Laws, Act 3796, § 62.

P. E. Durkee, Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Donald M. Redwine, Assistant City Attorney, and Philip E. Grey, Deputy City Attorney, Los Angeles, for respondent.

PER CURIAM.

Convicted of having served intoxicating liquor to a person who was obviously intoxicated, an act made a misdemeanor by section 62 of the Alcoholic Beverage Control Act, Stats.1937, p. 2175, Act 3796, Deering's Gen'l Laws, the defendant has appealed, contending that the evidence is insufficient and that the trial court erred in permitting two witnesses to testify that in their opinion the patron served by the defendant was drunk. We find neither contention well taken.

The first prosecution witness was a police officer of three years' experience. Seated at the bar behind which the defendant was serving, the witness' attention was called to the patron involved in the case by the latter's loud talking, followed by the fellow's falling against him (the witness) and spilling some of the beer he (the patron) was drinking. Then, having finished his beer, the patron set the glass down on the bar two or three times rather heavily, hollering to the defendant, "Bring me another glass of beer." The patron's clothing was very dirty and disarranged, his eyes were bloodshot, his face was flushed and his speech rather thick. He kept arguing with another patron seated next to the witness, who turned away from him. The patron we are interested in was not seated at any of this time, but standing; his balance was poor and he kept leaning against the bar. The witness demonstrated how the patron was leaning on the bar and the tone and the manner in which he ordered another beer. Following his testimony and a statement that he had seen intoxicated persons before, and had formed an opinion as to whether or not the patron was intoxicated, the officer was asked: "What was your opinion? As to his sobriety—[the patron's] sobriety?" Over timely objection he was permitted to reply that in his opinion the patron served by the defendant was in a drunken condition. Another officer was later permitted to testify that in his opinion the patron was intoxicated.

[1-3] It was not error to permit the officers to give their opinions. In order to convict one on a charge of violating the statute here involved two elements, touching the person served with liquor, must be proved: (1) that he was intoxicated; and (2) that his condition was obvious. The first element is regarded as a matter of fact concerning which a witness may give an opinion based on his observation of the person. This is established beyond debate in this state, as is evident from these cases: People v. Monteith, 1887, 73 Cal. 7, 8, 9, 14 p. 373 374; People v. Sehorn, 1897, 116 Cal. 503, 511, 48 P. 495, 498; People v. Hill, 1898, 123 Cal. 47, 51, 55 P. 692, 693; Bidwell v. Los Angeles, & S. D. B. Ry. Co., 1915, 169 Cal. 780, 784, 148 P. 197, 199; People v. Mullins, 1924, 66 Cal.App. 475, 477, 226 P. 622; Finn v. Sullivan, 1930, 110 Cal.App. 38, 40, 293 P. 639; People v. Moore, 1945, 70 Cal.App.2d 158, 164, 160 P. 2d 857; People v. Hernandez, 1945, 70 Cal. App.2d 190, 192, 160 P.2d 564. That these cases are in accord with the overwhelming weight of authority is apparent from an examination of the cases cited in the American Digest System, Evidence, ⚿478 (3), and from this statement in 32 C.J.S., Evidence, § 508, page 183, supported by citations: "A witness * * * may state whether a person was or was not intoxicated."

[4] But it is necessary, in these prosecutions, not only to prove that the patron served was intoxicated but also to establish that the fact of his intoxication was obvious. In People v. Johnson, 1947, 81 Cal. App.2d Supp. 973, 185 P.2d 105, 106, we held that it was error to permit an officer to testify that the patron there identified was obviously drunk, stating, "By the very nature of the offense as defined by the statute, it does not permit of opinion evidence."

We set forth, in People v. Johnson, the reasons why we deemed, and deem, it improper to permit a witness to state his conclusion that the intoxication was obvious, and there is no occasion to dwell upon them here. The distinction between the two questions is unmistakeable; the one there condemned contains the adverb "obviously" and thereby adds the second element necessary to a successful prosecution to the questions asked in this case, which were limited to the first element; the questions here approved do not include the adverb nor the second element to which we have referred. If we entertained any serious doubt that the distinction between the two sentences is substantial, and we do not, that doubt would not cause us to question the conclusion to which we have come in this case.

[5] We shall not repeat, but we adhere to, the observations we made in People v. Johnson, supra, 81 Cal.App.2d Supp. 973, 975, 185 P.2d 105, 106, concerning the meaning of "obviously intoxicated," as used in the provision of the statute that the defendant flouted, and concerning the duties that it imposes upon a bartender. We are satisfied that the testimony set forth earlier in this opinion afforded ample support for the trial court's conclusion that the patron served by the defendant was intoxicated, and obviously so.

The judgment is affirmed.

94 Cal.App.2d 118

RAINIER BREWING CO. v. McCOLGAN.

Civ. 7620.

District Court of Appeal, Third District, California.

Oct. 13, 1949.

Hearing Denied Dec. 8, 1949.

The Rainier Brewing Company sued Charles J. McColgan, Franchise Tax Commissioner of the State of California, to recover additional franchise taxes levied against plaintiff and paid under protest.

The Superior Court of Sacramento County, Peter J. Shields, J., rendered a judgment for plaintiff, and defendant appealed.

The District Court of Appeal, Thompson, J., reversed the judgment, and held that royalties under a contract with a Washington corporation to sell merchandise in that state were attributable to good will having a situs within California, and hence California could levy a franchise tax measured by net income from the royalties.

1. Corporations 🔑52

Corporation organized and existing under California laws with principal office and place of business in San Francisco was domiciled in California.

2. Trade-marks and trade-names and unfair competition 🔑71

An owner's right to have his property in a trade-mark protected is coextensive with territory throughout which it is known and from which it has drawn its trade; and in whatever markets use of the trade-mark has been extended or its meaning has become known, a manufacturer or trader whose trade is pirated by an infringing use will be entitled to protection and redress.

3. Taxation 🔑983, 1001

Income from intangible personalty is taxable at situs or domicile of a corporation as its owner. Gen.Laws, Act 8488, §§ 4(3), 10.

4. Trade-marks and trade-names and unfair competition 🔑1, 67

A trade-mark is an assurance of good faith of its owner and of the quality of the commodity, and involves standing and reputation of business of owner of the trademark; and an infringement is an injury to good will of the business and may be enjoined. Business and Professions Code, §§ 14272, 14273.

5. Taxation 🔑934, 935

A state may tax the entire net income of a domiciliary corporation regardless of source of the income.

6. Taxation 🔑983

Proceeds from a royalty contract have situs at domicile of corporation receiving proceeds and are taxable in that state. Gen.Laws, Act 8488, §§ 4(3), 10; Business and Professions Code, §§ 14272, 14273.

7. Taxation 🔑117

Where corporation domiciled in California sold, under contract with Washington corporation, the exclusive right to manufacture and sell in that state and in Alaska beer and other beverages under tradename "Rainier", royalties were attributable to good will which had its situs within California, and that state could levy a franchise tax measured by net income from such royalties. Gen. Laws, Act 8488, §§ 4(3), 10; Business and Professions Code, §§ 14272, 14273; Civ.Code, § 655.

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Fred N. Howser, Attorney General, James E. Sabine & Ernest P. Goodman, Deputies, for appellant.

A. Calder Mackay, Adam Y. Bennion and John C. Mackay, Los Angeles, F. Sanford Smith, San Francisco, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment for refund of additional franchise taxes levied against plaintiff pursuant to Section 4(3) of the Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, and amendments, 3 Deering's Gen.Laws, p. 3010, Act 8488), and which were paid under protest. This appeal was heard upon a written stipulation of facts.

The additional franchise taxes were levied against plaintiff, a California corporation, for the year 1938, measured by the net income for royalties paid in the preceding year 1937 by a Washington corporation to which plaintiff had sold by contract the exclusive right to manufacture and sell in that State and in the Territory of Alaska "beer, ale, and other alcoholic malt beverages under the trade names, trade marks and labels of 'Rainier', etc." in consideration of the payment to plaintiff of royalties in the sum of 75 cents per barrel. Neither the State of Washington nor the Territory of Alaska levied or collected franchise taxes on such income.

The questions to be determined on this appeal are, What is the intangible property to which the income or royalties are attributable for taxation purpose in this case, and where are they located? Incidentally, the further question arises as to whether the doctrine of "mobilia sequuntur personam" is applicable in determining the situs of that property. Our response to those questions is that the intangible personal property to which the royalties are attributable is the good will of plaintiff's business which is attached to the transferred trade-mark and that, pursuant to the foregoing maxim, the situs of that property is at San Francisco where the principal place of its business is located. The California Franchise Tax Commissioner therefore properly levied and collected the taxes involved in this case.

Subsequent to the execution of the contract in this case, by which the trade-mark and good will of the plaintiff's business was transferred to Seattle Brewing and Malting Company for the districts of Washington and Alaska, the last-mentioned company manufactured and sold in Washington, under plaintiff's trade-mark, "Rainier" in the year 1937, 82,017 barrels of beer for the aggregate sum of $1,451,900. Royalties accrued therefrom and paid to plaintiff at its principal place of business in San Francisco amounted to $77,812.50, no part of which was accounted for to the Franchise Tax Commissioner in this state or elsewhere. After due notice, pursuant to statute, the California Franchise Tax Commissioner levied and assessed against plaintiff, on the theory that such revenues were attributable to the good will of the California corporation whose principal place of business and domicile were in this state, additional franchise taxes for the year 1938, measured by the ascertained income from that source in 1937, the sum of $3,112.50 and the further sum of $690.99, accrued interest thereon, which sums were paid by plaintiff under protest. This suit was then brought by plaintiff to recover said taxes and interest which were alleged to have been illegally levied and collected. Judgment was rendered in favor of plaintiff, from which judgment this appeal was perfected.

[1] There can be no question regarding the domicile of the owner of that trade-mark and good will which were transferred to plaintiff. It was in the State of California. The first paragraph of the written stipulation of facts reads:

"Plaintiff, Rainier Brewing Company, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office and its principal place of business in the City and County of San Francisco, State of California. * * *."

In an able opinion of the learned trial judge, and in his findings, it was determined that the domicile and principal place of business of plaintiff corporation was at San Francisco in the State of California; that the revenues from the transfer of the trade-mark and good will were not taxed in Washington or Alaska; that the royalties derived from said transfer of trade-mark and good will "did not arise from nor did it have its source in business done in California", nor was it attributable to the contract of transfer of the trade-mark and good will, since that instrument created merely a relation of debtor and creditor; that the doctrine of mobilia sequuntur personam therefore had no application in determining the situs of the corporation and the source of the revenue, and that the California Commissioner erroneously and illegally levied and collected the franchise taxes in question.

[2] We are persuaded the trial court inadvertently overlooked the fact that it was not the trade-mark and good will of the Seattle Brewing Company which was transferred by the contract, but it was the good

will of the plaintiff corporation domiciled in California which was attached to (Bus. and Prof. Code, Sec. 14272) and part of the plaintiff's trade-mark "Rainier" transferred by contract to the Seattle Brewing Company. The good will of plaintiff's business which was attached to the trade-mark "Rainier" and transferred to the Seattle Brewing Company did not exist in separate segments attributable to different businesses operated by plaintiff in various states or countries. It was an element of the general business of plaintiff, whose domicile and principal place of business was conceded to be at San Francisco in California. The revenues derived from the transfer of that trade-mark and good will were therefore attributable to the general business which had its situs in California. Plaintiff's trade-mark "Rainier" extended over a wide territory including various states and possibly other countries. As is said in 63 Corpus Juris 319, section 11: "A trade-mark frequently extends over a large area. It acknowledges no territorial boundaries of municipalities, or states, or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. The owner's right to have his property in a trade-mark protected is co-extensive with the territory throughout which it is known and from which it has drawn its trade, and so, into whatever markets the use of a trade-mark has been extended, or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress." See Derringer v. Plate, 29 Cal. 292, 87 Am.Dec. 170.

It is immaterial that the plaintiff, prior to the transfer of its trade-mark and good will to be used in the State of Washington, also owned and conveyed a warehouse and equipment which it owned in Seattle. It still remains true, as conceded by the written stipulation of facts and the findings of the court, that plaintiff's domicile and principal place of business was in California and not in Washington. All of the facts and circumstances of this case indicate that the domicile and principal place of business was in San Francisco. That was, therefore, the situs of the intangible property rights represented by the proceeds from the transfer of the trade-mark and good will of the business. The receipts from that source, and not from the actual sales of beer in Washington, were attributable to the good will of the business attached to the trade-mark which had its situs in this state. That property interest did follow the "personam" of the corporation to its domicile in California. The doctrine of "mobilia sequuntur personam" appears to apply in full force to the facts of this case. We conclude that the Commissioner properly and lawfully assessed and taxed to plaintiff the proceeds received in the year 1938, from the transfer of the trade-mark and good will of plaintiff's business. It is immaterial whether those property rights in intangible property may also be attributable to the contract, which the court suggests merely created the relationship of debtor and creditor between plaintiff and the Seattle Brewing Company. That contract may be considered as mere evidence of the terms and conditions upon which the trade-mark for use in Washington was transferred. Even though the contract itself may not warrant the Commissioner in attributing the receipts therein provided for to it, which we do not concede, the fact remains that they were attributable to the transferred trade-mark and attached good will of the corporation whose business was located in this state. That fixes the situs of the taxable property.

The appellant contends that the royalty income received by the Rainier Brewing Company, a California corporation, for the use of its trade name "Rainier" in the State of Washington and the Territory of Alaska, has its source in and is attributable to intangible personal property in the nature of a trade-mark and the incidental good will of the business having its situs in California, and is therefore taxable under the doctrine of "mobilia sequuntur personam", at the domicile of the corporation, under Section 10 of the Bank and Corporation Franchise Tax Act, supra, Stats. 1935, p. 965. That section provided that: "If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income *reasonably attributable to the business done within this State* and to avoid subjecting the taxpayer to double taxation. * * *"

[3] In accord with the recent authorities in California and elsewhere, determining that the income from intangible personal property is taxable at the situs or domicile of the owner corporation, Section 10 of the Franchise Tax Act of California was amended in 1939, Stats. 1939, p. 2944, to read as follows: "When the income of the bank or corporation is derived from or attributable to sources both within and without the State, the tax shall be measured by the net income derived from or attributable to sources within this State. Such income shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacture, pay roll, value and situs of tangible property or by reference to any of those or other factors or by such other method of allocation as is fairly calculated to determine the net income derived from or attributable to sources within this State. Income from business carried on partly within and partly without this State shall be allocated in such a manner as is fairly calculated to apportion such income among the States or countries in which such business is conducted. Income attributable to isolated or occasional transactions in States or countries in which the taxpayer is not doing business shall be allocated to the State in which the taxpayer has its principal place of business or commercial domicil. *Income derived from or attributable to sources within this State includes income from tangible or intangible property located or having a situs in this State and income from any activities carried on in this State, regardless of whether carried on in intrastate, interstate or foreign commerce.* * * *" (Italics added.)

The term "mobilia sequuntur personam" is a maxim defined as meaning, "Movables follow the [law of the] person." 58 C.J.S. page 837. In Miller v. McColgan, 17 Cal. 2d 432, it is said at page 443, 110 P.2d 419, at page 425, 134 A.L.R. 1424: "The doctrine of mobilia sequuntur personam has been repeatedly and consistently maintained in determining the taxable situs of intangible property, and as recently as the 1938-1939 term the Supreme Court of the United States again recognized it in Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 906, 83 L.Ed. 1339, 123 A.L.R. 162, * * *." Quoting with approval, to that effect, from the last cited authority.

[4] There is a distinction between a trade-mark and trade name. A trade name relates to a business and its good will rather than to a vendible commodity. Ball v. Broadway Bazaar, 194 N.Y. 429, 87 N.E. 674, 675; 42 Words and Phrases, Perm.Ed., pages 178-188; Business and Prof.Code, Sec. 14273. A trade-mark is usually affixed to the vendible commodity as a guaranty of quality and ownership. It is an assurance of the good faith of the owner and of the quality of the commodity. It involves the standing and reputation of the business of the owner of the trade-mark. An infringement of the trade-mark is an injury to the good will of the business, Hall v. Holstrom, 106 Cal.App. 563, 571, 289 P. 668, and may be enjoined.

In the present case it appears the plaintiff had acquired a national reputation under its trade-mark "Rainier" beer, and had formally registered that trade-mark, not only in California, but also in the State of Washington and in Alaska, incident to and as an indispensable part of the general good will of its business located in California. That trade-mark was assigned by written contract, April 23, 1935, to Century Brewing Company of the State of Washington, which assignee subsequently changed its name to Seattle Brewing and Malting Company, in consideration of payment to plaintiff of royalties of 75 cents per barrel on all liquor manufactured and sold by the assignee under the trade-mark of "Rainier". The sale of that trade-mark with the attached good will to be used in Washington and Alaska, render the proceeds therefrom attributable to the good will of the plaintiff corporation which is domiciled in California. Section 14272 of the Business and Professions Code provides that: "Any trade-mark may be transferred in the same manner as personal property *in connection with the good will of the business in which it is used* or the part to which it is appurtenant, and the owner is entitled to the same protection by suits at law or in equity." (Italics added.)

The contract of sale was a transfer of intangible personal property (Civil Code, sec. 655) in the form of plaintiff's trade-mark "Rainier", in connection with the good will of the business which was domiciled in California. It conveyed those property interests to be used by plaintiff *exclusively and perpetually* in the State of Washington and in the Territory of Alaska. Since said transfer of trade-mark and good will of the business, the plaintiff has manufactured no beer in Washington or Alaska, but has maintained its office, and place of business exclusively in the State of California. It is true that plaintiff also sold and conveyed to Century Brewing Association of Seattle, in 1935, certain real property and equipment in Seattle, which are not involved in this suit to recover franchise taxes.

Subsequent to the transfer of the trade-mark for use in Washington and Alaska with the good will attached thereto, the plaintiff assigned the interest therein and the royalties therefrom to the Trustees of the Anglo-California National Bank of San Francisco, whose residence and place of business was and is in that city, to secure payment of a series of first mortgage bonds in the sum of $1,200,000. Since acquiring the said trade-mark and good will for the State of Washington and the Territory of Alaska, the plaintiff has never paid said State or Territory any franchise taxes except the nominal sum of $15 per annum. Neither has the State of Washington nor the Territory of Alaska levied or collected franchise taxes on the actual sale of liquor in that State or Territory by the Seattle Brewing and Malting Company, under the trade-mark of "Rainier".

Even though the State of Washington had collected franchise taxes on the actual sales of liquor in that State, as distinguished from a tax upon the royalties derived by the California corporation from separate property interests, namely, the sale and transfer of a trade-mark and good will of the business, that would not result in double taxation. The first is a tax upon vendible commodities, and the latter is a tax upon a distinct property interest, to wit, the royalties derived by another corporation from the sale and transfer of a trade-mark and the attached good will of a business enterprise.

[5-7] It is immaterial whether we consider the contract or the actual conveyance of the trade-mark and incidental good will as the source of the tax liability. It has been held a state may tax the entire net income of a domiciliary corporation, regardless of the source of the income. People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666, 108 A.L.R. 721; Lawrence v. State Tax Commission, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374; Cream of Wheat Co. v. County of Grand Forks, 253 U.S. 325, 40 S.Ct. 558, 64 L.Ed. 931; Southern Pac. Co. v. McColgan, 68 Cal. App.2d 48, 69, 156 P.2d 81. It has also been held that the proceeds from a royalty contract has its situs at the domicile of the corporation and is taxable in that state. Nelson v. Ferguson, 3 Cir., 56 F.2d 121, Certiorari denied, Ferguson v. Nelson, 286 U.S. 565, 52 S.Ct. 646, 76 L.Ed. 1297; Sunnen v. C. I. R., 8 Cir., 161 F.2d 171, Rev. on other grounds, Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 68 S.Ct. 715, 92 L. Ed. 898; Hazeltine Corporation v. McColgan [Sacramento County Superior Court, No. 63,171; opinion attached to brief]; Commonwealth ex rel. Luckett v. Radio Corp. of America, 299 Ky. 44, 184 S.W.2d 250. In the Hazeltine case, supra, in which, pursuant to the principle of the application

of the doctrine of mobilia sequuntur personam announced in Farmers' Loan & Trust Co. v. State of Minnesota, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000, the learned judge of the Superior Court in California determined that the situs of the income received was in the State of New Jersey, and therefore that the proceeds from the contract were not taxable in the State of California. But the court did decide in accordance with said maxim that the situs of the corporation was in New Jersey. The facts of that case are the reverse of those in the present case, but the principle decided is the same. The court said: "* * * This intangible royalty, or credit, which plaintiff is entitled to receive is not income from sources within the state of California, because the corporation (plaintiff) to whom it is owing resides in New Jersey, and it is there, under the mobilia rule, that the source of income arises. Miller v. McColgan, 17 Cal.2d 432 [110 P.2d 419, 134 A.L.R. 1424]. Plaintiff does not come in competition with any business in California. It does no business in this State, and exercises no rights under its patent here. True, it authorizes the California corporations to manufacture and sell articles, which otherwise they could not do by reason of plaintiff's patent rights, and for this privilege they pay to plaintiff certain royalties, but those royalties are but debts due from debtors residing and doing business in California to a creditor in a foreign state."

Applying that case to the facts of the present action, it determines that the State of Washington would have no authority to tax the royalties due by contract to the corporation domiciled in California, and that such payments were taxable solely by the state in which the creditor resides.

In the Luckett case, supra, the Supreme Court of the State of Kentucky approved and quoted from the opinion in the foregoing Hazeltine case, and followed the rule of mobilia sequuntur personam, in determining the situs of intangible personal property represented by a contract to pay royalties. The Kentucky court said 184 S.W.2d at page 252: "The source of the royalties was not in Kentucky where the tubes happen to be manufactured, but was in New York where the contract was signed and the royalties were payable. The contract created a debt or obligation on the part of Ken-Rad, whose domicile was in Kentucky, to R.C.A., whose domicile was in New York, and this debt is intangible, personal property which under the rule of mobilia sequuntur personam has its legal situs at the domicile of the creditor. Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339, 123 A.L.R. 162, * * *."

We are convinced that, under the circumstances of this case, regardless of whether the contract for royalties or the conveyance of the trade-mark and good will of the plaintiff's business for that same consideration is the source from which the royalty income is derived, it is attributable to intangible property having a situs in this State where the owner of the good will and the corporation creditor resides.

The judgment is reversed and the court is directed to render judgment in favor of the defendant to the effect that plaintiff take nothing by this action.

ADAMS, P. J., and PEEK, J., concur.

94 Cal.App.2d 197

PEOPLE v. BELTRAN et al.

Cr. 4330.

District Court of Appeal, Second District,
Division 2, California.
Oct. 17, 1949.

Jesus Deanda Moreno, after conviction of robbery on two counts, was granted a new trial by the Superior Court of Los Angeles County, Paul Nourse, J., on the ground that the trial judge, Ranse, R. Sischo, had erred in holding prior acquittal of kidnaping for purpose of robbery did not bar the People from presenting evidence upon the issue as to the defendant's participation in such crime, and granted the defendant a new trial on

such ground, but refused to consider the other grounds of the defendant's motion, and both the People and the defendant appealed.

The District Court of Appeal, Wilson, J., dismissed the defendant's appeal and sustained the Peoples' appeal, and also held that the other errors complained of by the defendant in his motion for a new trial were not prejudicial, and reversed order granting the new trial with directions to pronounce judgment against defendant as required by the law.

1. Criminal law 🔑1023(13)

A defendant may not appeal from an order granting his motion for a new trial even though trial court had refused to consider all the grounds on which the motion was based and attempted appeal from such order would be dismissed. Pen.Code, § 1237.

2. Judgment 🔑751

The doctrine of res judicata applies to any matters in issue which the verdict determined irrespective of whether the defendant was tried on two separate indictments or upon two counts of one indictment charging separate and distinct offenses.

3. Criminal law 🔑59(5), 737(1)

Persons who aid and abet in the commission of a criminal offense though not present are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised or of which they have knowledge, and such natural and probable consequences are questions of fact for the jury.

4. Judgment 🔑751

In determining whether the doctrine of res judicata is applicable the instructions pursuant to which verdict was rendered may be looked to for such light as they shed on the issue determined by such verdict.

5. Judgment 🔑751

Where defendant drove the automobile in which others who had committed robberies and kidnaping for purpose of robbery left the place of such crimes, verdict of not guilty of kidnaping for purpose of robbery was not res judicata of the issue of defendant's knowledge in respect of the crimes of robbery. Pen.Code, § 954.

6. Criminal law 🔑959

A trial court may not refuse to consider certain grounds of the defendant's motion for a new trial and grant the motion solely on one ground and thereby deprive the defendant of his right to have the other grounds raised by him determined.

7. Criminal law 🔑1175

Where the penalty was the same irrespective of whether an aider and abettor was armed at time of his arrest following robbery, fact that verdict finding that he was so armed was not sustained by the evidence was not prejudicial. Pen.Code, §§ 213, 3024(a).

8. Criminal law 🔑1171(3)

Where there was an abundance of substantial evidence to support conviction district attorney's argument upon matter outside the issues and evidence was not prejudicial.

9. Witnesses 🔑338

A witness can be questioned only as to his knowledge of the reputation of the accused in relation to the traits involved in the offense charged, including his reputation as a law abiding citizen.

10. Witnesses 🔑274(2)

Where witness to defendant's reputation has testified, the prosecution may test the accuracy and the weight of his statements by asking whether the witness has heard of certain rumors, occurrences or charges as to specified acts of misconduct of the accused which relate in general to the traits involved in the charge and which are inconsistent with the reputation attributed to him.

11. Criminal law 🔑1186(4)
Witnesses 🔑274(1)

Cross-examination of defendant's character witnesses as to what they would have thought of defendant's reputation if they had had additional information specified by cross-examiner was error, but where all of the witnesses maintained that defendant's reputation was good, the error was not prejudicial. Const. art. 6, § 4½.

Fred N. Howser, Attorney General, Frank Richards, Deputy Attorney General, for the People.

Ellery E. Cuff, Public Defender, Richard F. Bird, Deputy Public Defender, Los Angeles, for respondent.

WILSON, Justice.

This is an appeal by the People from an order granting a new trial to defendant Jesus Deanda Moreno. Defendant is purportedly appealing from that portion of the order granting him a new trial "in so far as said order denies him a new trial upon the issues raised by his pleas of not guilty."

Defendants were charged in counts I and II of the information with robbery and in count III with kidnaping for the purpose of robbery. Each defendant pleaded not guilty to all counts and their joint trial before a jury resulted in verdicts finding defendants Beltran and Louis Moreno guilty on all three counts. As to defendant Jesus Deanda Moreno the jury disagreed on counts I and II (robbery) and found him not guilty on count III (kidnaping for the purpose of robbery).

The cause as to respondent Jesus Deanda Moreno was reset for trial on counts I and II, whereupon he entered the additional pleas of former acquittal and once in jeopardy. It was stipulated that these pleas raised no issues of facts but questions of law only for determination by the court. Both pleas were overruled and the cause went to trial by a jury before the Honorable Ranse R. Sischo. Respondent was found guilty on both counts. A motion for new trial was made upon all the grounds provided in section 1181 of the Penal Code, Judge Sischo having returned to his own county the motion was heard by the Honorable Paul Nourse.

Upon the hearing of the motion respondent stated there were four grounds upon which he was entitled to a new trial: (1) that the question of respondent's knowledge necessary to make him an abettor was res judicata and it was error to relitigate it at the second trial, this being the point presented by his pleas of former acquittal and once in jeopardy which had been discussed with Judge Sischo in chambers prior to their being overruled; (2) errors in instructions given to the jury; (3) misconduct of the district attorney in his argument to the jury; (4) errors of the court in its rulings on objections to questions asked by the district attorney on cross-examination of defendant's character witnesses.

In granting the motion for a new trial Judge Nourse made it clear that the motion was granted upon only one ground, stating: "Motion for new trial will be granted solely upon the ground that the court erred in holding that the judgment of acquittal of kidnaping in the first trial under this information did not bar the People from presenting evidence upon the issue as to this defendant's participation in those crimes. I am granting the motion on that sole ground. I am not reviewing the other grounds assigned by the defendant, and am not reviewing the evidence. I am granting this motion on the sole ground stated."

[1] Respondent contends that he is not appealing from the order granting him a new trial but because of the fact that the trial court did not consider all the grounds set forth in his motion for new trial he has "filed a cross-appeal from that portion of the order wherein it might be construed as a denial of a new trial as to some issues." Section 1237 of the Penal Code sets forth those cases in which an appeal may be taken by the defendant. He cannot appeal from an order granting a motion for a new trial and his purported appeal from a portion thereof is unauthorized and therefore will be dismissed.

The evidence and the instructions to the jury in the first trial have by stipulation been made a part of the record on appeal. The undisputed evidence is that defendants Beltran and Louis Moreno entered a liquor store on East Foothill Boulevard about 4:30 in the afternoon; both were armed; they held up the proprietors, the accountant and a customer in the store and ordered them into the back room, a distance of about 25 feet; they took the money that was in the cash register and money from a secret hiding place which they intimidated one of the victims into revealing, one of whom was robbed of his wallet. While these two defendants were engaged in robbing the store respondent Jesus Deanda Moreno was in or near an automobile parked at the curb across the side street opposite the rear of the store. After the robbery Beltran and Louis Moreno left the store by the front door, proceeded around the southeast corner of the building, crossed the street to the car and were driven away by respondent. They left respondent's car when he made a boulevard stop almost a mile and a half from the liquor store and were shortly afterwards arrested in another car. Respondent was apprehended after he had proceeded a few blocks.

Respondent testified and denied all knowledge of the criminal intent of the other two defendants to rob the store. His story was supported by the testimony of his brother, Louis Moreno and that of Beltran. There is, however, other substantial evidence upon which a conclusion could be reached that respondent did have knowledge which would make him an abettor.

Res Judicata as Applied to Criminal Cases.

Respondent does not contend that the evidence does not support the verdict but maintains that the question of his guilty knowledge was determined by the jury at the first trial when it acquitted him of the charge of kidnaping and that the verdict was res judicata of that issue; that evidence as to this knowledge was improperly introduced by the prosecution at the second trial and without that evidence he could not have been convicted.

Appellant asserts that the question is governed by section 954 of the Penal Code as amended in 1927 and that each count which charges a separate and distinct offense must stand upon its own merits and disposition of one count has no bearing upon the verdict with respect to other counts contained in the information or indictment, citing People v. Ranney, 123 Cal.App. 403, 11 P.2d 405.

That section provides that "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." However, although under this section each count stands on its own merits, if a defendant is acquitted on one and convicted on the other and the verdicts are irreconcilable, the latter verdict is void. People v. Novo, 12 Cal.App.2d 525, 527, 55 P.2d 915, 56 P.2d 560; In re Johnston, 3 Cal.2d 32, 36, 43 P.2d 541.

Unquestionably the crime of kidnaping is distinctly separate from that of robbery and proof of the former calls for other evidence than that necessary to prove the latter, People v. Bruno, 140 Cal.App. 460, 462, 35 P.2d 391 and cases cited, and a verdict of acquittal of the former would not be irreconcilable with a verdict of conviction of the latter. But conceding that the acquittal of kidnapping on count III is not an acquittal of any other count, and that each count which charges a separate and distinct offense must stand on its own merits, there is still the question whether upon trial for the separate offense any matter of law or fact which has necessarily been determined upon a prior trial between the same parties is res judicata. In other words, does the doctrine of res judicata apply in criminal cases as well as in civil?

The doctrine has been applied in California in criminal cases under different circumstances. In People v. Majado, 22 Cal.App.2d 323, 70 P.2d 1015, the defendant was prosecuted for failing to provide for a minor child, the offense having been committed after he had served a sentence for a previous failure to provide for the same child. His proferred defense that the child was not his was held res judicata, the court stating that there could have been no prior conviction in the absence of a judicial determination that the defendant was the father of the child. In Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764, the indictment contained 33 counts accusing the defendants of grand larceny and embezzlement and one of conspiracy. It was alleged that in furtherance of the conspiracy the defendants committed certain overt acts which were delineated as the same offenses as those charged in the first 33 counts. The jury acquitted some of the defendants of grand larceny and embezzlement but failed to agree on the conspiracy charge. These defendants brought proceedings in prohibition to prevent the superior court from re-trying them for conspiracy upon the ground the subject matter of that count was res judicata. The court held that since the sole overt acts averred were larceny and embezzlement of which the petitioners had been acquitted, the remaining portion of the count charging conspiracy was insufficient to constitute criminal conspiracy and by finding that one of the overt acts charged as parts of the conspiracy had been committed the jury in effect acquitted the petitioners of the offense of conspiracy. See also In re Johnston, 3 Cal.2d 32, 43 P.2d 541.

In Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969, the court stated that the fundamental principle that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties is as applicable to the decisions of criminal courts as to those of civil jurisdictions.

In United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 69, 61 L.Ed. 161, 3 L.R.A. 516, the defendant was indicted for a conspiracy to conceal assets from a trustee in bankruptcy. The defendant in a so-called motion to quash, which was in substance a plea in bar, pleaded that upon a former indictment for the same offense there had been an adjudication that it was barred by the statute of limitations. The prosecution contended that the doctrine of res judicata did not exist in criminal cases except in the modified form of the 5th Amendment and that a decision upon a plea in bar could not prevent a second trial when the defendant had never been in jeopardy. The court quoted with approval from the case of Reg. v. Miles, L.R. 24 Q.B.Div. 423, 431 holding that where a criminal charge has been adjudicated upon by a court having jurisdiction, the determination is final as to the matter so adjudicated upon and may be pleaded in bar to any subsequent prosecution for the same offense and in this respect the criminal law is in unison with that which prevails in civil proceedings. The court concluded by stating: "The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice."

In United States v. De Angelo, 3 Cir., 138 F.2d 466, 468, the defendant and two others were jointly indicted for having robbed two bank messengers. At the same time they were indicted by separate bill for having conspired to commit the robbery of which they were accused in the first mentioned indictment. Defendant was acquitted of the robbery and upon trial on the conspiracy indictment he proposed to prove the former verdict of acquittal and that the material issues at the robbery trial as to his alleged presence at and participation in the robbery were the same issues as certain of the allegations and offers of proof at the second trial. This the trial court refused him the right to do. Upon appeal the court stated that the question presented was whether the government was estopped from relitigating in a criminal trial facts theretofore materially in issue at a former trial between the same parties for a different criminal offense which resulted in a verdict of acquittal. The court quoted from Frank v. Mangum, supra, and United States v. Oppenheimer, supra, and stated: "The conclusiveness of a fact which has been completely adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined." The court further stated that "an accused is constitutionally entitled to a trial de novo of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto" but he has the further right under a recognized "rule of evidence" to claim finality with respect to facts determined in his favor upon a previous trial. See also Sealfon v. United States, 332 U.S. 575, 578, 68 S.Ct. 237, 92 L.Ed. 180, 184 and annotation; United States v. Meyerson, D.C., 24 F.2d 855, 856-857; Harris v. State, 193 Ga. 109, 17 S.E.2d 573; 147 A.L.R. 980 and annotation, page 991.1.

[2] Thus whether a defendant is tried on two separate indictments or upon two counts of one indictment each count being considered as a separate and distinct offense, the doctrine of res judicata applies as to any matters in issue which the verdict determined. Whether the doctrine applies in the instant case then depends upon whether the acquittal of defendant of the kidnaping charge, which necessarily determined the issue of his knowledge as to that crime, since he could be guilty only as an aider and abettor, was a determination that he did not have knowledge which would make him an aider and abettor in the crime of robbery, both crimes having arisen out of the same transaction.

[3] It is said in People v. King, 30 Cal. App.2d 185, 203, 85 P.2d 928, 939: "In this state those persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised. As at common law, the nature of the crime actually committed, and not the act contemplated, fixes and determines the liability and character of guilt not only of him who committed the act, but of those who counseled him to proceed." But he would be guilty only to the extent (1) of his knowledge or (2) of the natural and reasonable consequences of the acts which he aided or encouraged. People v. Bond, 13 Cal.App. 175, 185, 109 P. 150; People v. Le Grant, 76 Cal.App.2d 148, 153, 172 P.2d 554. Whether the act committed was the natural and probable consequence and the extent of the defendant's knowledge are questions of fact for the jury. People v. King, supra, 30 Cal. App.2d page 202, 85 P.2d page 938; People v. Kauffman, 152 Cal. 331, 335, 92 P. 861.

[4] The instructions under which a verdict was rendered may be looked to for such light as they shed on the issue determined by the verdict. Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180, 184. The only instructions given by the court at the first trial concerning "aiding and abetting" were general instructions [1] which the court followed by saying: "* * * in determining whether or not the defendant, and this applies to Jesus Deanda Moreno, had knowledge that a crime was to be committed and of the crime before it occurred, you must not only consider, but you should consider all the evidence as to what occurred before and what occurred afterwards. You have to consider all the evidence as to what his knowledge was at the time he went there, and at the time of the commission of the crime."

The jury was further instructed that each count set forth in the information charged a separate and distinct offense; that it must consider the evidence applicable to each alleged offense as though it were the only accusation before it for consideration; that it must state its finding as to each count in a separate verdict, uninfluenced by the mere fact that its verdict as to any other count or counts is in favor of, or against the defendant.

[5] Nowhere was the jury told that an aider and abettor would be guilty only to

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1. "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense, or who knowingly and with criminal intent, aid and abet in its commission, or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

"One who does not actively commit the offense, but who aids, promotes, or encourages its commission either by act or counsel or both, is not deemed by law to be guilty, and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense.

"The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement of the crime."

the extent of his knowledge or of the natural and reasonable consequences of the acts aided and encouraged by him. There is nothing in the record from which it can be said that by the verdict of acquittal of the kidnaping charge the jury found that respondent had no knowledge of the plan to commit robbery. Indeed, they were unable to agree on the question of his guilt on that charge although by its verdict the jury found he had no knowledge of the kidnaping or of the intent to kidnap until after the crime had been committed. There is likewise nothing in the record to indicate that the jury found as a matter of fact that the kidnaping was the ordinary and probable effect of the common design. Therefore it cannot be assumed that lack of knowledge of the one crime would perforce be (1) a lack of knowledge of the other or (2) a lack of knowledge that the other defendants entered the store with the intent to commit any crime at all. Consequently the verdict of not guilty of the crime of kidnaping is not res judicata of the issue of respondent's knowledge with respect to the crime of robbery.

By his pleas of once in jeopardy and former acquittal, respondent sought to raise the defense of res judicata. Since the two crimes with which he was charged are separate and distinct offenses he was not placed in double jeopardy. While the doctrine of res judicata is necessarily included in the plea of once in jeopardy, that doctrine may also be applicable where a plea of once in jeopardy is not available. United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161, 3 L.R.A. 516. Respondent should have raised the point by proper and timely objection to the introduction of the evidence. However, it is evident from the record and from the briefs of counsel that the question of res judicata was discussed at length with the court in chambers prior to its ruling on the pleas. It is also apparent that counsel for respondent was of the opinion that since the court had ruled adversely on the question of his right to present those defenses, any objections to the evidence upon the ground that the issue to which it related was res judicata would not be sustained. Furthermore, the trial court granted the motion for new trial upon the ground that the trial judge had erred in ruling that res judicata was not applicable and not upon the ground that the error consisted in ruling against respondent on his pleas of once in jeopardy and former acquittal. For these reasons we have determined the question of the applicability of the doctrine of res judicata although by so doing we do not approve the manner in which the point was raised.

[6] The trial court has attempted to restrict the granting of the motion for new trial to one ground only. There is no provision in the Penal Code authorizing or empowering the court to limit the ground upon which such motion is granted and thereby to deprive a defendant of his right to have a determination of the other grounds raised by him. Respondent is entitled to a decision on the points which were not considered by the court.

Alleged Error in Instructions Given to the Jury

Respondent contends that (1) the verdicts finding that he was armed at the time of his arrest were contrary to the evidence and (2) the instruction which led to the verdicts was erroneous.

[7] (1) Conceding that the evidence does not support a finding that respondent was armed at the time of his arrest he was not deprived of any substantial rights and will suffer no disadvantage from the verdicts. His codefendants were armed at the time of the robbery and respondent as an aider and abettor was found guilty of first degree robbery, the punishment for which is not less than five years in the state prison. Penal Code, sec. 213. The minimum sentence for a person not previously convicted of a felony but armed with a deadly weapon at the time of the commission of the offense or with a concealed deadly weapon at the time of his arrest is five years. Penal Code, sec. 3024(a). Respondent will suffer no additional penalty because the jury also brought in a verdict that he was armed at the time of his arrest.

(2) The instruction complained of[2] refers to the possession of a deadly weapon by one of two or more persons participating in the commission of a crime and is a correct statement of the law. It contains no reference to the possession of a deadly weapon at the time of arrest.

Misconduct of the District Attorney.

Respondent contends that the district attorney committed misconduct by making an improper argument to the jury and that the court erred in permitting the misconduct to continue.

Respondent's codefendants testified that their counsel had told them if all three defendants would plead guilty to one count of robbery, the district attorney would dismiss the other count of robbery and the count of kidnaping; that counsel had told them the punishment for kidnaping was much greater than for robbery; that at no time did they ask respondent to plead guilty in order to lighten their punishment. Respondent contends the purpose of the testimony was to show the state of mind and motives of the codefendants in testifying for respondent; that no testimony was given as to whether or not the district attorney had expressed himself on the subject of dismissing any of the counts.

[8] The district attorney in his closing argument told the jury something of the custom in his office with respect to dismissing some of the counts of an information if a defendant should plead guilty to one or more counts. Undoubtedly the argument was upon irrelevant matter outside the issues and concerned facts not in evidence. There does not, however, appear to be anything prejudicial to respondent in the statements objected to, especially since there was an abundance of substantial evidence to support the verdict. Indeed in his brief respondent virtually concedes that the evidence was sufficient.

Errors in Rulings on Objections.

Respondent's character witnesses testified that his reputation in the community for honesty, peace and quiet was good. On cross-examination the prosecution asked the witnesses whether they had heard that respondent had been arrested in El Paso for possession of marijuana; arrested in Los Angeles for possession of marijuana; for rape; for petty theft and for interfering with an arrest. Objections to the questions were overruled and the witnesses answered in the negative. The witnesses were then asked whether they would still say respondent's reputation for truth, honesty, peace and quiet was good.

[9, 10] A witness can be questioned only as to his knowledge of the reputation of the accused in relation to the traits involved in the offense charged, including his reputation as a law-abiding citizen. People v. Gin Shue, 58 Cal.App.2d 625, 634, 137 P.2d 742. When the witness has testified his credibility is then in issue and one way by which the prosecution may test the accuracy and weight of his statements as to the good reputation of the accused is to ask whether he has heard of certain rumors, occurrences or charges as to specified acts of misconduct of the accused relating in general to the traits involved in the charge and inconsistent with the reputation attributed to him. People v. McKenna, 11 Cal.2d. 327, 336, 79 P.2d 1065; People v. Sambrano, 33 Cal.App.2d 200, 217, 91 P.2d 221; People v. Gin Shue, supra. The prosecution is confined to the answer given by the witness and can inquire no further into the matter. People v. Gin Shue, supra; People v. McKenna, supra.

[11] The direct examination of respondent's witnesses was limited to his general reputation. The cross-examination should not have been extended to include inquiries as to what the witnesses personally might have thought of his reputation if they had had additional information. People v. Neal, 85 Cal.App.2d 765, 771, 194 P.2d 57. However, none of the witnesses changed his testimony, each of them maintaining respondent's reputation in the community was good.

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[2] "When two or more persons participate in committing the crime of robbery, if one of them has in his possession a dangerous or deadly weapon while engaged in the robbery, such possession constitutes a possession of the weapon by each of the others."

Although there was error in overruling respondent's objections to the prosecution's questions on the cross examination of his character witnesses, upon examination of the entire record, including the evidence, we are of the opinion that the errors complained of have not resulted in a miscarriage of justice, Const., art. VI, sec. 4½ and the motion for new trial should not be granted upon the grounds of the errors assigned.

The order granting the motion for new trial is reversed and the purported appeal by respondent is dismissed. The trial court is directed to pronounce judgment against defendant as required by law.

MOORE, P. J., and McCOMB, J., concur.

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93 Cal.App.2d 729

WEAVER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 14204.

District Court of Appeal, First District, Division 1, California.

Oct. 22, 1949.

On petition for rehearing.

The District Court of Appeal, Peters, P. J., denied the petition, holding that petitioner was not entitled to discharge of writ of attachment in action against petitioner by buyers of interest in furniture and in lease to recover money paid on the purchase price to petitioner.

Original opinion 209 P.2d 830.

1. Attachment 🔑11
Sales 🔑391½

Where buyers elected to rescind contract to buy interest in furniture and in a lease because of alleged misrepresentations by seller, and removed from the property after staying in possession for five days, and redelivered possession to seller, buyers waived their lien and were entitled to issuance of attachment in action for money paid on the purchase price. Civ.Code, § 1789(5).

2. Attachment 🔑109

Where buyers elected to rescind contract to buy interest in furniture and in a lease because of alleged misrepresentations by seller, and removed from the property after staying in possession for five days, and redelivered possession to seller, buyers were not required to aver in their affidavit filed in support of their attachment in action for money paid on the purchase price, that they once had a lien, but that such security had, without any act of the buyers, become valueless, since such an averment was not jurisdictional. Code Civ.Proc. §§ 537, 538; Civ.Code, § 1789(5).

◆

Carroll, Davis & Freidenrich, San Francisco, J. D. Burdick, San Francisco, for petitioner.

Henry C. Clausen, San Francisco, for respondents.

PETERS, Presiding Justice.

On this petition for rehearing it is urged that the opinion as written is predicated upon the theory that there was a simultaneous offer to rescind and delivery of the property, and that such theory is false. It is contended that the record shows that the Davises kept the personal property for five days after offering to rescind. It is then urged that during that period they had a lien under the provisions of § 1789(5) of the Civil Code, which, it is claimed, bars the right to an attachment.

[1] The record shows the following: The complaint and offer to rescind are silent as to the fact here involved. The affidavit filed in support of the attachment avers that the claim is unsecured. The petition for a writ of mandate filed in this court avers that the Davises "are secured by a lien." The verified answer of the Davises avers that they removed from the property and that "since said rescission have not had any of the real or personal property in their possession or under their control." After the oral argument, petitioner was permitted to file the affidavit of Meizel in which it is averred that the Davises kept the property for five days before returning it. Thus, even if the facts

be interpreted most strongly in favor of petitioner, the most that appears is that the Davises, who claimed to have suffered damage by reason of the acts of petitioner and Meizel, rescinded and offered to restore, stayed in possession for five days, then, long before filing their complaint, removed from the property. Under such circumstances, the Davises waived their lien and elected to proceed as they did. Certainly they had a legal right to waive their lien, and the fact that they did so clearly appears.

[2] But, says petitioner, under such circumstances, under the provisions of §§ 537 and 538 of the Code of Civil Procedure, the Davises were required to aver in their affidavit filed in support of their attachment, that they once had a lien, but that "such security has, without any act of the plaintiff, * * * become valueless." Such an averment was not jurisdictional under the facts here disclosed. As pointed out in the opinion on file, "in determining the right to an attachment all of the facts set forth in the record before us must be considered." The affidavit averred that the claim was unsecured, and the facts disclosed by the entire record demonstrate the truth of that averment. Sections 537 and 538 have no application to the disclosed facts. Here the Davises could have had a lien, and perhaps did have one for a period of five days. They could have kept possession of the property and asserted their lien. But they elected to redeliver possession of the property and waive their lien. Certainly, they were not forever barred from an attachment because, perhaps, they had a lien for five days and then elected to waive it. Certainly, the person who must be considered in this proceeding as a wrongdoer should not be legally entitled to claim that a waiver is the making a security "valueless" within the meaning of the sections.

The proper application of the sections is shown in Yosemite Growers Co-op. Ass'n v. Case-Swayne Co., 73 Cal.App.2d 806, 167 P.2d 541. That was an appeal from an order discharging an attachment. The trial court discharged the attachment because the record before the court disclosed that the plaintiffs had a lien on 82,000 cases of peaches but sold 80,000 cases of the fruit. The plaintiff failed to aver that the lien on the 2,000 cases still in his possession without fault had become valueless. The appellate court, of course, affirmed the trial court, because the pleadings disclosed an existing effective lien. In the instant case the pleadings disclose no lien, disclose that even if one existed it does not now exist, and that it does not exist because the Davises waived it.

The petition for rehearing is denied.

WARD and BRAY, JJ., concur.

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94 Cal.App.2d 233

In re FIELDS' ESTATE.

SMITH et al. v. FIELDS.

Civ. 17281.

District Court of Appeal, Second District,
Division 3, California.
Oct. 19, 1949.

Rehearing Denied Nov. 7, 1949.

Proceeding in the matter of the estate of William C. Fields, also known as W. C. Fields, also known as Bill Fields, wherein Adel C. Smith and another petitioned for distribution of legacies payable to them, opposed by Magda Michael, executrix, and Harriet B. Fields, contestant.

The Superior Court of Los Angeles County, Harold B. Jeffery, J., made an order of partial distribution, and Harriet B. Fields appealed.

The District Court of Appeal, Vallée, J., affirmed, holding that the findings of the Probate Court were sufficient to support the order of partial distribution in view that the estate was "little indebted" and that the legatees were required to give bond.

1. Executors and administrators 🔑314(3)

Under the Probate Code, findings that the estate being administered is but little indebted and that distribution may be made without loss to creditors or injury to the estate or any person interested therein are prerequisites to an order of partial liquidation. Probate Code, § 1001.

2. Executors and administrators 🔑314(11)

Findings of fact in order of the Probate Court making partial distribution of the estate of a decedent are to be considered a part of the formal findings of fact.

3. Executors and administrators 🔑314(8)

Findings of Probate Court on which order of partial distribution of a decedent's estate were based, that the estate was but little indebted, save for claim of the widow, and that the shares of petitioners could be allowed to them without loss to the creditors of the estate, were supported by the evidence. Probate Code, § 1001.

4. Courts 🔑202(3, 5)

All presumptions are in favor of findings made by the Probate Court, and they must be read and considered together as a whole to ascertain the court's intention.

5. Executors and administrators 🔑314(12)

Findings made by Probate Court in support of an order of partial distribution of a decedent's estate were presumed to be supported by the evidence and were to receive if possible such a construction as would uphold rather than defeat the order and were to be liberally construed and if possible any ambiguity would be resolved in favor of sustaining the order. Probate Code, § 1001.

6. Appeal and error 🔑1071(1)

An order may not be set aside unless the conflict in the findings is clear and incapable of being reconciled.

7. Executors and administrators 🔑314(11)

Findings of the Probate Court in support, of an order of partial distribution of the estate of a decedent were not contradictory but could be reconciled so as to support the order notwithstanding an inadvertent statement that the legacies might be paid without loss to creditors of the estate except the widow. Probate Code, § 1001.

8. Executors and administrators 🔑314(3)

An estate is but "little indebted" within the Probate Code, authorizing partial distribution when the amount of the estate over and above the debts is sufficient to allow the distribution to be made without danger to the creditors. Probate Code, § 1001.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Little Indebted".

9. Executors and administrators 🔑314(8)

Evidence supported findings of the Probate Court, making a partial distribution of the estate of the decedent, on the ground that distribution could be made to legatees upon giving bond securing the estate without loss to creditors of the estate. Probate Code, § 1001.

10. Executors and administrators 🔑314(3, 12)

The Probate Court has broad discretion in passing upon a petition for partial distribution, and in the absence of a clear showing of abuse of discretion its conclusion that the condition of the estate is such that the distribution can safely be made upon giving of bond by legatees should not be disturbed. Probate Code, § 1001.

◆

George A. Bisbee, Ernest A. Tolin, and Wendell H. Davis, Los Angeles, for contestant and appellant.

John W. Preston and John W. Preston, Jr., Los Angeles, for petitioners and respondents.

No appearance for executrix and respondent.

VALLÉE, Justice.

Appeal from an order of partial distribution. The will of W. C. Fields bequeathed $5000 each to his sister and brother. They petitioned for distribution of the legacies. The widow of Fields appeals from the order distributing the legacies to them.

The verified petition for partial distribution alleged these facts: All claims against the estate have been paid except a contingent claim of the widow in the amount of $241,000. See Fields v. Michael, 91 Cal. App.2d 443, 205 P.2d 402. The inventory and appraisement shows the value of the estate to be about $800,000. After the payment of all allowed claims there will be left about $550,000. All of the assets of the estate are in cash or other liquid assets. The will bequeathed $5000 each to decedent's sister and brother. No part of these legacies has been paid. The State Controller has consented to their distribution. The other legacies bequeathed by the will are set forth. The claim of the widow is being contested. If her claim is valid, there will be more in the estate than will be required for the payment of specific legacies. More than two-thirds of the estate is separate property of decedent and as such is not liable for the payment of the claim of the widow.

The executrix answered the petition. She alleged that the value of the estate was $727,373.75, and that the widow had filed a claim in the amount of $241,225 which had been rejected and suit brought thereon. The widow appeared at the hearing of the petition and opposed the making of partial distribution.

The appeal is presented on the clerk's transcript. No transcript of the oral proceedings has been filed. A statement appears in the record to the effect that a reporter was not present at the hearing.

The court found the facts generally as alleged in the petition. It found that: W. C. Fields died December 25, 1946; the value of the estate left by the decedent in California before estate taxes was $771,429.38; the time for filing claims had expired before the filing of the petition for partial distribution; all claims against the estate have been paid in full except a claim of the widow "for an undetermined amount of money and for $241,225.00"; after payment of all allowed claims, the executrix' estimate of inheritance taxes, and personal property taxes, the estate consists of cash and personal property of the value of $556,996.82; the indebtedness of the estate cannot be determined at this time, but in no event will the indebtedness to the widow exceed $241,225; the legacies to the decedent's sister and brother of $5000 each may be paid without loss to the creditors of the estate, "except the creditor Harriet v. Fields, [the widow] the amount of whose claim cannot at this time be determined," upon the giving by each petitioner of a bond in the sum of $5000 "if given by a surety company authorized to furnish such bond, otherwise each of said bonds to be in the sum of Ten Thousand Dollars ($10,000.00)." In the order for partial distribution made December 6, 1948, the court further found that the estate "is but little indebted, save and excepting the claim" of the widow for $241,225, and that the shares of the petitioners may be allowed to them without loss to the creditors of the estate. The order provided for distribution upon the giving of bond.

Appellant contends: (1) the findings of the probate court do not justify the conclusions of law or the order appealed from; (2) the findings are in conflict with the evidence; (3) the showing made in the probate court was not sufficient upon which to base findings supporting an order of partial distribution.

[1-8] Probate Code section 1001, in part, provides: "If, at the hearing, [of a petition for partial distribution] it appears that the estate is but little indebted * * * and the legacy, * * * may be distributed to the person entitled thereto, without loss to the creditors or injury to the estate or any person interested therein, the court shall make an order requiring the executor or administrator to deliver the legacy, * * * to the person entitled thereto, * * *." The only evidence to be found in the record, which no doubt was before the probate court at the hearing, is in the clerk's transcript and consists of: the will of decedent, the order admitting the will to probate and for letters testamentary, the inventory and appraisement, the claim of the widow, the first account current and report of the executrix filed July 12, 1948. Appellant says that findings that the estate is but little indebted and that distribution may be made without loss to the creditors or injury to the estate or any person interested therein, are prerequisites to an order of partial distribution and that the court did not so find. The statement of the law is correct. 11b Cal.Jur. 691, sec. 1217. The contention, however, is without merit. The court in the order expressly made these findings. The findings of fact in the order are to be considered as part of the formal findings of fact. In re Estate of Dam, 126

Cal.App. 70, 72, 76, 14 P.2d 162. In the absence of any evidence to the contrary, we cannot say that the findings are unsupported. They appear to be supported by the documents we have listed found in the clerk's transcript. It is argued that the findings are contradictory because of the statement that the legacies may be paid "without loss to the creditors of said estate except the" widow. It appears that the statement of the exception was an inadvertence. The specific facts found in the findings of fact, together with the finding in the order that the legacies may be paid without loss to the creditors, negative the exception. All presumptions are in favor of the findings. They must be read and considered together as a whole to ascertain the intention of the court. They are presumed to be supported by the evidence and are to receive, if possible, such a construction as will uphold rather than defeat the order. They are to be liberally construed and, if possible, any ambiguity or uncertainty will be resolved in favor of sustaining the order. They are to be harmonized and reconciled so as to prevent any conflict upon material points. An order may not be set aside unless the conflict in the findings is clear and incapable of being reconciled. Costello v. Bowen, 80 Cal.App.2d 621, 182 P.2d 615; Shank v. Blackburn, 53 Cal.App. 620, 624, 200 P. 762. We have no difficulty in this case in reconciling the findings to support the order. The fact that the amount of the claim is large does not negative the fact that the estate is little indebted. An estate is little indebted when the amount of the estate over and above the debts, is sufficient to allow the distribution to be made without danger to creditors. In re Estate of Hinkel, 176 Cal. 563, 567, 169 P. 70.

[9] The claim that the findings conflict with the evidence cannot be sustained. Appellant's contention is that in her claim she requested an accounting, whereas the court found that in no event will the indebtedness to her exceed $241,225. We do not find any request for an accounting in the claim. It specifically states that it is for $241,225. There is language in the claim to the effect that the decedent may have made gifts of community property in addition to items specified and if claimant ascertains that he did, the executrix pay her one-half the value thereof. There is no showing that the estate's indebtedness to the widow will exceed $241,225.

In re Painter's Estate, 115 Cal. 635, 47 P. 700; In re Estate of Hale, 121 Cal. 125, 53 P. 429, and In re Estate of Dutard's Estate, 147 Cal. 253, 81 P. 519, relied upon by appellant, are not analogous. In Painter an order denying partial distribution was reversed because the probate court had not heard evidence on the petition but had heard the opposition, and then had denied the petition. In Hale an order granting partial distribution was reversed because the evidence, which was without conflict, did not support the findings and because the probate court had not required a bond. In Dutard an order granting partial distribution was affirmed.

[10] As far as appears from the record, the bond required will secure the estate and provide against any error of judgment. The probate court has broad discretion in passing upon a petition for partial distribution. In the absence of a clear showing of abuse of discretion, its conclusion that the condition of the estate is such that the distribution can safely be made upon the giving of bond should not be disturbed. Cf. In re Painter's Estate, 115 Cal. 635, 640, 47 P. 700.

Prior to the filing of appellant's opening brief, respondents filed a motion to affirm the order. As the motion is now moot, it is not necessary to decide it.

Order affirmed, respondents to recover their costs on appeal.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. The findings were sufficient to show the nature and value of the estate and its condition with relation to indebtedness. The widow has a claim of some $241,000 as the value of her interest in community property which she alleges decedent gave away without her consent. She also asserts a claim that all the remaining property is community property. Both of these claims are disputed. If they are established in full the widow will take everything that is left after the taxes, debts and expenses of administration are paid. Upon the other hand, after the claims of the widow are adjudicated and settled, there may be sufficient estate left for payment of the legacies. The court should take a broad view of this situation and of the powers of the probate court in such matters. The law should not be given a narrow, technical application. The widow is not the only one who has rights in the matter. The legatees are entitled to be paid if that can be done without prejudice to the rights of the widow. If there is uncertainty on that point the uncertainty does not have to be resolved in favor of the widow. The court was not required to assume that her claims will be established to such an extent that she will take the entire estate. The litigation may continue for years and the final result may show that there was no necessity to defer payment of the legacies. The law does not require that all uncertainties as to the indebtedness of the estate be resolved before there can be a partial distribution. Oftentimes that cannot be done by the court in probate. It sometimes happens that claims are asserted against an estate in a sufficient amount to wipe it out entirely. The claims may be good or they may be spurious. The court should be accorded a wide discretion in such situations and I think the law was framed to that end. If there must be absolute certainty as to the amount of the indebtedness of the estate before a partial distribution may be had, a bond would serve no purpose. It would be folly to refuse to order partial distribution upon the giving of bonds until the estate was in such condition that bonds were unnecessary. I think the provision for the giving of bonds was intended to meet situations (among others) where there are contingent or uncertain liabilities which will probably be the subject of protracted litigation. I grant that the widow should not have to bring suit upon the bonds of the distributees in order to enforce her rights, but who can say that she will have to sue on the bonds? The trial court was confronted by that possibility and also by the prospect that a refusal to order the legacies paid might result in serious inconvenience or injustice to the legatees. Appellant does not want to be placed in a position where she will have to sue on the bonds. I do not think the court was required to protect her against that possibility, where to do so would in all probability postpone payment of the legacies for years. It was a proper case for an order for payment of the legacies upon the giving of bonds.

94 Cal.App.2d 211

HEBERT et al. v. MILLER.

Civ. 7634.

District Court of Appeal, Third District, California.

Oct. 18, 1949.

Clarence H. Hebert and wife sued Louis L. Miller to quiet title to land and for an accounting and conveyance of defendant's interest in the land to plaintiffs, and defendant filed a cross-complaint for accounting and partition of the land.

From a judgment of the Superior Court of Colusa County, W. T. Belieu, J., denying partition and ordering an accounting, plaintiffs appealed.

The District Court of Appeal, Peek, J., affirmed the judgment, holding that the evidence did not support plaintiffs' contention that defendant had no interest in the land and that uncontradicted evidence negatived plaintiffs' contention that they acquired title thereto by adverse possession.

1. Tenancy in common 🔑**4**

In suit to quiet title to land, evidence was insufficient to show that defendant had no interest therein, though named as grantee in deed conveying land to him and plaintiffs as tenants in common.

2. Deeds ⚷136

Grantees' intention in accepting clear, certain and unambiguous deed, conveying land to them as tenants in common, had no effect on estate created thereby.

3. Evidence ⚷461(4)

Oral evidence of spouses' understanding that grantors' intent, in naming wife's brother as grantee in deed conveying land to him and spouses as tenants in common, was merely to permit spouses to obtain federal land bank loan, so as to exclude brother from any interest in land, was inadmissible.

4. Deeds ⚷60
Evidence ⚷461(4)

A deed delivered to grantee vests title to land conveyed in him free from any condition, and its operation cannot be defeated by parol evidence of grantor's intention that it should have effect different from that apparent on its face.

5. Tenancy in common ⚷15(2)

While relationship of cotenants of land does not of itself preclude one of them from asserting and acquiring title thereto by adverse possession as against the others, no such title can be acquired until there is an ouster or repudiation of such relationship.

6. Tenancy in common ⚷15(10)

Uncontradicted evidence that all three grantees in deed were in joint possession of land conveyed and jointly farmed it for their mutual advantage, with no intimation of ouster or repudiation of their relationship as cotenants by any of them, from date of execution of deed to date of trial of action by two of them to quiet title to land, negatived plaintiffs' contention that they acquired title by adverse possession.

◆

C. D. McComish, Colusa, for appellants.

Manwell & Manwell, Marysville, for respondent.

PEEK, Justice.

By their complaint plaintiffs sought to quiet title to certain farm land standing in the names of plaintiffs and defendant as cotenants. Additionally they sought an accounting and a decree ordering defendant to convey to them his interest in said property. The defendant, by his cross-complaint, acknowledged his interest in the property but denied generally the remaining allegations in plaintiffs' complaint. He also prayed for an accounting and for a partition of the property as well.

The court determined that plaintiffs and defendant were tenants in common of said farm, each being the owner of an undivided one-third interest therein, refused to partition the property, and ordered an accounting. By stipulation the accounting has been held in abeyance pending the outcome of this appeal. From the judgment so entered the plaintiffs have appealed.

At the outset we have noted that the record before us discloses testimony of but two witnesses, Minnie M. Hebert on behalf of herself and her husband as plaintiffs, and Louis L. Miller on behalf of himself as defendant. Although admittedly available, the parents of the parties were not called. From such meager record it appears that Henry and Nettie Miller, said parents of the plaintiff Minnie M. Hebert and the defendant Louis L. Miller, acquired the property in question in the year 1907 and continuously resided thereon until 1940 when domestic difficulties caused their separation. On the date of the separation and for some time prior thereto the farm was encumbered by a mortgage in the sum of approximately $5,000.00. A small judgment lien, as well as certain unpaid taxes and levee district assessments, had attached against the property. Because of a threatened foreclosure, the parents, on February 8, 1939, executed a deed conveying the farm to their son-in-law and daughter, Clarence H. and Minnie M. Hebert (plaintiffs herein) and their son Louis L. Miller (defendant herein) as tenants in common. Except for a short period during 1942 and 1943 when he was in the armed services the defendant lived on the farm continuously from 1907 until the time of trial. During the period of defendant's absence the plaintiffs resided on the property and although both were employed elsewhere they farmed it to a degree. Upon defendant's return from the service he resumed his residence on the farm with the plaintiffs, who continued to make it their home, and likewise resumed his farming of the land.

The record further shows that the plaintiffs consulted the Federal Land Bank with the thought of effecting a loan to pay off the mortgage against the property. They were informed by the bank that it would be necessary to reduce the existing debt and that the borrower would have to own sufficient farming equipment. Subsequently $3,000.00 was advanced by the parties, of which approximately $1,000.00 was contributed by the defendant. As security for the remaining $2,000.00 which the Land Bank loaned them, each of the parties joined in the execution of a note and trust deed and the original indebtedness was paid off.

Defendant's testimony showed that he had always lived on the farm; that after the execution by his parents of the deed in question he continued to farm the land and turned over to his sister and brother-in-law all of the proceeds derived from such farming activities; that the plaintiffs out of the proceeds paid the installments on the loan and the operating expenses; that on one occasion the proceeds from a walnut crop were divided, one-third to each, but other than that there had been no accounting between the parties; that their disagreement grew out of the desire of plaintiffs to divide the property; that plaintiffs had the same surveyed for such purpose; that the one-third portion which they set apart for him did not represent one-third of the value of the farm and for that reason he refused to accept the suggested partition; that his one-third interest in the property had never been questioned by plaintiffs and that it had been his understanding from the beginning that he was the owner of an undivided one-third interest in the farm.

[1-4] Two contentions are made by plaintiffs, both of which are wholly without merit. It is their first contention that although the defendant is named as a grantee in the deed nevertheless he has no interest therein and that plaintiffs are the sole owners thereof. Such contention is based solely upon the testimony of Minnie M. Hebert, the only witness testifying in behalf of plaintiffs, and apparently they and their counsel's understanding of the circumstances leading up to the execution of the deed, viz.: that the only reason respondent was named therein as a grantee was to permit plaintiffs to obtain a loan from the Federal Land Bank. In so arguing plaintiffs entirely ignore the testimony of defendant. It would seem that mere reference to such conflict in the evidence would be amply sufficient to disopse of such contention. The position taken by plaintiffs in this regard is erroneous for the further reason that since the deed is clear, certain and unambiguous, the intention of the grantees, the parties herein, in accepting said deed, had no effect whatsoever upon the estate thereby created. Even if it be assumed that the grantors' intent accorded with appellants' understanding, nevertheless such oral evidence would not be admissible in view of the well-established rule that: "The legal effect of a deed delivered to a grantee is to vest title in him free from any condition, and its operation cannot be defeated by parol evidence of an intention on the part of a grantor that it would have an effect different from that apparent on its face." Security-First Nat. Bank v. Leatart, 75 Cal.App.2d 211, 215, 170 P.2d 687, 689.

[5, 6] Appellants' second contention is that they have acquired a prescriptive title to the farm by adverse possession. While the relationship of cotenants is not of itself such as would preclude one cotenant from asserting and acquiring an adverse claim against the others, yet until there is either an ouster or a repudiation of a relation, no such title can be acquired. See 1 Cal.Jur. 543, and numerous cases therein cited. Here the record is totally devoid of any evidence whatever to substantiate such a claim by plaintiffs. To the contrary it shows without contradiction that from the date of the execution of the deed to the date of the trial both plaintiffs and defendant have been in joint possession of, and have jointly farmed the land for their mutual advantage with no intimation of

either ouster or repudiation by any of the parties.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

94 Cal.App.2d 142

BILLE et al. v. MANNING.

Civ. 14117.

District Court of Appeal, First District,
Division 2, California.

Oct. 14, 1949.

Action by Victoria Bille and Louise Bille against Joseph Manning for damages for abuse of process.

The Superior Court of the City and County of San Francisco, Theresa Meikle, J., awarded plaintiffs a judgment for $227 actual damages and $100 punitive damages, and plaintiffs appealed.

The District Court of Appeal, Dooling, J., held that the evidence was insufficient to require the allowance of other damages, and affirmed the judgment.

1. Process 🔑171

Evidence that tenants became nervous and sick because of wrongful eviction obtained by abuse of process was insufficient to require judgment for such damages where unsupported by medical testimony.

2. Process 🔑171

Evidence that tenant paid two or three thousand dollars more than she should have for residence property after eviction from rented premises by landlord by means of abuse of process was insufficient to require judgment for damages in such respect.

3. Process 🔑171

Testimony as to loss of time in seeking a new place to live before as well as after service of writ of possession obtained by abuse of process was insufficient to require allowance of damages in such respect where there was no segregation of the loss of time after the service of such writ.

4. Damages 🔑181

Evidence of the defendant's wealth is admissible for the consideration of the court or jury when fixing the amount of exemplary damages if such damages are awarded.

5. Damages 🔑208(8)

A plaintiff is never entitled to exemplary damages as a matter of right, but such matter rests entirely in discretion of the court or jury.

6. Damages 🔑181

The consideration of the defendant's wealth where exemplary damages are allowed is discretionary.

7. Appeal and error 🔑1056(5)

Where action was tried before the court without a jury, exclusion of evidence of the defendant's wealth was not prejudicial to the plaintiffs.

8. Appeal and error 🔑882(19)

Where the plaintiffs prayed for a single award of damages, they could not complain on appeal that the damages were awarded jointly to them instead of separately.

◆

Albert J. McGuire, San Francisco, for appellants.

Edmund J. Holl, San Francisco, for respondent.

DOOLING, Justice.

Plaintiffs appeal from a judgment awarding them $227 actual damages and $100 punitive damages. Appellants, mother and daughter, were evicted from a flat in which they were living by a writ of possession following a judgment for the owner in the Municipal Court. The case is similar to Tranchina v. Arcinas, 78 Cal.App.2d 522, 178 P.2d 65, in that the owner represented to the O.P.A. that he desired to occupy the flat as his own dwelling and procured a certificate allowing him to terminate the tenancy for that purpose. After evicting the appellants by process issued under his judgment for possession he did not occupy the premises himself but on the same day let them to another tenant. This was an abuse of the process which he had obtained solely for the legal purpose of securing occupancy for himself.

The award was for special damages only and appellants urge that they were entitled to general damages as well, made up of the following items: 1. physical injury; 2. damage in being compelled to buy a home at more than its market value; 3. loss of time in looking for another place to live. None of these elements was specially pleaded, the allegation of general damage being that "plaintiffs were generally damaged in the sum of Two thousand five hundred * * * dollars." The items involved are not the results ordinarily to be expected to follow an eviction, especially where the appellants were not summarily ejected by the officer in execution of the writ of possession but themselves quit the premises in obedience to its mandate. It may be questioned whether they constitute general or special damages and even if general damages whether they should not have been at least "pointed out" in the complaint. Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 685, 44 P. 320, 32 L.R.A. 193.

However assuming that they were properly pleaded we find no error in the action of the court. The only evidence of physical injury was the following in the testimony of appellant Victoria Bille:

"Q. What effect did these proceedings have on your health? A. Well, it didn't make me feel very good. I got nervous over it and kind of sick about it, and I just couldn't work and couldn't eat. Well, I was sick.

"Q. And what effect did it have on your mother? A. She got very sick too; she got a kind of nervous spell and she was very sick over it; it affected her stomach and we had to have the doctor for her."

[1] Appellants produced no other evidence on this subject than these generalizations of a non-medical witness. The trial court was entitled to conclude that no physical consequences entitling appellants to any substantial damages were proved.

The only evidence of damage by paying more than its market value for a place in which to live is found in the following answer given to the following question by a real estate broker:

"Q. From your knowledge as a real estate broker would you say that was a fair market value for that property? A. Well, she paid two or three thousand more than she should have for that property."

[2] The answer was ambiguous and not strictly responsive. The witness did not give his opinion of market value and did not say that two or three thousand dollars more than the market value was paid. The somewhat evasive answer might as well mean that the purchase was at the market value but the witness regarded the market value as two or three thousand dollars more than it should have been. The trial judge may well have concluded that it was not proved that anything in excess of the market value of the property was paid for it.

[3] The testimony as to loss of time in seeking a new place to live covered the period before service of the writ of possession as well as after it with no segregation of time spent in each period. The gist of the tort was the wrongful use of the writ, the good faith of the defendant being res adjudicata up to the entry of judgment for possession. Tranchina v. Arcinas, supra, 78 Cal.App.2d 522, 524, 178 P.2d 65. There was no proof of loss of time after service of the writ definite enough to support a specific award.

[4-7] Appellants complain of the action of the trial court in excluding evidence of the defendant's wealth on the issue of exemplary damages. Such evidence is admissible for the consideration of the court or jury in fixing the amount of exemplary damages if such damages are awarded, 8 Cal.Jur. 899, but the plaintiff is never entitled to exemplary damages as a matter of right, their granting or withholding resting entirely in the discretion of the court or jury, 8 Cal.Jur. 866. The consideration of the defendant's wealth,

where exemplary damages are allowed, is likewise discretionary, Thomas v. Williams, 139 Wis. 467, 121 N.W. 148, and in this case, tried without a jury, the trial judge made it clear in excluding the evidence that she did not intend to consider that element if she concluded to allow exemplary damages. Since the matter of its consideration was discretionary with her we can see no prejudicial error in the judge exercising that discretion at the time the evidence was offered. A different question would be presented if evidence of wealth was excluded in a case tried before a jury, in which case the court would be taking from the jury evidence which the jury was entitled to consider if it saw fit to do so.

[8] Appellants are in no position to complain that damages were awarded jointly to both appellants instead of being segregated to each since the complaint prayed for a single award to both appellants.

Judgment affirmed.

GOODELL, Acting Presiding Justice, and RUNNELLS, Justice pro tem., concur.

* * *

94 Cal.App.2d 136

NELSON v. ANGEL et al.

Civ. 13986.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1949.

Rehearing Denied Nov. 12, 1949.

Hearing Denied Dec. 13, 1949.

Carl N. Nelson, landlord, sued Peter T. Angel and Peter F. Agnost, tenants, for failure to comply with requirements of lease.

The Superior Court, City and County of San Francisco, Edward P. Murphy, J., rendered judgment for defendants, and plaintiff appealed.

The District Court of Appeal, Goodell, acting P. J., reversed the judgment, holding that assignment of lease by tenants to corporation organized by them did not relieve tenants of primary obligation to deliver a chattel mortgage constituting a first lien on property and equipment, and to furnish copies of conditional sales contracts which landlord could pay off and have assigned to him by conditional vendors.

1. Landlord and tenant 🔑79(3)

Ordinarily an assignment of a lease does not release lessee from his obligations even though the lessor consents to the assignment.

2. Landlord and tenant 🔑79(3)

Under lease authorizing tenants to assign to corporation organized by them, and containing provisions relative to discharge of tenants from personal liability upon assignment, assignment did not relieve tenants of primary obligation to deliver chattel mortgage which would be a first lien on all inventoried property and on equipment placed on premises subject to conditional sales contracts covering such new equipment, and to furnish copies of conditional sales contracts, which landlord could pay off and have assigned to him by conditional vendors.

3. Appeal and error 🔑422

That notice of appeal inadvertently spoke of non-appealable "order" sustaining demurrer of complaint and not of the "judgment" following order, was not ground for dismissing appeal.

Charles A. Christin, Thomas J. Keegan, Earl J. Carroll, J. W. Radil, O. A. Hunt, San Francisco, for appellant.

Philander Brooks Beadle, San Francisco, for respondents.

GOODELL, Acting Presiding Justice.

This is an appeal from a judgment in defendants' favor after their demurrer to the amended complaint had been sustained without leave to amend.

The action was brought by the lessor against his two lessees of premises on Mason street, in San Francisco, to be occupied as a night club. The lease was dated

April 30, 1947, to run for a term of ten years commencing on August 1, 1947.

The lease (which consists of some 33 articles) provides that it may be assigned to a California corporation organized by lessees. Such corporation, named Hellenic Enterprises, Inc., was so organized, an assignment to it was made on July 1, 1947, and the corporation on that day accepted and assumed the lease and agreed to perform and be bound by all its terms and conditions. Hellenic Enterprises, Inc., is not sued.

Attached to the lease is an inventory of the equipment, furniture and other personal property located on the premises and owned by lessees, "subject to certain encumbrances".

By paragraph 4 lessees agreed to execute to lessor and record, not later than July 31, 1947, a chattel mortgage which would be a first lien (1) on all the inventoried property, free and clear of all encumbrances, and (2) on all equipment, furniture and personal property thereafter placed in the premises, which would be a first lien thereon subject to any conditional sale contracts covering such new property (with certain limitations respecting the amount or value thereof), to secure the faithful performance of the lease including the rent. Paragraph 4 provided, further, that whenever any personal property was placed by lessees on the property subject to conditional sales contracts, exact copies of such contracts would be immediately furnished to lessor, who would have the right to pay off such contracts, and to have them assigned to him by the conditional vendors.

Paragraph 5 contains the provisions mentioned above respecting assignment to a corporation. Those provisions, however, contain the proviso that such assignment may be made only if lessees "are not then in default in the performance of any of the terms of this lease * * * and upon the written assumption of this lease by such corporation and the compliance by said Lessees or by said corporation of the terms of paragraph 4 above relating to the security for this lease, Lessees shall be personally discharged from all liability under this lease, except that Lessees shall severally remain liable to Lessor upon their covenants in said paragraph 4 to pay to the conditional vendors and to Lessor all balances due under all conditional sale contracts not later than July 31, 1948, and except that Lessees shall also at all times remain liable for all of the obligations of this lease pursuant to the terms of paragraph 6 hereof relating to alcoholic beverage licenses."

The amended complaint alleges that the lessee-defendants "failed, neglected and refused to execute and deliver the chattel mortgage and-or chattel mortgages referred to in paragraph 4" and that they purchased personal property under conditional sales contracts but did not immediately furnish lessor with exact copies thereof as agreed in the lease.

The question for decision is whether these allegations show that the lessees continued to be liable for such alleged breaches after their assignment to Hellenic Enterprises, Inc.

[1] "Ordinarily an assignment of a lease does not release the lessee from his obligations even though the lessor consents to the assignment", De Hart v. Allen, 26 Cal.2d 829, 832, 161 P.2d 453, 455, citing Samuels v. Ottinger, 169 Cal. 209, 211, 146 P. 638, Ann.Cas.1916E, 830, and other cases, and it is apparent that the draftsman of this lease was careful, in paragraph 5, to provide that the lessees would be freed from their primary obligations only on the concurrence of several conditions. First, they could assign if not in default. The assignment was made on July 1, before there was any default. However, the second condition was the assumption of the lease by the corporation "and the compliance by said Lessees or by said corporation of the terms of paragraph 4 above relating to the security for this lease." The conjunctive "and" was used.

Paragraph 6 imposes a further condition to the release of the lessees from their primary obligations. It is that the lessees at all times shall "maintain in effect for use upon the demised premises on-sale alcoholic beverage licenses for distilled spirits, wines and beer, whether in their own name or in the name of the corporation * * *" and as long as they or the corporation do so, lessees shall not be personally liable on the lease "other than as provided in said paragraph 5, but otherwise the said two Lessees shall be individually and personally liable to Lessor for each and every obligation of this lease."

The language "other than as provided in said paragraph 5" shows an intent to hold the lessees bound by their primary obligations respecting security for the lease and conditional sales contracts, since paragraph 5 relates back to the obligations mentioned in paragraph 4.

Respondents claim that the lease provides two alternative methods for their release from liability. They argue that if the liquor licenses were maintained, as paragraph 6 requires, a form of security would be afforded different from, and in lieu of, that called for by paragraph 4, hence that the provisions are alternative. They argue further in this connection that the reference to paragraph 5 is only to the part thereof dealing with the lessees' obligation "to pay to the conditional vendors and to Lessor all balances due under all conditional sales contracts not later than July 31, 1948." The answer to that argument is that paragraph 5 is all one sentence, and the reference found in paragraph 6 is to "said paragraph 5" and not to any particular part thereof. No reason appears why the reference to "said paragraph 5" does not mean just what it says and embrace everything contained in it.

[2] The allegations of a failure to execute the chattel mortgage or mortgages and to furnish exact copies of the conditional sales contracts clearly state that the lease was breached in those respects, and paragraphs 4, 5 and 6 show that defendants were not released from their primary liability resulting from such breaches.

It is not necessary to discuss the allegations respecting bankruptcy.

[3] The notice of appeal speaks of the "order" and not the "judgment" of June 24, 1948. This, obviously, was a mere inadvertence since the (non-appealable) order sustaining the demurrer was made on June 18 while the judgment thereon was entered on June 24. No ground exists for dismissing the appeal.

The judgment is reversed.

DOOLING, J. and RUNNELLS, J. pro tem., concur.

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94 Cal.App.2d 973

PEOPLE v. PRYOR.

Cr. 2583.

District Court of Appeal, First District, Division 2, California.
Oct. 20, 1949.

Rehearing Denied Nov. 4, 1949.
Hearing Denied Nov. 17, 1949.

Stanley Pryor was convicted of arson and he appealed from order of Superior Court, San Francisco County, Daniel R. Shoemaker, J., denying his petition for writ of error coram nobis.

The District Court of Appeal, Goodell, Acting P. J., affirmed the order because petition was simply a repetition in somewhat different language of an earlier petition of same defendant, denial of which was affirmed by District Court of Appeal.

Courts 🔑90(1)

Where petition for writ of error coram nobis was a repetition in somewhat different language of an earlier petition of same defendant, denial of which was affirmed by District Court of Appeal, court would affirm order of denial.

◆

Stanley Pryor, in pro. per.

Fred N. Howser, Atty. Gen., David K. Lener, Dep. Atty. Gen., for respondent.

GOODELL, Acting Presiding Justice.

Appellant was accused by an information of the crime of arson, defined by section 447a of the Penal Code, to which he pleaded not guilty. At the first trial the jury disagreed. An amended information was filed alleging that he had been convicted of a felony in the State of New York in 1926, and of another felony in 1931 and another in 1939 in Michigan, all three of which he admitted. On the second trial he was found guilty. A motion for new trial was denied. No appeal was taken from the judgment of conviction. Appellant was represented by the public defender.

About a year later he filed (in propria persona) in the superior court a petition for a writ of error coram nobis and motion to annul, vacate and set aside the judgment, all of which were denied.

An appeal was taken (in propria persona) from the order denying appellant's petition, which appeal came to this court on a record consisting of the petition for a writ of error coram nobis, the minute order denying the petition, and the notice of appeal, certified by the clerk of the trial court. The order was affirmed, People v. Pryor, 1948, 87 Cal.App.2d 352, 196 P.2d 948. After an unsuccessful petition for rehearing in this court appellant petitioned the Supreme Court of the United States for a writ of certiorari which petition was denied on November 8, 1948, without opinion. Appellant applied there for a rehearing, which was denied on December 20, 1948.

On January 4, 1949, appellant filed (in propria persona) in the Superior Court at San Francisco another "petition for writ of error coram nobis" also entitled "Motion for release on Letters of Law, or new trial". The minutes show that the matter came before the court on January 5, 1949, with the district attorney represented and answering present, but "without the petitioner or his counsel" and on that day the petition was denied. On January 17, 1949 appellant filed (in propria persona) a notice of appeal reading in part as follows: "the Defendant Stanley Pryor is appealing from all records exclusive, including the Records of the first and Second trial. Also the Process of the Preliminary Hearing; So that he can continue to Proceed with his case. The Defendant Stanley Pryor. Pray that his Prays will Be answered By this Honorable Court. And the Honorable Judge Daniel R. Shoemaker, Presiding thereof and the Clerk of the Court."

The petition in the present case is simply a repetition of somewhat different language (although in many places in identical language) of the petition before this court in 87 Cal.App.2d 352, 196 P.2d 948. For the reasons given and upon the authorities cited on that appeal, the same result must be reached herein.

The narrow scope of a coram nobis proceeding was again declared in People v. Adamson, 1949, 34 Cal.2d 320, 210 P.2d 13.

The order appealed from is affirmed.

DOOLING, JJ., and RUNNELLS, Justice pro tem., concur.

94 Cal.App.2d 227

MOSCONI et al. v. RYAN.

Civ. 16906.

District Court of Appeal, Second District, Division 3, California.

Oct. 19, 1949.

Rehearing Denied Nov. 15, 1949.

Hearing Denied Dec. 15, 1949.

Action by Louis Mosconi and Bruce Tobian, a minor, by his guardian ad litem Marcus Tobian, against Margaret Ryan for injuries and death sustained when an automobile driven by the son of defendant went out of control and overturned.

Verdict was returned in favor of the defendant in the Superior Court of Los Angeles County, Henry M. Willis, J., and plaintiffs appealed from the resulting judgments.

The District Court of Appeal, Shinn, P. J., affirmed, holding that evidence of willful misconduct of the son of defendant in driving the automobile was insufficient for jury and that alleged remarks of the trial judge from the bench were not shown to be prejudicial.

Wood, J., dissented.

1. Automobiles 🔑242(1)

In action for death and injuries of guests sustained when automobile driven by deceased went out of control, presumption that the driver was not guilty of willful misconduct was included in the presumption against negligence of the driver.

2. Automobiles 🔑242(1)

In action for death and injuries of guests sustained when automobile went out of control, plaintiff had the burden to prove willful misconduct by the driver.

3. Automobiles 🔑181(1), 245(24)

In action for injuries and death of guests in automobile which went out of control, charge of willful misconduct by the driver must be determined from the particular circumstances and in unexceptional cases it presents a question of fact.

4. Automobiles 🔑181(1)

In action for injuries and death of guests in automobile which overturned when it went out of control while being driven by a 16 year old boy, measure of caution required of adults to disprove willful misconduct of the driver was not applicable to the boy.

5. Automobiles 🔑245(24)

In action for injuries and death of guests sustained in an automobile accident when automobile in which they were riding went out of control while being driven by a 16 year old boy at speeds of 70 to 80 miles an hour on a road with occasional sharp turns, evidence of willful misconduct of the driver was insufficient for the jury.

6. Appeal and error 🔑1046(5)

Alleged remark of trial judge from the bench that in all his 30 years of experience no case had been filed similar to the one on trial, was not prejudicial where there was no showing as to the circumstances under which the remark was made, nor that any objection was interposed thereto.

Ralph S. Rosen, A. J. O'Connor, Los Angeles, for appellants.

Parker, Stanbury & Reese, Los Angeles, for respondent.

SHINN, Presiding Justice.

William S. Ryan, deceased, at the time of his death was 16 years of age and the son of Margaret Ryan, the defendant herein. He held an automobile driver's license which had been issued upon an application signed and verified by his mother under the provisions of section 350(a) of the Vehicle Code. On October 7, 1948, he was driving a roadster automobile on a desert road in the vicinity of Palmdale. He had with him as guests, Charles Mosconi aged 17 years, and Bruce Tobian, a minor. At a curve in the road the car went out of control, was overturned, the Ryan and Mosconi boys were killed, and the Tobian boy was seriously injured. This action was brought by Louis Mosconi, father of Charles, and by Bruce Tobian, a minor, through his guardian ad litem, Marcus Tobian, against Margaret Ryan for the recovery of damages. In separate causes of action plaintiffs allege that young Ryan was driving in heavy traffic at a speed of approximately 75 miles an hour on a two-lane road on which were occasional sharp turns; that the driver maintained such speed wilfully and intentionally, without regard to human life or to the guests in the car, intending that harm should result to his guests, and not caring whether the same might result. The answer of Mrs. Ryan denied, for want of information and belief, all of the allegations of the complaint which were relied on as constituting wilful misconduct of her son. It was also alleged that the Mosconi and Tobian boys were guests of William S. Ryan and that the latter was not guilty of wilful misconduct or other misbehavior. There was a plea of contributory negligence in that the Mosconi and Tobian boys voluntarily and wilfully remained in the automobile, acquiesced in the manner in which the same was driven and assumed the risk thereof, which conduct upon their part, it was alleged, proximately contributed to the accident and the consequences thereof.

The case was tried to a jury and on each cause of action the verdict was in favor of the defendant. Plaintiffs appeal from the resulting judgments.

The points on appeal are stated as follows: "(1) The evidence overwhelmingly shows that William S. Ryan was guilty of wilful misconduct; (2) the trial judge committed prejudicial error in stating to the jury that in all of his 30 years experience no case had been filed similar to the one on trial."

The evidence of plaintiffs (defendant introduced none) disclosed the following facts: Many cars were on their way to a dry lake to participate in or to watch speed trials. The Ryan boy and his guests were going as spectators. The fatal accident occurred at the commencement of a long, winding curve, some 24 miles east and two miles north of Palmdale. The macadam road was 18 feet wide, with soft sand shoulders. Bruce Tobian testified that the car went into the turn at a speed between 70 and 80 miles per hour. It went off the road, turned over and left 240 feet of tire and brush marks from the beginning of the curve to where it came to rest. On the way, the Ryan boy had passed numerous cars, some of them traveling 60 or 65 miles an hour.

Bruce Tobian testified that Ryan made two right angle turns out of Palmdale. He made the first one without difficulty, but had a little trouble at the second one, and "we told him to take it easy. We told him to slow down." This was six miles short of the point of the accident. He testified that both he and Mosconi told Ryan several times to slow down but that he paid no attention to them and the speed of the car was not reduced.

[1-5] Defendant informs us that the court instructed the jury to the effect that it is presumed that every person takes ordinary care of his own concerns and that he obeys the law, and that such presumption will prevail unless the jury finds that it is overcome by evidence to the contrary. It is argued that this presumption stands as evidence here that the Ryan boy was not even guilty of negligence, much less of wilful misconduct. We are by no means satisfied that under the evidence as to the manner in which the accident occurred the presumption against negligence would be of sufficient substantiality to create a conflict in the evidence, but it is true, as defendant contends, that a presumption against wilful misconduct is included in the presumption against negligence. It was incumbent upon plaintiffs to prove wilful misconduct. They argue that they succeeded in doing that. They rely upon cases in which the evidence was held sufficient to support a finding of wilful misconduct, but none in which it was held that the evidence proved wilful misconduct as a matter of law. Defendant, upon the other hand, has cited as controlling, McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189, and Katz v. Kuppin, 44 Cal.App.2d 406, 112 P.2d 681, in each of which it was held as a matter of law that the evidence was insufficient to support a finding of wilful misconduct. These are but two of many cases which declare that the acts to constitute misconduct must be done under circumstances disclosing knowledge, express or implied, that an injury to a guest will be a probable result. It has been repeatedly said that the charge of wilful misconduct must be determined from the particular circumstances of the case. In unexceptional cases it presents a question of fact. Our inquiry, then, is whether the evidence was such as to exclude as wholly unreasonable a conclusion that the Ryan boy was not guilty of wilful misconduct. Clearly the question calls for a negative answer. The jury was not required to infer that the 16-year-old boy, daring as he was, had an appreciation of the danger that lay ahead of him. Although the macadam roadway was only 18 feet wide, and although a considerable number of cars were traveling east, as Ryan was, and if it be assumed that the jury believed he was driving at 70 or 80 miles per hour, it would not necessarily follow that he doubted his ability to stay on the road and to avoid collision with other vehicles. Even though it may be well argued, in the light of what happened, that he had no regard for his own safety or that of his guests, another reasonable conclusion is that he believed he would be able to see dangerous conditions ahead in time to cope with them. There was no evidence that he had been over the road before. He had rounded two right angle

turns before reaching the one at which the fatal accident occurred, some 24 miles east of Palmdale. As the car approached the curve it was going slightly uphill, but the road sloped downward toward the curve from the point of the rise toward the west. The time was about 9:30 a. m., the visibility was good and the road dry. The Tobian boy testified that he did not see the curve as they approached it. Although in this curve, which bore to the right, the course of the road changed from east and west to directly north and south, it was not an abrupt curve, and it was slightly banked. As nearly as we can determine from the surveyor's map which was in evidence, the arc of the curve was considerably more than 400 feet in length. The point where the roadway took a direct south course was approximately 280 feet east and 280 feet south of the point where the curve began. Some 1200 feet west of the curve there was a sign indicating a curve and another mutilated sign, "Bad Curve." Although these signs were in plain sight, there was no evidence that the Ryan boy noticed them, or that he saw the curve in time to have slowed down to a safe speed. There was some evidence that he applied his brakes and skidded his tires as he entered the curve. At the age of 16 years he could scarcely have been an experienced driver. His youth was an important factor for the jury to consider. The measure of caution that is required of adults to disprove wilful misconduct is not to be expected of inexperienced 16-year-old boys. It was for the jury to determine whether young Ryan had complete confidence that he would arrive at his destination safely. Their implied finding was in the affirmative. We could not disturb that finding without holding, in effect, that every young boy who takes long chances in driving his car realizes that such conduct will probably result in injury to himself or his guests, or is wholly indifferent as to the consequences. This, of course, would be not only bad law, but also untrue as a matter of fact. It was not an unreasonable conclusion from the evidence that the Ryan boy did not have an appreciation of the danger of what he was doing or any fear that he or his guests would suffer injury.

[6] On motion of plaintiffs for a new trial, one of their attorneys filed an affidavit in which he stated that during the trial the judge said from the bench that in all his 30 years experience no case had been filed similar to the one on trial, and it was alleged that said remark was prejudicial to the plaintiffs, in that it was calculated to cause the jury to believe that plaintiffs' case had no merit. The reporter's transcript does not contain any such statement of the court and necessarily there is no showing as to the circumstances under which the remark was made, nor does the record show that objection was interposed on behalf of plaintiffs. The remark, if made, may well have been pertinent to the matter under discussion. We are well satisfied that the trial judge would not have intimated that he considered the case to be without merit, nor can we believe that the observation meant more than that the circumstances of the case were most unusual. We discover in it no lack of consideration for the rights of plaintiffs, nor any sound basis for the claim of prejudice.

The judgments are affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

VALLÉE, Justice.

I concur. I agree with Mr. Justice Wood that the jury might well have interpreted the remark of the trial judge to mean such cases were not filed and that they had no merit. However, on the record I am unable to say that making the remark was error, or if it was, that it was prejudicial. The proceedings which occurred at the time the remark was made were not reported. They should have been. Without the setting, the remarks of counsel, and the situation which prompted the remark, I cannot say that the judgment should be reversed. The learned judge who tried the case is not one given to the making of gratuitous remarks. I am satisfied that if he had thought that his making of the remark was prejudicial or affected the result in any way, he would have granted a new trial.

WOOD, Justice.

I dissent. It cannot be determined, of course, whether the jury found that the driver was not guilty of wilful misconduct, or whether it found that he was guilty of wilful misconduct but that the guests assumed the risk of riding with him. If the jury found that the driver was not guilty of wilful misconduct, that finding, in my opinion, was not supported by the evidence. If the jury found that the driver was guilty of wilful misconduct but that the guests assumed the risk of riding with him, then it necessarily appears that the jury disbelieved the uncontradicted testimony of Bruce Tobian, the surviving guest, that he and Charles Mosconi, the deceased guest, told the driver "several times to slow down" and that the driver "just didn't pay any attention to us." That witness was not impeached in any respect and that testimony was not at all unreasonable. In view of such terrific speed of the light automobile upon a narrow and hazardous public highway, where many other automobiles were being driven, it would seem reasonable that the guests would demand that the driver slow down.

If the verdict was based upon a finding that such testimony of Bruce Tobian was not true, it should appear clearly that the rights of plaintiffs to a fair trial were not prejudicially affected by remarks of the trial judge. Upon the hearing of the plaintiffs' motion for a new trial, the attorney for plaintiff who tried the case filed his affidavit which recited in part as follows: "That during the trial the Court, in the presence of the jury, stated from the bench that in all his thirty years experience no case had been filed similar to the one on trial." It does not appear that any counter-affidavit was filed by defendant's attorneys, or that any denial of said alleged statement was made by said attorneys or the judge or anyone. Even though the shorthand reporter did not report said alleged part of the proceedings, it appears that it is true that the trial judge made said statement. The jury might well have interpreted that remark of the judge to mean such cases were not filed and that they had no merit. I think that a new trial should have been granted. In my opinion the judgment should be reversed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

94 Cal.App.2d 70

PEOPLE v. WRIGHT et al.

Cr. 4309.

District Court of Appeal, Second District, Division 3, California.

Oct. 7, 1949.

Rehearing Denied Oct. 20, 1949.

Hearing Denied Nov. 3, 1949.

Edwin R. Wright and Daniel M. Casey were convicted of grand theft in the Superior Court of Los Angeles County, Walter S. Gates, J., and they appealed.

The District Court of Appeal, Vallee, J., held that the evidence was sufficient to sustain convictions and that instructions contained no prejudicial error and affirmed the judgments and orders.

1. Criminal law 🔑1159(2, 4)

The credibility of witnesses and the weight of the evidence were matters for jury and for trial judge on motion for new trial.

2. Larceny 🔑65

Evidence sustained conviction of driver to getaway automobile of grand theft.

3. Criminal law 🔑1159(2)

A verdict cannot be set aside on appeal on ground of insufficiency of the evidence, unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support it.

4. Criminal law 🔑1159(2)

If the evidence reasonably justifies conviction, opinion of reviewing court that it might also be reconciled with innocence of defendant will not warrant interference with the determination of jury.

5. Criminal law 🔑1159(6)

The rule that circumstances relied upon by prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury and not the rule for guidance of reviewing court.

6. Criminal law 🔑1159(6)

Where jury rejects the hypothesis pointing to innocence and there is evidence to support implied finding of guilt as the more reasonable of the two hypotheses, reviewing court is bound by jury's finding.

7. Criminal law 🔑1159(2)

It is the jury and not reviewing court which must be persuaded beyond a reasonable doubt of the guilt of defendant.

8. Criminal law 🔑1159(2)

The function of reviewing court is to determine whether the evidence is of such character as to justify conviction, if believed.

9. Larceny 🔑65

Evidence sustained conviction of grand theft.

10. Criminal law 🔑562

Whether there is evidence to support the verdict depends upon the circumstances of each case.

11. Criminal law 🔑1172(1)

Where defendants did not question the commission by some one of the grand theft charged but contended only that evidence was insufficient to connect them with the offense and intent was not an issue, any error in instructing as to criminal intent without requiring proof of a specific intent was harmless.

12. Criminal law 🔑1172(1)

Where defendant denied that he was intoxicated on day of theft and intent was not an issue, any error in instructing that an act committed while in a state of voluntary intoxication is no less criminal by reason of such intoxication, was not prejudicial.

13. Criminal law 🔑407(1)

A false, evasive or contradictory statement made by defendant in the face of an accusation, heard and understood by him, charging him with the offense for which he is on trial or tending to connect him with its commission may be considered against him as constituting an admission that accusation was true. Code Civ.Proc. § 1870, subd. 3.

◆

Morris Lavine, Los Angeles, for appellant Daniel M. Casey.

Frederic H. Vercoe, Los Angeles, for appellant Edwin R. Wright.

Fred N. Howser, Attorney General, and Henry A. Dietz, Deputy Attorney General, for respondent.

VALLÉE, Justice.

Appellants Wright and Casey were convicted by a jury of grand theft. Motions for new trials were denied. They appeal from the judgments and the orders denying their motions for new trials. Each appellant contends that the evidence is insufficient to justify the verdict as to him, and that the court erred in giving instructions.

The evidence stated most favorably to respondent follows.

On April 19, 1948, Ila Brown was employed as cashier and bookkeeper at the Alexander Market located on Washington Street near Rimpau in Los Angeles. Immediately after 2:30 p.m. that day, she left the market with about $8,800, including some $5,800 in cash, in a moneybag to be deposited in a bank located the second door down Washington Street. She had not quite reached the sidewalk when she felt some one pull on the moneybag held in her hand. She turned around, saw a strange man next to her, and screamed. The man took the bag, hurried away and entered a car parked at the curb. Mrs. Brown had not seen the man before. She testified that he had on coveralls and a cap like a trainman wears,—a soft cap with a bill; that a cap shown to her which was found in the glove compartment of appellant Wright's automobile looked exactly like the one she saw. The car he entered was a light gray Plymouth coupe without a license on the rear. The car appeared to be new. There was another man seated in the car. Mrs. Brown only saw the back of his head. When the man who took the bag entered the car, it pulled away. She testified that appellant Casey looked like the man who took the bag; "he looks like the man, from his height and coloring and age, and all that"; that she was not sure it was Casey.

Lawrence Morain was seated in an automobile nearby. He heard a scream, looked in the direction of the market and saw a man struggling with a woman. The man was 5 feet 8 or 9 inches, and wore a sort of olive-drab coveralls, green, such as were worn during the war by members of the armed forces. The man ran 12 or 15 feet to a light gray Plymouth coupe, about a 1947 model, which was parked against the curb facing west right near the scene of the scuffle, and entered it. A man who wore glasses was seated in the automobile in his shirt sleeves. Morain testified that the license plate on the car, which pulled off in a westerly direction, bore license number 75X530 on the front end and that there was no license plate on the rear end. He gave the license number to a clerk in the market, who wrote it down correctly. He saw the car a couple of days later at a police station. It was appellant Wright's car.

Booker Forston was operating a shoeshine stand across the street from the market. About 2:45 he heard a scream, looked up, and saw a man grab some money from Mrs. Brown, run, get in a car and speed away. The car was a light cream colored coupe. The man had a cap on something like the cap shown him. He did not see a license plate on the rear of the car.

Appellants had known each other about 30 years prior to the day of the theft. They were born in Oak Park, Illinois, grew up together, and had been neighbors in Chicago. Wright came to California in December, 1947, and engaged in the engineering business with an office at 8511 Sunset Boulevard, Los Angeles, at the time of the theft. He lived at the Hollywood Athletic Club, 6521 Sunset Boulevard, about 2-½ miles from his office. Casey had been in California about 6 years and lived at 1625 South Vineyard, Los Angeles, about 3 to 5 blocks from the Alexander Market. He is a veteran. He had been employed by Wright for about 3 months between January and March, 1948. Casey knew where the Alexander Market was located and had been there several times. He told a police officer, "I think I even know the girl." Wright knew where Casey lived and his exact address from memory. On April 12th or 13th, 1948, Wright went to Casey's home and got him out of bed at 8:15 a. m., ostensibly to talk about employing him. On the night of April 16, 1948, Wright and Casey met on the corner of Rimpau and Pico Streets about 7 blocks north of the Alexander Market at about 10:00 p. m., also ostensibly to talk about Casey's employment. Casey did not own an automobile. On March 12, 1948, Wright rented from a rental agency, and on April 19, the day of the theft, he had in his possession, a light gray Plymouth coupe, 1947 model, with license number 75X530, with both front and rear license plates attached. On occasions Wright parked this car in a parking lot at 6521 Sunset Boulevard, next door to the Hollywood Athletic Club, where he lived.

On April 19, 1948, about noon, Wright parked the car in the parking lot, went into the Athletic Club, had lunch, had a conference with Jack Cartwright, and then went with Cartwright to the lobby. When they arrived in the lobby "close to" 2:00 p. m., Casey was there. Wright stepped over to Casey, spoke to him a few moments and Casey left. A few minutes later Wright went to the parking lot, talked to the attendant, took the Plymouth, and about 2:00 p. m. left with Casey in the car. At that time both front and rear license plates were on the car.

The police began an investigation of the theft about 5 minutes after it occurred. After learning that the Plymouth with license number 75X530 was rented to Wright, they went to the Athletic Club about 5:00 p. m. and found Wright wearing glasses in the lobby. Wright told them that the car was in the parking lot next door. Two officers and Wright proceeded to the parking lot where they found three men starting to wash the car. The rear end had not been washed. The car appeared to be quite clean. There were several fresh scratches just back of the license plate. The officers found a sort of denim cap in the glove compartment similar to those used by firemen and brakeman on railroads. Wright told the officers that he had bought the cap; he did not know where; he had a friend up in the country who had a farm or something; he was going to do some rock work up there; he bought it to wear up there; he had never worn it. Wright told the officers that he had arrived at the club at noon and had stayed until 3:15 or 3:30; he did not meet any one downstairs in the club except Cartwright; when he left he drove directly to his office; he had not gone any place with the car that afternoon except to the club and to his office.

The officers examined the rear license plate. It was loose. There were three small bolts which fastened the plate to the rear end of the car, called the turtleback. The nuts on two of the bolts were very loose. They could be screwed or unscrewed with the fingers. The nut on the third bolt was missing. An officer found the missing nut on the pan between the bumper and the body of the car near the handle of the turtleback and placed it loosely on the bolt. He then lifted the turtleback three times and dropped it down hard. Each time the nut fell off and rolled into the back end of the car. In the rear end there was a place alongside of the spare tire for the tool kit. The kit was out of its place lying on the floor. A pair of pliers was out of the kit on the mat. The distance between the license plate and the turtleback was not more than ⅛ inch. Each of two officers was unable to place his finger between the license plate bracket and the body of the car.

On the face of the rear license plate, the officers found fingerprint smudges which they were unable to identify because there were water spots on the rear of the car. They found a print of Wright's right thumb in an upward position on the rear of the plate about two inches from the right-hand side as one faces the plate and about one inch from the bottom of the plate. When confronted with this fact and told that he must have had the plate off to get the fingerprint on it, Wright answered, "I don't know what happened." He said that he had not had any occasion to be near the back plate; that the only time he had been near the turtleback was about a week before when he put a bed roll in the rear end of the car. On April 22nd, Wright told the officers he thought he could explain how his fingerprint got on the license plate, and proceeded to do so. On the witness stand he admitted the story was a fabrication.

On April 20th, Wright was interrogated by police officers as to his movements on the 19th. He stated that he left his office about 12:40 p. m. arrived at the club about 12:50, had lunch, stayed with Mr. Cartwright on an upper floor from about 1:30 until 2:40 or 2:50, did not see any one in the lobby, went to a linotype company and to the auto park next to the club about 3:25; he did not "meet a soul" in either the lobby or the auto park; he took his car out of the park and drove directly to his office where he stayed until 4:50. One of the officers testified that after Wright had made this statement, the following occurred:

"Then I said, 'Well, Mr. Wright,' I said, 'the fact of the matter is,' I said, 'you left Mr. Cartwright much earlier than that, because I have two witnesses that will testify that you left that auto park no later than five minutes to 2:00.' And he said, 'No, it couldn't be.' He said, 'I left there about 3:30 or 3:25.' 'Well,' I said, 'these same two witnesses,' I said, 'are willing to state that you left there with another man.' I said, 'Now, isn't that a fact?' And he stopped a minute and he said, 'Well, yes, come to think about it I did leave there with another man.' I said, 'Well, who is that man?' He said, 'Dan Casey.' I said, 'Where does Dan Casey live?' He said, '1625 Vineyard.' I said, 'Have you known him long?' 'Well,' he said, 'he used to work for me'. And I said, 'It is a fact,' I said, 'that you met him in the club, didn't you, when you came downstairs after you talked to Mr. Cartwright? Didn't you tell Mr. Cartwright that you had to meet a man downtown, downstairs?' He said, 'Well, I don't remember, but,' he said, 'I met him, but I didn't meet him downstairs.' He said, 'I met him in the doorway of the Hollywood Athletic Club.' I said, 'You went out and got in the car with him?' He said, 'Yes.' I said, 'Where did you go after you left the auto park?' He said, 'I drove east on Sunset to Cahuenga, north on Cahuenga to Hollywood Boulevard and then west on Hollywood Boulevard, and I stopped at Hudson Street and I left Mr. Casey out at Hudson Street, Hudson and Hollywood.' I said, 'Where did you go then?' He said, 'I went directly to my office.' I said, 'Well, when you were with Mr. Casey,' I said, 'You know him quite well; he used to work for you.' He said, 'Yes.' I said, 'What was the purpose of him meeting you?' He said, 'Well, I was putting out this magazine for the Athletic Club and I thought that he might be able to sell that type of insurance, and' he said, 'he came to see me about a job.' I said, 'Well did you notice during this time whether Mr. Casey was drinking or was drunk or had been drinking during the time that you were with him in the car? You know him pretty well.' He said, 'Well, he might have had a drink,' he said, 'but I didn't notice that he was drinking or drunk.' He said, 'He talked all right to me. He said he wanted to get out of the car, that he had some shopping to do.'" Wright told the officers that he had not seen Casey for a month or more before the 19th.

On April 20th, about 5:00 p. m., the officers went to Casey's apartment, knocked, and rang the bell repeatedly, and received no answer. They entered with a key obtained from the owner and found Casey in bed. He appeared to have been drinking, and dressed reluctantly. He told the officers he had spent the 19th on Hollywood Boulevard getting a haircut and in about six bars. He named one bar, but did not name any others. He said he did not know what time he had returned to his home. He denied knowing Wright. Later he said he had known him for 30 years. An officer asked him how long it had been since he had seen Wright. He answered, "Oh, I don't know. It has been quite awhile." The officer asked him if he had seen Wright "yesterday." Casey answered, "I don't want to answer that question. I don't know too much of what I did yesterday. I was drinking, you know. I was pretty drunk." Later that evening at a police station the officers told Casey they believed he was implicated with Wright in a robbery and asked him to give them the time and places he had attended on the 19th. He answered, "I am not going to tell you anything. I don't know anything. I wouldn't do anything to hurt Mr. Wright. He is a great guy." The interrogation on April 20th was discontinued because Casey appeared to be in an intoxicated condition.

On April 21st when interrogated by other officers as to his movements on the 19th, Casey told about getting a haircut and visiting a number of bars, naming some of them; that he was pretty drunk and did not remember what happened or where he was. He was asked if he had gone to the Hollywood Athletic Club. He replied, "No. I didn't go there." He was asked if he had met Wright at the Hollywood Athletic Club and gone to the Alexander Market. He said, "No. I wasn't there." He was asked if he had met Wright. He answered that he went to Wright's office about 4:00 o'clock about getting a job—"I was going to work for him selling advertising." He said he stayed about five minutes; that Wright gave him the "brush-off"; that that was the only time he saw Wright that day; that he then got on a bus and went home, arriving about 6:00.

In a conversation on April 22, between police officers and Wright and Casey, both being present, Wright said he met Casey as he was coming out of the club; that Casey got in the car with him at the auto park, and he drove to Hollywood Boulevard near Hudson, where he let Casey out. One of the officers asked Casey if that was true. Casey replied, "Well, I don't remember it, but if Wright says it, it must be so." The officers had Wright try on the cap found in the glove compartment. He could hardly get it on his head. They then had Casey try it on. It appeared to fit him perfectly.

An officer drove two different routes from the Hollywood Athletic Club to the Alexander Market at about 2:00 p. m., going about 30 miles per hour under normal driving conditions. One route was 4.9 miles. It took him 12½ minutes. The second route was about 5 miles. It took him 13½ minutes.

Casey testified he saw Wright twice on April 19th, once in the lobby of the Hollywood Athletic Club, about 1:30 p. m., when he talked to him about three minutes and left, and again at Wright's office about 4:30 p. m.; that he had had two drinks before meeting Wright at 1:30. He denied having been in the parking lot with Wright or leaving the lot in Wright's car. He testified he was not intoxicated on the 19th; that he had only two bottles of beer on the 20th, the day he was arrested, and was not under the influence of liquor at that time; that he had been at the Alexander Market a good many times and had traded there. He denied he was in the vicinity of the market on the 19th and denied he had anything to do with the theft.

Wright testified he had never removed the rear license plate. He admitted he told the officers he had removed it on the 18th and that this statement was false. He testified he met Casey about 2:00 p. m. on the 19th in the lobby of the club; that Casey got in the car at the parking lot about 2:15, and he drove him to Hollywood Boulevard, between Hudson and Cherokee, and then drove to his office, arriving there about 2:40; that he next saw Casey about 4:30 at his office; that he left his office about 5:00 p. m., drove to the club parking lot and gave instructions to have his car washed because some one suggested he have it done. Wright testified he purchased the cap found in the glove compartment of his car about a month before April 19; he did not try it on when he bought it; later when he tried it on he could not get it on his head. He testified he had raised the turtleback of the car at least 10 or 12 times before April 19; he had done so on April 17 and 18, although he had only driven between the club and his office on those days. He admitted having been at Casey's home on April 12 or 13, and having met him at the corner of Rimpau and Pico about 10:00 p. m. on April 16, when he was with him about an hour. Wright denied he was in the vicinity of the market on April 19, and denied he had anything to do with the theft.

[1-8] Counsel for Wright, in an able and exhaustive brief, discusses the evidence at length, arguing the credibility of the witnesses and the weight of the evidence. These were matters for the jury and for the trial judge on the motion for new trial. We think it manifest without discussion that there is substantial evidence sufficient to support the verdict against Wright. Casey argues that Mrs. Brown did not identify him positively; that she testified he looked like the man who took the moneybag "from his height and coloring and age, and all that," and that she was not sure it was Casey, and that the other facts and circumstances shown by the evidence merely arouse suspicion. Unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support a verdict, it cannot be set aside on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. If the evidence reasonably justifies the verdict, our opinion that it might also be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631. The rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence, is a rule of instruction for the jury and is not the rule for the guidance of the court on review. Where the jury rejects the hypothesis pointing to innocence and there is evi-

dence to support the implied finding of guilt as the more reasonable of the two hypotheses, we are bound by the finding of the jury. People v. Newland, 15 Cal.2d 678, 682, 104 P.2d 778. It is the jury which must be persuaded beyond a reasonable doubt of the guilt of the defendant, not this court. People v. Smith, 35 Cal. App.2d 73, 76, 94 P.2d 633. Our function is to determine whether the evidence is of such character as, if believed, justifies conviction.

[9] The circumstances implicating the defendant Casey were such as to meet this test. Casey and Wright were intimates. Casey's apartment was but 3 to 5 blocks from the Alexander Market. He knew the market well. By his own admission, he may have known the victim of the theft. He and Wright were together at his home on April 12 or 13. They were together again on April 16, at 10:00 at night on a street corner not far from the place of the theft. Wright had a business office where they could have met. Casey met Wright at the club just before 2:00 p. m. on the day of the theft. He got into the car with Wright about 2:00 p. m. and drove away. The car was a light gray Plymouth coupe, with license number 75X530. Within about 30 minutes (ample time to remove the license plate and drive to Washington and Rimpau) a light gray Plymouth coupe with the rear license plate removed, and license number 75X530 on the front end, was used as the getaway car. Casey, from his height, age and coloring, looked like the man who took the moneybag. The man who took the money wore a cap exactly like the one found in the glove compartment of Wright's car. The cap fitted Casey. About 4:00 p. m. Casey met Wright at Wright's office. About 5:00 p. m. Wright drove the car into the club parking lot and directed that it be washed, although it appeared clean. Shortly after 5:00 p. m. the rear license plate was found to be loose and appeared to have been recently removed. The loose nut had not bounced off from between the bumper and the body of the car. Wright's fingerprint was on the inner side of the rear plate where it could not have been placed unless the plate had been removed. The jury could infer that Casey became intoxicated to throw the officers off the scent. He denied on the witness stand that he was intoxicated. He made false, evasive and contradictory statements to the officers. The jury was warranted in inferring that he testified falsely. These circumstances and the reasonable inferences therefrom are ample to support the verdict against Casey. Cf. People v. Latona, 2 Cal.2d 714, 721, 43 P.2d 260; People v. Harris, 87 Cal.App.2d 818, 823, 198 P.2d 60; People v. Sturman, 56 Cal.App.2d 173, 180, 132 P.2d 504; People v. Stark, 16 Cal. App.2d 467, 60 P.2d 595.

[10] We have examined the cases relied upon by appellants in which judgments of conviction were reversed because of insufficent evidence to connect the defendant with the offense charged. Analysis of them would unduly lengthen this opinion. Whether there is evidence to support the verdict depends upon the circumstances of each case. We find nothing in the cases relied upon which would justify a reversal as to either of them.

[11] Appellants contend that the court erred in instructing the jury that an essential element of the crime of grand theft is criminal intent; that this does not mean that one must intend all the consequences of his conduct, or that he must know that such conduct is unlawful, to be guilty of the offense charged; that the intent to do the forbidden act constitutes the criminal intent. (California Jury Instructions Criminal, No. 71.) They argue that a specific intent is an essential ingredient of grand theft; that a specific intent must be proved and may not be based on a presumption. Assuming without deciding that the giving of the instruction was error, it was not prejudicial. The evidence is conclusive that the theft was committed. Neither appellant contended otherwise in the trial court and neither contends otherwise here. The sole contention of each below and here is that the evidence is insufficient to connect him with the offense committed. Intent was not an issue A man does not

grab a bag of money, run away with it and keep it unless he intends to steal it. Under these circumstances the error, if any, was harmless.

[12] Appellant Casey contends that the court erred in instructing the jury that the law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. (California Jury Instructions Criminal, No. 78.) He argues that if he was so intoxicated as not to be conscious of his act, such fact could be taken into consideration by the jury in determining the intent with which the act was committed. At the trial Casey testified and claimed he was not intoxicated on the day of the theft. As we have said, the question of intent was not an issue. The instruction obviously was not prejudicial. There was no implication in the instruction that the court thought him guilty, as appellant Casey argues.

[13] Appellants claim the court erred in telling the jury that where a defendant makes false, evasive or contradictory statements in the face of an accusation expressed directly to him or in his presence charging him with the offense for which he is on trial or tending to connect him with its commission, and they find that he heard the accusation or understood its nature, his conduct may be considered against him as indicating an admission that the accusation thus made was true. California Jury Instructions Criminal, No. 30. Appellants argue that "When a person is accused of crime, it is not the statement that constitutes an admission, but it is silence that is an admission—not the making of false, evasive or contradictory statement that constitute an admission." The argument is fallacious. The making of a false, evasive or contradictory statement may constitute an admission. Code Civ.Proc. § 1870, subd. 3; People v. Simmons, 28 Cal.2d 699, 712, 718, 172 P.2d 18; People v. Megladdery, 40 Cal.App.2d 748, 784, 106 P.2d 84.

The judgments and orders are affirmed.

SHINN, P. J., and WOOD, J., concur.

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94 Cal.App.2d 100

PEOPLE v. HIGHT et al.

Cr. 4327.

District Court of Appeal, Second District,
Division 2, California.
Oct. 10, 1949.

Rehearing Denied Oct. 19, 1949.

Hearing Denied Nov. 7, 1949.

Harry J. Hight and others were convicted in the Superior Court of Los Angeles County, Percy Hight, J., of kidnapping, and they appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgment holding that the evidence sustained the conviction and that the verdict of guilty of kidnapping was not inconsistent with the verdicts of not guilty of conspiracy to murder and attempted murder.

1. Kidnapping ⟹5

Evidence that prosecuting witness was forced to enter automobile for a "ride" and forced to remain therein until he could effect escape sustained conviction of kidnapping. Pen.Code, § 207.

2. Criminal law ⟹1159(2)

A judgment of guilty derived from sufficient substantial evidence cannot be reversed upon any hypothesis.

3. Criminal law ⟹1144(13), 1159(2)

Appellate court must assume existence of every fact reasonably inferable from evidence and then determine whether verdict is supported, even though circumstances might be consistent with innocence of accused.

4. Criminal law ⟹1159(2)

That record of criminal case may contain much or little evidence contrary to verdict is not ground for reversal.

5. Criminal law ⟹1159(2)

Where sufficiency of evidence in a criminal case is questioned, sole responsibility of appellate court is to determine whether adopted evidence is sufficient.

6. Criminal law ⟹878(4)

Verdicts of not guilty of conspiracy to murder and attempted murder based on same evidence as received in prosecution for kidnapping did not directly conflict with finding that defendants forcibly transported witness so that conviction of kidnapping would not be reversed on ground that verdict was inconsistent with findings and with evidence. Pen.Code, §§ 207, 954.

7. Kidnapping ⚿1, 6

Kidnapper's possession of a deadly weapon while perpetrating crime is not an element of such offense but that fact is pertinent to extent of his punishment only. Pen.Code, §§ 207, 954, 3024.

8. Criminal law ⚿1159(4)

Testimony of prosecuting witness in prosecution for kidnapping as to his fears could not be rejected by reviewing court merely because to some persons behavior might have appeared unusual.

9. Kidnapping ⚿5

Evidence sustained conviction of kidnapping. Pen.Code, § 207.

On Petition for Rehearing

10. Criminal law ⚿1133

Where trial court made an order pursuant to stipulation of the parties for the jury to inspect the premises after a verdict on one count of kidnapping had been signed following two days' deliberation, petition for rehearing would not be granted on ground that jury was permitted to go out and view the scene of the crime.

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Richard C. Fildew, Los Angeles, for appellants.

Fred Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

MOORE, Presiding Justice.

From a conviction of kidnapping defendants demand a reversal of the judgment on the grounds of (1) insufficiency of the evidence, (2) its inconsistency with the jury's implied findings and (3) the improbability of its truth.

The Evidence is Sufficient

The evidence adopted by the jury established that about 12:15 a. m. of a morning in May, 1948, appellants were engaged in operating games of chance in the city of Compton. Some 15 persons were present in the old barn gambling hall when a group of bandits swooped down upon and robbed them, taking from appellants about $2300. During the criminal performance one Jerald Jenkins, complaining witness herein, while suffering a nose bleed asked a robber to assist him to blow his nose so that he might breathe; also he pleaded for the return of his long cherished silver dollar. Compliance with these requests created a suspicion in the minds of appellants that Jenkins was there as the "finger man"[1] for the desperadoes and their subsequent movements were inspired by that suspicion.

Forty feet south of the gambling hall stood another barn used for bedding horses. Upon arrival Jenkins had parked his truck next to the barn and could from the driver's seat observe the gambling house and its front entrance. Other automobiles were parked nearby. Jenkins testified that after the robbery Hight ran to some point south of the gambling house and returned with a revolver. Appellants and Jenkins entered an automobile and attempted to overtake the fleeing brigands.

Having returned from their vain pursuit, the men speculated upon the identity of the marauders as Jenkins gathered up his billfold, bank book and scattered papers. Suddenly, as he started toward his truck, Hight approached, accusing him of having knowledge of the thieves and demanded to know their names. At this juncture the landlord of appellants heard Dunn accuse Jenkins of "fingering" the robbery. As he was denying knowledge of the bandits, Hight jammed something into Jenkins' back as Fairbairn flanked him on the right and Dunn followed in the rear. Dunn said: "You had better keep moving," as one of the trio pushed Jenkins toward the barn which he entered. There they vehemently demanded that he "better start spilling." To his disclaimers of knowledge of the midnight visitors, Fairbairn said, "You had better start talking * * * if you don't you're going on a ride you're not coming back on. How would you like to go to the river bed? I guess we're going to have to start working." As Jenkins remonstrated, Dunn said, "Let's go. Start walking towards that door." When Jenkins stated that he was going home, Hight said, "You are not going home; you're going for a ride; come on." At that command the three men closed in on their prisoner and escorted him to an automobile. Hight jammed something against his back as he ordered, "Get in the car." By reason of his fear of the men, Jenkins occupied the rear seat with Fairbairn to his right while Hight sat to the right of Dunn who drove. They proceeded over principal thoroughfares and by devious turns until they had reached a remote dirt road paralleling the riverbank. On Hight's command Dunn stopped in a weed patch a short distance from a principal highway. Jenkins testified that during the ride Hight held a "38" revolver in his had on the back of the seat. Dunn extinguished the lights and shut off the motor. As the two men on the right disembarked, Hight handed the revolver to Fairbairn who ordered Jenkins to leave the conveyance. The latter testified that Fairbairn pointed the gun at him and moved the barrel "upward and downward." When the marksman commanded his victim to back further into the high weeds Jenkins replied, "If you're going to shoot me, you might as well shoot me now." When the gun fired, Jenkins in attempting to flee struck the front of the car with his left side. This turned him around enabling him to witness the "muzzle flaming" as it was held by Hight.[2] As Jenkins, terrified by succeeding shots, fled through the darkness he was unaware of his wounded arm until he had fallen over a clod. He made his way to a house on the boulevard immediately after the three men had driven by in the unlighted car. The occupants of the home called the police. When the ambulance arrived, six minutes after his collapse, Jenkins was bloody, his clothes were torn and soiled, his shirt severed in several places. After his removal to a local hospital he was treated for bullet wounds in the upper as well as in the lower left arm.

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[1] Advanced lookout.

In the car driven by the miscreants the officers on the same day found a rope, dice, poker chips and a white cloth stained with blood. Hight and Dunn told the officers that when Fairbairn returned to the automobile one of his fingers was bleeding; that they heard two shots and saw Jenkins running; that they believed Jenkins was one of the bandit gang. Dunn testified that at the holdup Jenkins said he knew one of the robbers; that the $2,300 stolen was his own; that after the first ride he did not suspect Jenkins of having been the "finger man" for the bandits.

He and his two codefendants at the trial denied having accused Jenkins of being in league with the bandits and denied all his testimony as to their possession of a gun and denied having forced him into the barn or into the automobile and denied that they discharged a revolver at the river or turned off their lights. Not only was their denial of all of Jenkins' accusatory testimony sweeping, but they related a fantastic story of how Jenkins left the automobile at his own request, defiantly remonstrated that they should not take him to the police station, and ordered Fairbairn back into the car. They asserted that Jenkins flourished a revolver, a scuffle ensued in which the revolver was discharged and that Jenkins took flight with his gun in hand. However, no firearm had been found on Jenkins by the bandits when they raided the gambling den, he had no opportunity to get one before the ride, none was found on his person when he arrived at the home on the boulevard and the discovery of one in that vicinity was never reported.

A marine testified that he was walking along the boulevard in that vicinity at 1:15 a. m. of the same day and observed an automobile parked some 60 feet from the boulevard with its lights extinguished. After he had gone a short distance he heard a gun shot from the direction of the same parked car and in five seconds four more shots in rapid succession. After he had run some distance the unlighted car passed him.

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[2] All the testimony as to the shooting of Jenkins and the possession of the gun by appellants was by Jenkins and was denied by the three kidnappers.

[1-3] Conceding the absence of a deadly weapon from the possession of appellants following the holdup, their language and conduct were so severe and savage as to constitute force and threat of force sufficient to put an ordinarily prudent person in fear for his personal safety. Not only did they threaten to take Jenkins for a "ride" from which he would not return, but they closely guarded him and compelled him to enter the motor car, conveyed him to the weed patch in a sparsely settled area and repeated the same demands. Whether he entered the machine voluntarily or not, the jury were entitled to infer from the proof that he was conveyed to the remote spot against his will. People v. Trawick, 78 Cal.App.2d 604, 606, 178 P.2d 45. From the testimony of Jenkins, if believed, an inference of his enforced restraint was unavoidable. People v. Flores, 62 Cal.App.2d 700, 703, 145 P.2d 318. Their threats indicated a malign and vindictive purpose and they had the power to enforce them. He protested accompanying them as long as he thought it reasonably safe to do so and they expelled him from the vehicle in a remote and dismal weed patch with anything but friendly feelings. That appellants had a motive is proved by their belief that Jenkins was a "finger man" for the bandits. They admitted such belief to the officers. These facts fully meet the requirements of the kidnapping statute. Penal Code, sec. 207. A judgment of guilty derived from sufficient substantial evidence cannot be reversed upon any hypothesis. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The appellate court must assume the existence of every fact reasonably inferable from the evidence and then determine whether the verdict is supported. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. This principle is emphasized where the trial judge has approved the verdict. Also, it is controlling even though the circumstances might be consistent with the innocence of the accused. People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631.

The Verdict is Consistent With the Findings and With the Evidence.

[4, 5] That the record may contain much or little evidence contrary to the verdict is not ground for reversal. The judgments in most contested cases are the results of conflicting proofs. It is the function of the trial court to resolve by its findings such conflicts and to enter the required judgment. With properly rejected evidence courts of appeal are not concerned. Where the sufficiency of the evidence is questioned, their sole responsibility is to determine whether the adopted evidence is sufficient. People v. Newland, supra; People v. Ohman, 67 Cal.App.2d 467, 154 P.2d 463.

[6, 7] Appellants contend that they are entitled to a reversal because the finding of their guilt of kidnapping (count 3) is inconsistent with the verdicts of not guilty of conspiracy to murder (count 1) and attempted murder (count 2). They assert that the verdicts on counts 1 and 2 "based upon the *same* evidence directly contradict and conflict with the finding that appellants forcibly transported Jenkins" and that the verdicts of not guilty on the first two counts cannot be reconciled with their inconsistent finding of guilty on the third count. Such logic is specious. The finding that there was no gun in the possession of appellants when they forced Jenkins into the motor car and while they transported him to the weed patch did not determine contrary to the prosecution a factor that is essential to a case of kidnapping. The kidnapper's possession of a deadly weapon while perpetrating his crime is not an element of such offense. That fact is pertinent to the extent of his punishment only. Penal Code, sec. 3024.

Jenkins did not voluntarily accompany appellants on the fatal ride. He at first resisted their invitation, then yielded when threatened by three resolute men who viciously forbade him to mount his truck, and displayed a unified purpose to abduct him as one of them pressed a hard substance to his back and directed him to enter their car. The jury determined that at the time of the kidnapping each "defendant was not armed with a deadly weapon."

While in view of the record such finding shocks the sense of reason, logic and justice, yet possession of such weapon is not an essential of the crime of kidnapping. The jury believed that appellants threatened dire results for Jenkins' noncompliance, that their show of force was ominous and that they actually conveyed him to a locality remote from the barn at which the ride began. Because they did not find any evidence of an agreement to commit murder and because appellants' possession of a gun was not established beyond a reasonable doubt, their determination that Jenkins was forcibly transported is not thereby depreciated. It is at once evident that a total lack of proof of an agreement to commit a murder is not necessarily a finding that the alleged overt act did not occur.

A man may be readily acquitted of murder by reason of the absence of proof of the mental element essential to the establishment of that crime although the act he did may have been admitted by him. Likewise, a group of men accused of conspiracy to commit murder may be exonerated of that charge for lack of evidence of their agreement to kill, while at the same time they may separately have purchased murderous weapons. They might even have by force compelled the alleged victim to drive with them to a lonely spot to settle their differences without a thought of murder. Would they be innocent of kidnapping because at the commencement of their drive no one of them had thought of the more serious offense? In acquitting these appellants of a conspiracy to murder the jury did not necessarily intend to find that they did not do the overt acts alleged. It must be assumed that they intended to do exactly what they wrote in their verdicts, namely, to clear appellants of an agreement, conspiracy or confederation and to convict them of kidnapping. Verdicts acquit men of crimes but seldom of the acts alleged. If acquittal of the crime of conspiracy to commit murder were tantamount to an exoneration of the alleged overt act, there would be no virtue in section 954 of the Penal Code which specifically provides that an acquittal on one count is not to be deemed an acquittal on any other count. Penal Code, sec. 954; Fricke's Calif.Crim.Law, 2d Ed., p. 143.

The authorities cited by appellants in support of their second proposition are not apropos. See People v. Koehn, 207 Cal. 605, 279 P. 646; In Re Johnston, 3 Cal.2d 32, 43 P.2d 541; People v. Novo, 12 Cal. App.2d 525, 526, 55 P.2d 915, 916, 56 P.2d 560. Koehn had been convicted of attempted murder and malicious use of explosives. The former was reversed because it was inconsistent with the finding that in placing the bomb near the judge's residence defendant intended merely to intimidate—not to destroy. The Novo and Johnston cases are each distinguished by facts that the conviction of acts alleged in one count was inconsistent with verdict of acquittal of the same acts which were alleged in a separate count. Novo was accused in two counts, (1) of entering a dwelling in the nighttime with intent to commit rape, (2) of assaulting a woman not his wife by means of force and violence to accomplish sexual intercourse with her. Although both charges arose out of the same transaction the accused was found guilty of burglary under count 1 and of simple assault under count 2. That part of the judgment based upon the finding of a simple assault was held void and stricken and the conviction of burglary was affirmed because it was "amply supported by the record." Verdicts are not inconsistent unless they are rendered upon charges wherein the elements of the offenses alleged are identical. People v. Doxie, 34 Cal.App.2d 511, 512, 93 P.2d 1068. There is no identity of findings (1) that A conspired with B to kill C and (2) that A and B kidnapped C. Neither is there a conflict in the findings (1) that A and B did not conspire to kill C and (2) that A and B kidnapped C.

The Penal Code provides, sec. 954, that different offenses arising out of the same circumstances may be charged, election is not required, and acquittal of one or more counts shall not be deemed an acquittal of any other count. See People v. Amick, 20 Cal.2d 247, 125 P.2d 25, wherein it was held that involuntary manslaughter and negligent homicide were not identical.

In the Johnston case the defendants were indicted in 13 counts for selling corporate stock in nonconformity with the Corporate Securities Act, and in a 14th count of conspiring to violate the provisions of the Act in furtherance of which they committed certain overt acts which were identical with the crimes charged in the preceding counts. They were convicted of the conspiracy and acquitted of all the other 13 counts. It was held that because the specific controls the general, the court was without jurisdiction to pronounce a judgment on the conspiracy count.

The Evidence Is Not Improbable

[8] Appellants argue that the evidence is improbable because (1) Jenkins alone testified that Fairbairn and Hight shot at him, (2) the paraffin test on such appellants taken on the morning of their arrest was negative, (3) Jenkins' first ride with appellants was voluntary and free of threats, (4) he did not attempt to leave the machine when it stopped for signals, (5) there is no evidence of Jenkins' resistance to the demands that he accompany them, (6) Hight's car as well as Jenkins' truck were at the barn, (7) Jenkins was impeached. Such matters were solely for the jury if there was any substantial proof of them. The testimony of Jenkins was potent evidence of the facts recited in the early part of this discussion. The paraffin test was not determinative since it was not shown that Hight and Fairbairn had not previously washed their hands with a cleaning solvent. That Jenkins remained silent and that his silence was induced by fear of appellants were questions answered by the jury. His testimony as to his fears cannot be rejected by the reviewing court merely because to some persons his behavior might have appeared unusual. People v. Klinkenberg, 90 Cal.App.2d 608, 626, 204 P.2d 47; People v. Newland, 15 Cal.2d 678, 104 P.2d 778. His fear of the men was a natural emotion and his conduct was discreet in not attempting to escape from three stern, indignant men who were suspecting him of complicity in the offense which had caused their loss. People v. Flores, 62 Cal.App.2d 700, 702, 145 P.2d 318. As to the jury's finding that appellants had no pistol while they kidnapped Jenkins the only consistent view thereof is that the jury intended to declare that it had not been proved beyond a reasonable doubt that appellants possessed a gun.

[9] The attempt to impeach Jenkins adds virtue to his testimony. If there is any merit in the seven arguments of appellants listed in the preceding paragraph, the jury had additional cause to accept them as they listened to the bludgeoning of the only witness to testify to the truth of the crime charged. While the impeaching evidence was depreciated by the animus or self-interest of the witnesses, yet, conceding to the fullest measure the sincerity and adequacy of the impeaching witnesses, the jury is not required to disbelieve the narrative of a witness merely because he may have been shown to be devoid of all sense of honor, truth and integrity. He may be competent though degraded; he may be believed though unworthy; he may report the truth accurately though contradicted by others. It is the function of the jury to appraise his utterances and to record their value. See People v. Cox, 66 Cal.App. 287, 293, 226 P. 14.

Finally, the approval of the verdict by the trial judge who saw, heard and evaluated the accused and their accuser leaves little to be said. No assignment is made of any ruling as erroneous. They rest their appeal upon the record and upon the court's denial of a new trial.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

On Petition for Rehearing

PER CURIAM.

[10] Appellant Dunn seeks a rehearing of the judgment of affirmance herein on the ground that after two days' deliberation the jury was permitted to "go out and view the scene." This point was not presented at the original hearing. It would be just as well had it never been mentioned. The court made the order pursuant to

stipulation of the parties for the jury to inspect the premises after a verdict on one count had been signed following two days' deliberation.

Rehearing denied.

94 Cal.App.2d 215

COMMERCIAL LUMBER CO., Inc. v. UKIAH LUMBER MILLS.

Civ. 17024.

District Court of Appeal, Second District, Division 2, California.

Oct. 19, 1949.

Rehearing Denied Nov. 4, 1949.

Hearing Denied Dec. 15, 1949.

The Commercial Lumber Company, Inc., sued the Ukiah Lumber Mills and another, to recover a balance alleged due under a written agreement.

The Superior Court of Los Angeles County, Samuel R. Blake, J., denied a new trial and rendered a judgment for the corporate defendant, and plaintiff appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment, dismissed the appeal from the order denying a new trial, and held that there was no implied ratification by the defendant corporation of a contract between plaintiff and the individual defendant.

1. Appeal and error 🔑172(1)

Where corporation which lent money to individual sued second corporation on the contract and neither complaint nor answer raised issue of alter ego relationship between the individual and second corporation, and plaintiff declined to amend complaint to cover that issue, and issue was not covered by the findings to which no amendment was proposed and no objections were made, alter ego issue could not be raised on appeal.

2. Corporations 🔑448(2)

Where first corporation loaned money to individual under agreement that individual would deliver lumber to first corporation subject to credit until loan was repaid, and thereafter individual acquired second corporation and turned over portion of loan to it and received stock but concealed existence of the agreement, first corporation could not recover on the contract against second corporation on theory of implied ratification.

3. Corporations 🔑426(10)

Even if corporation receives benefits of a contract, ratification will not be presumed unless corporation has actual knowledge of specific contract out of which the benefits arose.

4. Corporations 🔑428(11)

Knowledge of a director who is directly interested in a contract is insufficient to charge the corporation; and knowledge of a promoter who subsequently becomes a director cannot be imputed to the corporation.

5. Corporations 🔑432(8, 11)

Where statements and admissions of individual did not establish that individual at any time possessed actual or ostensible authority to adopt or ratify a certain contract on behalf of a corporation, such evidence was not admissible against the corporation in action on the contract to sustain contention that individual was acting as authorized agent and that there was a ratification.

6. Continuance 🔑12

Where case was tried by member of law firm who had signed complaint and presumably had knowledge of facts at time he drew pleading, and member of firm for whose illness continuance was requested attended trial and appeared as witness and plaintiff was well represented and case was competently tried, refusal of continuance on ground of illness of counsel was not an abuse of discretion.

7. Appeal and error 🔑882(17)

Where court allowed defendant a credit of $1,162.72 as repayment on account of $15,000 loaned, after plaintiff had pleaded a credit in amount of $1,162.72 as a deduction from the $15,000 sued for and prayed for judgment for the difference, plaintiff could not complain that findings were inconsistent upon recovering judgment against the defendant for the difference prayed for.

Rosenthal & Chatinover, Los Angeles, for appellant.

Hale McCowen, Ukiah, Julius V. Patrosso, Los Angeles, for respondent.

WILSON, Justice.

From a judgment in favor of defendant Ukiah Lumber Mills in an action brought to recover the balance alleged to be due under a written agreement, plaintiff appeals. Plaintiff has also purportedly appealed from the order denying its motion for a new trial.

The circumstances surrounding the transaction involved are as follows:

Plaintiff and defendant Lyons entered into a written agreement on or about April 9, 1946, whereby plaintiff loaned Lyons the sum of $15,000 and the latter agreed to ship and deliver to plaintiff approximately five million feet of lumber at the rate of five or more railroad carloads per week, the first shipment to commence on or before May 24, 1946. Plaintiff was to be allowed a credit deduction of $3.00 per thousand feet of lumber shipped and delivered until the loan had been paid in full. In the event the weekly shipments were not received by plaintiff the balance due was to be repaid on demand.

Prior to and at the time the agreement was entered into it was the understanding of the parties that Lyons was to form a corporation, erect a sawmill at Ukiah, California, and immediately commence the shipments of lumber to plaintiff in accordance with the agreement. The loan was made to give Lyons capital for this project.

About a week after the execution of the agreement Lyons, in association with John S. Bateman, acquired an existing corporation and caused its name to be changed to Ukiah Lumber Mills. He used part of the $15,000 received from plaintiff to purchase timber, turned the balance over to the corporation and on June 17, 1946, 125 shares of stock were issued to him and his wife jointly. Bateman invested $4,000 in the corporation, for which he received 200 shares of stock; he was to receive $400 a month for his services, which he agreed to take in stock, and he turned over to the corporation certain machinery owned by him in return for which it was understood he was to receive a reasonable price.

Lyons and his wife, Mabel Lyons, and Bateman were elected directors and at the same time Mabel Lyons was elected president, Lyons was elected secretary-treasurer and Bateman vice president. In December, 1946, Bateman sold his stock and Mr. and Mrs. Lyons sold 75 shares of their stock to Messrs. Goforth and McGah. As a result of the transaction Mabel Lyons ceased to be a stockholder and resigned as director and president; Bateman resigned as director and vice president. Messrs. McGah and Goforth were elected directors, McGah becoming president and Goforth vice president. Lyons continued as a director and secretary-treasurer until September, 1947, at which time he resigned and John P. O'Shea was elected to those offices.

The transaction between plaintiff and Lyons was never entered upon the books of account of the defendant corporation or reflected upon its financial statement and no mention of the agreement appears in the minute book. The evidence is undisputed that at no time did Lyons disclose to the new officers of the corporation the agreement he had entered into with plaintiff. On the contrary, he took pains to conceal the transaction.

The first shipment of lumber was made to plaintiff in March, 1947, and several additional shipments were made between that time and July, 1947. Both Lyons and Goforth testified that the lumber shipped to plaintiff was billed at prevailing market prices and there was no credit or deduction noted on the invoice. However, when plaintiff remitted for the invoices it accompanied the payment with a memorandum wherein $3 was deducted from the net purchase price for each one thousand feet of lumber shipped. Lyons concealed these payment memoranda from the other directors and officers. Goforth first learned of the agreement in July, 1947, when he discovered that plaintiff's account was in arrears and called regarding it. Following this Lyons was discharged as an officer.

Plaintiff contends that (1) defendant Ukiah Lumber Mills expressly adopted, ratified and confirmed the agreement with plaintiff or impliedly did so by its voluntary acts and conduct in performing under it and accepting and retaining the benefits thereof with full knowledge; (2) defendant Ukiah Lumber Mills is liable because it was the alter ego of Lyons; (3) there was prejudicial error in the exclusion of certain evidence; (4) there was an abuse of discretion in denying plaintiff's motion for continuance and (5) the findings of fact and conclusions of law are inconsistent and are not supported by the evidence.

Plaintiff concedes that at the time of the execution of the contract Lyons was a stranger to the defendant corporation and was not its agent for any purpose. It does, however, maintain that after Lyons acquired the corporation it either expressly or impliedly ratified the agreement; that express ratification took place before December, 1946, when McGah, Goforth and O'Shea became interested in or connected with the corporation, and at a time when Lyons was for all practical purposes, insofar as third persons were concerned, the corporation.

This contention is based upon the hypothesis that Lyons and his wife owned 125 out of a total of 145 shares of the corporation's issued and outstanding capital stock; that they were directors constituting two thirds of the membership of the board of directors; that neither Mrs. Lyons nor Bateman, who owned the other 20 shares of stock and was the remaining director, took any active part in the business or financial affairs of the corporation, both of them having authorized Lyons to arrange for and take care of its sales, financing and general supervison; that thereby Lyons had the authority to bind the corporation and did so by expressly ratifying the contract in stating to plaintiff's agent that the corporation would fulfill the provisions of the agreement or pay back in full the monies loaned.

Since it is undisputed that there is no record on the books of the corporation of the contract between Lyons and plaintiff or the ratification thereof, plainiff cannot recover from the corporation unless (1) the corporation is the alter ego of Lyons and therefore his acts were the acts of the corporation or (2) there was an implied ratification by the corporation.

[1] The complaint contains no allegations raising the issue of the alter ego relationship between Lyons and the defendant corporation nor any facts which would justify a finding that the corporation was the alter ego of Lyons. Plaintiff contends the issue is raised by the answer of Lyons but that answer cannot be so construed. Moreover, since the purpose of the doctrine is to prevent fraud, it would not be available to Lyons, who was the actor in the transaction, for the purpose of fastening his liability upon the corporation. The trial court in its summation stated that plaintiff had raised the question of alter ego and other theories which it did not plead; that the court would permit plaintiff to amend its complaint. Thereafter the court decided that issue against plaintiff. The complaint was not amended and the issue is not covered by the findings. Plaintiff maintains that since the court had found against it, it would have been an idle act to amend and that the court erroneously made no written finding with respect thereto after making its oral decision. The record shows that the findings were served upon plaintiff on June 22, 1948, and the judgment was not filed until July 26, 1948. The record does not indicate that amendments to the findings were proposed by plaintiff. Plaintiff having declined to amend its complaint to raise the issue and having made no objection to the findings, cannot now complain since it is not necessary that the findings go beyond the pleadings. The issue not having been properly raised is not before this court.

[2] Plaintiff's contention that there was an implied ratification of the contract by the defendant corporation is likewise

untenable. Lyons used part of the $15,000 received from plaintiff to pay for the construction of the mill and to buy timber which was turned over to the corporation. Thereafter he caused stock to be issued therefor which became a liability upon the books of the corporation. The fact that the permit from the Corporation Commissioner specified that the shares be sold for cash does not affect the situation as between plaintiff and the defendant corporation. Plaintiff loaned $15,000 to Lyons upon his credit. At the time the transaction was entered into Lyons had not acquired the corporation and therefore was not its agent. The agreement was signed by him individually. Thereafter Lyons turned over certain assets to the corporation, including the lumber and the balance of the $15,000 he had borrowed from plaintiff and he received therefor 125 shares of stock.

[3, 4] Furthermore, even had the corporation received the benefits of the contract, ratification will not be presumed unless the corporation had actual knowledge of the specific contract out of which the benefits arose. Rideout v. National Homestead Ass'n, 14 Cal.App. 349, 351, 112 P. 192; Abbott v. Limited Mut. Compensation Ins. Co., 30 Cal.App.2d 157, 163, 85 P.2d 961. The only person having actual knowledge of the transaction was Lyons. Bateman testified he had no knowledge of the contract at any time and when at his request Lyons submitted a financial statement of the corporation in September, 1946, it contained no reference to the contract or any notation of any indebtedness due to plaintiff from the defendant corporation. Lyons' knowledge of the transaction cannot be imputed to the corporation. The knowledge of a director who is directly interested in the contract is insufficient to charge the corporation and knowledge of a promoter who subsequently becomes a director cannot be imputed to the corporation. Abbott v. Limited Mut. Compensation Ins. Co., supra; Kiefhaber Lumber Co. v. Newport Lumber Co., 15 Cal.App. 37, 41, 113 P. 691.

[5] Plaintiff maintains that the court erred in excluding evidence as to defendant Ukiah Lumber Mills which was admitted as to defendant Lyons. The evidence in question related to statements and admissions of Lyons which, plaintiff asserts, would sustain their contention that Lyons was acting as the authorized agent of the defendant corporation and that there was a ratification of the contract. A review of the evidence adverted to does not establish that Lyons at any time possessed actual or ostensible authority to adopt or ratify the contract on behalf of the corporation. The most that can be said is that by his statements to plaintiff's agent, Lyons led him to believe that the corporation had accepted the agreement when in fact it had no knowledge of the transaction.

[6] Plaintiff's next contention is that the court erred in denying its motion for a new trial since there was an abuse of discretion in denying its motion for a continuance of the trial upon the ground of the illness of "plaintiff's attorney." The record discloses that plaintiff was represented by a law firm; that the case was tried by the member of the firm who had signed the complaint and who presumably had knowledge of the facts at the time he drew the pleading. The member of the firm for whose illness the continuance was requested attended the trial and appeared as a witness. Furthermore, a review of the record indicates that plaintiff was well represented and that the case was ably and competently tried. Plaintiff was in nowise prejudiced by not having been granted the continuance requested and there was no abuse of discretion upon the part of the trial court in refusing to grant a new trial upon that ground.

[7] Finally plaintiff contends that the findings of fact and conclusions of law are inconsistent and not supported by the evidence in that the court allowed defendant Lyons a credit of $1,162.72, as a repayment on account of the $15,000, for sales and shipment of lumber which was billed at the current market price. Plaintiff pleaded a credit of $1,162.72 as a deduction from the $15,000 and prayed for judgment in the sum of $13,883.28. Since it has recovered a judgment against Lyons

for the amount prayed for there is nothing inconsistent in the findings.

Judgment affirmed. The appeal from the order denying a new trial, which is a nonappealable order, is dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

* * *

94 Cal.App.2d 112

PEOPLE v. QUINN.

Cr. 2588.

District Court of Appeal, First District, Division 1, California.

Oct. 13, 1949.

Hearing Denied Nov. 10, 1949.

Harvey Samuel Quinn was convicted in the Superior Court of Alameda County, Edw. J. Tyrrell, J., on three counts of robbery in the first degree, and from judgments entered on the verdicts and from an order denying motions for a new trial, the defendant appealed.

The District Court of Appeal, Bray, J., affirmed the judgments and order, holding that evidence was sufficient to justify verdicts, that information was not void, that verdicts and judgments thereon were not void, and that district attorney was not guilty of misconduct.

1. Robbery 🔑24(1)

Evidence sustained convictions on three counts of robbery in the first degree.

2. Criminal law 🔑857(1)

Fact that jury was out four hours and two minutes deliberating in prosecution on three counts of robbery in the first degree, before returning verdicts finding defendant guilty on all three counts, did not indicate weakness in the case of the prosecution.

3. Constitutional law 🔑265

Statutes providing that an offense may be charged in the short form and without technical averments, does not deprive an accused of due process. Pen.Code, §§ 951, 952.

4. Robbery 🔑17(6)

Information in three counts charging that district attorney accused defendant of a felony, to wit, robbery, in that on or about certain dates in certain county defendants robbed named persons of specified sums of lawful money, was not void because it did not allege that the money was taken by defendant from possession of another, from the other's person or immediate presence, and against his will as result of force or fear. Pen.Code, §§ 951, 952.

5. Robbery 🔑28

Verdict finding defendant "guilty of felony, to wit: robbery as charged in the first count of the information and we further fix the degree of robbery to be robbery of the first degree," and two verdicts in similar form, were sufficient.

6. Criminal law 🔑881(2)

Verdicts finding defendant guilty of first-degree robbery on three counts, were not void because the information merely charged defendant with robbery on three counts.

7. Criminal law 🔑706

In robbery prosecution, evidence was insufficient to establish any misconduct on part of the district attorney in withholding evidence favorable to defendant.

Harvey Samuel Quinn, in pro per.

Fred N. Howser, Attorney General, David K. Lener, Deputy Attorney General, for respondent.

BRAY, Justice.

Appeal in propria persona from judgments entered upon jury verdicts finding defendant guilty of three counts of robbery in the first degree and from an order denying defendant's motions for new trial.

Questions Involved.

Defendant contends (1) that the evidence is insufficient to justify the verdict; (2) that the information is void; (3) that the

jury verdicts are void; (4) that the judgments are void; and(5) that the district attorney was guilty of misconduct.

1. Evidence Sufficient.

[1] Defendant makes no attempt to point out in what respect the evidence fails to support the verdict, other than a statement that the "testimony of the police inspectors" was "incomplete," but urges (1) that as he is appearing in propria persona and is a layman it is the duty of this court to examine the record scrupulously to see if the evidence is sufficient; and (2) that as it took the jury four hours and two minutes to arrive at the verdicts "this time element alone bears out the fact that there was a doubt in the mind of some of the jurors."

We have carefully examined the record and find ample evidence of defendant's guilt on all three counts. It is not necessary to set it forth in detail. A résumé is sufficient.

First Count. Thoburn Giem, the manager of the Standard Oil Station at 26th and Broadway, Oakland, testified that on the night of October 11, 1948, at about quarter to 12, as he was preparing to close the station, he was held up. A masked man drove into the station, pointed a German Luger at the witness and demanded the money. He got about $31 and drove off. Witness watched the robber's face carefully as he wanted to be able to identify him. Approximately four days later Giem was present at a police lineup and immediately identified defendant as the robber. He again positively identified him at the trial on November 12.

Second Count. Charles Main, an employee of the Standard Oil Station at 210 Grand Avenue, Oakland, testified that about 12:30 on the morning of Sunday, October 10, he was held up by an unmasked man who drove up in a car, pointed a gun (which witness thought was a German Luger) at him, and demanded the cash. The robber took between $30 and $40. All of the lights at the station were on. When the police arrived he described the robber to them and about four days later picked defendant out of a police lineup as the man who committed the crime. He, likewise, identified him at the trial.

Third Count. Hartley Lohnes, employed at the Craig Oil Company station on San Pablo Avenue, Berkeley, testified that about 5 minutes after 5 on the morning of October 14, he was held up by a man who drove in the station, pointed a gun at him, and took away about $62. The robber held a handkerchief up to his face. All the lights were on. Several days later at a police lineup, and at the trial, he identified defendant as the robber.

Two police inspectors present at all three lineups testified that as defendant was identified by each respective witness an inspector told defendant that the witness had identified defendant as the person who had robbed him, and asked defendant if he had anything to say. In each instance defendant did not answer.

Defendant produced two of the prisoners who were in the lineups, who testified in effect that the only one of the prosecuting witnesses who identified defendant was Giem, and that immediately prior to Giem's arrival, the police had placed defendant as the third man in line, and that Giem looked at no one but the third man. Another of defendant's witnesses testified that the witness Lohnes had stated to him the morning of the holdup that the robber was a colored man.

Defendant's story of what occurred at the lineup was the same as that of his witnesses. Defendant denied the commission of the robberies and gave alibis as to his whereabouts on each occasion. The police inspectors were recalled and denied defendant's version of the lineup incidents. It is obvious that the jury did not believe defendant or his witnesses. The testimony of the three prosecuting witnesses and the police inspectors, if believed (and it was), was sufficient to justify the verdicts.

[2] Defendant's contention that the fact that the jury was out four hours deliberating indicates weakness in the case of the prosecution is not well founded.

2, 3, 4. Validity of Information, Verdicts and Judgments.

All three counts are charged in the same language, except as to the date, amount of money taken, and the name of the victim. The first count charges: "The District Attorney of the County of Alameda hereby accuses Harvey Samuel Quinn of a felony, to wit, robbery, in that on or about the 11th day of October, 1948, in the County of Alameda, State of California, he robbed Thoburn Giem of personal property, to wit, Thirty-one and no/100 Dollars ($31.00) more or less, lawful money of the United States." Defendant contends that the information is void because it did not allege "that the property was taken from the possession of another, from his person or immediate presence and against his will accomplished by means of force or fear."

Defendant concedes that People v. Kent, 90 Cal.App.2d 77, 202 P.2d 376, holds that such an information is sufficient, but contends that the case is in conflict with "old and recent decisions" of the United States Supreme Court and the courts of this state. The cases cited in support of his contention are not in point. People v. Sanchez, 30 Cal.2d 560, 184 P.2d 673, did not discuss the requirements of an information, but in discussing the sufficiency of the instructions given to the jury, quotes the definition of robbery given by the court which, in turn, was quoted from the Penal Code. People v. Hopwood, 130 Cal.App. 168, 19 P.2d 824, concerned an ambiguous information. The court held that if the facts in an information are "capable of two constructions upon one of which the facts might be true and not constitute a crime, the pleading is insufficient in charging the offense." 130 Cal.App. at page 171, 19 P.2d at page 825. In People v. Campbell, 40 Cal. 129, the court held that an indictment charging a defendant with committing a crime could not be sustained by proof that he was an accessory after the fact. That case was decided in 1870 when the attitude of the courts was highly technical and before the adoption of section 951 of the Penal Code, which provides for the short form of indictment and information. People v. Kent, supra, sets forth a number of cases in which the identical form used here has been approved.

In White v. Levine, 10 Cir., 40 F.2d 502, defendant was charged with forging the name of the payee on a compensation check of the United States Veterans' Bureau with intent to defraud a certain bank. The court held that the U. S. Statutes did not cover the forging of a payee's name unless it was done to defraud the United States, and that as there was no allegation that the act was done to defraud the United States the indictment failed to state an offense.

There is language in United States v. Hess, 124 U.S. 483, 8 S.Ct. 571, 31 L.Ed. 516, which, taken literally, might support defendant's contention that a short form of information is not sufficient. However, the indictment there failed to name any victim of the crime, or any amount of money wrongfully obtained. Moreover, that case was decided in 1888 and courts have progressed considerably since that day.

[3, 4] Sections 951 and 952, providing that the offense may be charged in the short form and without technical averments, does not deprive defendant of due process. He is sufficiently informed of the offense with which he is charged to be able to prepare his defense. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406, and Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644, do not hold to the contrary. Defendant cites no case, federal or state, holding that an information in the form used here violates due process. In People v. Berg, 96 Cal.App. 430, at page 432, 274 P. 433, at page 434, the court said: "It is contended that sections 951 and 952 are in violation of that portion of the Fourteenth Amendment to the Constitution of the United States to the effect that no one shall be deprived of his liberty without due process of law, but we think it plain that they are not. We think the Constitution of the United States requires no more specific statement of the nature of appellant's alleged offense than that contained in the

information. Appellant was given the name of his alleged victim, the day and venue of the commission of the offense were specified, the name of the crime was set down, it was alleged that it was willfully, unlawfully, and feloniously committed * * *."

[5] The first verdict found the defendant "guilty of felony, to wit: robbery as charged in the first count of the information and we further fix the degree of robbery to be robbery of the first degree." The second and third verdicts were similar in form. Defendant contends, as he did as to the information, that the verdicts should have found that the money was taken from the victim's person or presence against his will by force or fear. That a verdict which finds a defendant guilty "as charged" or guilty of the particular offense by name such as "forgery" is sufficient, has long been held in this state. People v. Somsky, 46 Cal.App. 377, 189 P. 456; People v. DuFault, 1 Cal.App.2d 105, 36 P.2d 196; People v. McKinney, 71 Cal.App.2d 5, 161 P.2d 957. The verdicts were sufficient.

[6] Defendant's contentions that the judgments are void are based upon the same contentions made as to the information and the verdicts. The contentions are unsound. In addition, defendant apparently contends that as he was charged only with robbery, the verdicts and judgments in finding and adjudging him guilty of first degree robbery, found and adjudged him guilty of a greater offense than that with which he was charged. This contention is answered by People v. Stratton, 136 Cal.App. 201, at page 209, 28 P.2d 695, at page 699, where the court said: "The contention of the appellant that the information only charged robbery, and not robbery in either the first or second degree, is without merit. All that the law requires is that the defendant be charged with the offense of robbery, and the degree of the offense is to be fixed after testimony is taken for the purpose of ascertaining the same." The judgments were sufficient.

5. Misconduct.

[7] Defendant contends that the district attorney withheld evidence favorable to the defendant. However, we have diligently examined the references to the transcript given by defendant, as well as the whole transcript, and we can find no indication of any withholding of evidence by the district attorney. In this respect the defendant charges the district attorney with at first contending that the same car was used in the robbery in count 3 as in the other two counts. (This car was in the hands of the police at the time of the robbery in count 3.) The record shows, however, that the defendant is mistaken in this, as the district attorney at all times contended to the contrary.

The judgments and order denying new trial are affirmed.

PETERS, P. J., and WARD, J., concur.

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94 Cal.App.2d 51

PEOPLE v. HARDEMAN et al.

Cr. 4377.

District Court of Appeal, Second District, Division 3, California.

Oct. 6, 1949.

Joseph E. Hardeman and Robert White were charged with violation of Health and Safety Code, § 11500, in that they unlawfully had in their possession a preparation of heroin. Joseph E. Hardeman pleaded guilty. Robert White was found guilty in a jury trial in the Superior Court of Los Angeles County, Charles W. Fricke, J., and he appealed.

The District Court of Appeal, Wood, J., affirmed the judgment on ground that evidence was sufficient to sustain the conviction and dismissed purported appeal from the sentence.

1. Poisons ⚷4

The matter of knowledge in relation to defendant's awareness of presence of narcotics is a basic element of offense of unlawful possession of narcotics. Health and Safety Code, § 11500.

2. Poisons ⚷9

Evidence justified finding that defendant had knowledge of presence of narcotics found in clean-out pit of fireplace of his home and that he had immediate and exclusive possession, dominion and control thereof, so as to support conviction of unlawfully possessing a preparation of heroin. Health and Safety Code, § 11500.

3. Criminal law ⚷741(1), 742(1)

Question as to credibility of witnesses and weight to be given their testimony was for determination of trier of facts.

4. Criminal law ⚷829(15)

Refusal to give defendant's requested instruction on circumstantial evidence was not error, where it appeared that jury was sufficiently instructed regarding circumstantial evidence by instructions given.

◆

Francis D. Thornton, Alexander L. Oster, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Howard S. Goldin, Deputy Attorney General, for respondent.

WOOD, Justice.

Appellant, Robert White, and one Hardeman were charged with violation of section 11500 of the Health and Safety Code in that they unlawfully had in their possession a preparation of heroin. Hardeman pleaded guilty. Appellant was found guilty in a jury trial. He appeals from the judgment and sentence.

Appellant contends that the evidence was insufficient to support the judgment. Officers found 22 capsules of heroin in the possession of defendant Hardeman soon after he had alighted from appellant's automobile in which he had been riding with appellant, and they also found 29 capsules of heroin in the clean-out pit of the fireplace at appellant's home. Appellant argues that the heroin was not in his possession and under his control.

On February 14, 1949, about 4:30 p. m. appellant, accompanied by Hardeman, was driving his automobile north on Union Avenue near Ingraham Street in Los Angeles. At that intersection Hardeman got out of the automobile and entered a nearby alley. Appellant continued north one block, turned right on Wilshire Boulevard, drove one block east and turned right on Valencia Street. Two officers, who were in an automobile and had observed the actions of defendants, apprehended Hardeman in the alley and at that time Hardeman dropped a cellophane package containing 22 capsules of heroin. Three officers, who were in another automobile, followed appellant and apprehended him at Valencia and Ingraham Streets. The officers took the defendants to the office of the Narcotic Division in the State Building where they questioned them regarding the heroin. Three officers then took appellant to his home. They searched the premises and found a box containing empty gelatin capsules in the medicine cabinet in the bathroom, a bottle containing empty gelatin capsules in a dresser drawer in appellant's bedroom, a bottle containing 29 capsules of heroin in the clean-out pit of the fireplace (on the outside of the house), and a hypodermic needle and a plastic holder in a chicken coop in the backyard. The officers and the appellant then returned to the State Building.

Officer Hawkins testified that, in a conversation with appellant after returning to the State Building, appellant said that the heroin which had been found in the clean-out pit of the fireplace was his; that appellant said that he and Hardeman had purchased some heroin from a man named Mexican Dave for $125, and he (appellant) had paid $75 of that amount and Hardeman had paid $50; and that appellant stated that he and Hardeman then went to appellant's home, put the heroin in capsules, "more or less" split the capsules between them, and appellant then put the capsules in the "flue." He also testified that statements made by appellant to him were free and voluntary, and that no force or violence was used upon appellant. At the trial appellant testified that he did not tell the officer that he and Hardeman had purchased heroin or that they had "capped" heroin. He also testified that, when the officer questioned him before they took him to his home, Officer Hawkins hit him in the stomach with a coca cola bottle wrapped in a towel, slapped his mouth, and kicked him on the leg.

Appellant testified further that on the day he was arrested Hardeman asked him to take Hardeman to a hospital to see a friend; that while on the way there Hardeman said he wanted to go into a hotel "about some money"; that when they were on Union Avenue near Wilshire Boulevard, Hardeman, after saying "pick me up about 5 or 10 minutes," jumped out of the moving car, and appellant drove to Wilshire Boulevard and around a corner, and then the officers arrested him. Appellant testified that he and his wife were roomers at the house where the heroin was found, and that three other persons also lived in the house; that he had not seen the empty capsules which were in the medicine cabinet in the bathroom and that other persons had access to that room; that his wife had purchased the empty capsules, which were in the bedroom, to use in taking medicine that had been prescribed by a doctor. With reference to the hypodermic needle which was found in the chicken coop, he testified that he did not have access to, and had not been in, the back of the premises where his landlady kept chickens.

Hardeman, called as a witness by appellant, testified that the 22 capsules of heroin in the cellophane package, and the 29 capsules of heroin in the bottle found in the clean-out pit of the fireplace, were his; that on February 13, 1949, about 10 p. m. he bought a bottle of 51 capsules of heroin from his friend "Dave," and that he paid $125 for it; that he then put 22 of those capsules in a cellophane paper, and he intended to deliver them to a person named "Danny" who lived in a hotel at Union and Ingraham Streets; that he then went to appellant's home and, without appellant's knowledge, placed the bottle containing the 29 capsules of heroin in the clean-out pit of the fireplace; that on the next day (February 14th) he called Danny and made an appointment to meet him at a service station "across from" the hotel; that he then talked to appellant by telephone and asked appellant to pick him up and take him to a hospital; that on the way to the hospital he told appellant that he wanted to go to a hotel to collect some money; that when they were on Union Avenue near Wilshire Boulevard he asked appellant to let him out of the automobile and to pick him up about 5 minutes later; and that he was arrested after he got out of the automobile.

[1–3] Appellant asserts that he had no knowledge of the presence of the capsules in the clean-out pit of the fireplace. It is true that "the law makes the matter of knowledge in relation to defendant's awareness of the presence of the object a basic element of the offense of possession." People v. Gory, 28 Cal.2d 450, 454, 170 P.2d 433, 436. The evidence was sufficient, however, to justify a finding that appellant had such knowledge and that he had immediate and exclusive possession, dominion and control of the narcotics. Among other things, as above shown, 29 capsules of heroin were found in the clean-out pit of the fireplace of appellant's home, and 22 capsules of heroin were found in the possession of Hardeman soon after he had alighted from appellant's automobile. It is undisputed that those 22 capsules were taken from the bottle in which the 29 capsules were found in the clean-out pit. Also, an officer testified that appellant told him that the heroin which was in the clean-out pit belonged to appellant and that appellant had placed it there. The question as to the credibility of the witnesses and the weight to be given to their testimony was for the determination of the trier of facts.

[4] Appellant also contends that the trial court did not give sufficient instructions on the subject of circumstantial evidence. He asserts that it was error to refuse to give instruction number 26, requested by him, which was as follows:

"If the evidence in this case [as to any particular count] is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

The trial court refused to give said instruction on the ground that it was covered by instructions which were given. The court gave an instruction defining circumstantial evidence. It also gave instructions numbers 27 and 28, requested by appellant, which were as follows:

"I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."

"When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

Appellant asserts that the two instructions, last above quoted, do not embody the principles of law set forth in the refused instruction number 26. It appears that the jury was sufficiently instructed regarding circumstantial evidence. Appellant's further assertion that the court should have given, on its own motion, further instructions on circumstantial evidence is not sustained.

The purported appeal from the sentence is dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

94 Cal.App.2d 154

SMITH et al. v. GLO-FIRE CO.

Civ. 3837.

District Court of Appeal, Fourth District, California.

Oct. 14, 1949.

Rehearing Denied Nov. 2, 1949.

Hearing Denied Dec. 13, 1949.

F. H. Smith and M. C. Smith, copartners doing business under the fictitious firm name and style of Elsinore-Pioneer Lumber Company, sued the Glo-Fire Company for the value of lumber sold and delivered.

The Superior Court, Riverside County, Russell S. Waite, J., gave judgment for the plaintiffs and the defendants appealed.

The District Court of Appeal, Griffin, J., held that the evidence sustained the trial court's finding that the defendant corporation ratified the agreement to accept the lumber when delivered and affirmed the judgment.

1. Appeal and error 🔑1010(1)
Corporations 🔑448(1)

In action to recover value of lumber allegedly sold and delivered, evidence sustained trial court's finding that president of defendant corporation agreed to accept lumber for corporation, when formed, without qualification and finding could not be disturbed on appeal.

2. Corporations 🔑448(2)

The contract of a stockholder or member of a corporation, individually, made before incorporation, is not the contract of corporation nor binding on it, unless corporation expressly or impliedly ratifies contract.

3. Contracts ⚷41

A contract voidable solely for want of due consent may be ratified by the subsequent consent or by acceptance of its benefits. Civ.Code, §§ 1588, 1589.

4. Corporations ⚷448(2)

In action to recover value of lumber allegedly sold and delivered, evidence sustained trial court's finding that lumber was ordered by president of corporation or his agent in behalf of corporation that was to be formed, and that thereafter corporation expressly or impliedly ratified his contract.

5. Contracts ⚷333(1)

It is not expressly necessary to plead ratification of a contract.

◆

Alva D. McGuire, Riverside, for appellant.

Loyal C. Kelley, Riverside, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action against defendant Glo-Fire Company, a corporation, alleging in the first count that on or about April 8, 1946, plaintiffs sold to it certain lumber (classified as "shim stock" used for crating radiant gas logs manufactured by defendant company), which was delivered to defendant between April 8, and May 25, and that defendant agreed to pay plaintiffs $2001.92 therefor, but that it refused to make such payment. The second count is based on a claimed indebtedness in the same sum and a promise to pay it. The third count is for the reasonable value of the merchandise. The fourth count is based upon an account stated.

The court found in all respects in favor of plaintiffs on count one, excepting as to the amount due, which was found to be $1947.50. As to count two it found that on May 25, defendant was indebted to plaintiffs in the sum of $1947.50, and that it promised to pay said amount upon request, but refused. As to the third count, it found that on May 25, as alleged in the complaint, in consideration of the fact that plaintiffs had before that time sold and delivered to defendant certain lumber, it promised to pay plaintiffs the reasonable value therefor but refused to do so. A finding in favor of defendant corporation was noted on the fourth count. Judgment was entered accordingly and defendant appealed.

A Mrs. Warfield operated the Glo-Fire Company, under a fictitious name, in Elsinore. About April 8th she asked plaintiffs to see if they could obtain some shimstock. It was difficult to secure at that time. She then told plaintiffs that there was a possibility of a sale of the business and that she was going to "make contact" with the prospective purchaser about buying the lumber if plaintiffs were able to secure it. She later stated to plaintiffs that she had "contacted" a Mr. Camp, the prospective purchaser, and that he agreed to accept the lumber in her stead. She testified that Mr. Camp's plant foreman was with her at plaintiffs' place of business when she gave the final order for the lumber to be delivered to defendant's plant, and that the foreman represented himself as Mr. Camp's foreman. On May 25th the lumber was delivered to defendant's place of business. Subsequent demands were made of the defendant Glo-Fire Company for payment but no payments were received. About six months after the delivery of the lumber one of the partners of plaintiff company went to the place of business of defendant company and saw Mr. Camp for the first time. Camp, according to plaintiffs' evidence, at that time disputed the number of feet of lumber in the shipment, but never claimed that he did not order it. On May 17th, plaintiffs received a letter signed "Glo-Fire Company, by William Camp", stating:

"Under date of April 30, 1946, you rendered a statement to Glo-Fire Company for 47,500 board feet of ⅝-inch shimstock priced at $42.50 per M.

"Under O. P. A. regulations we are entitled to a tally sheet covering specific sizes furnished in this statement. Until we receive these tally sheets we are unable to check the number of board feet delivered from this car.

"Your attention is particularly directed to your invoice number B 12389 which specifies ⅝-inch shimstock. A large portion of this lumber was considerably under ½-inch thickness. No further action will be taken by us with reference to this account until we receive from you the tally sheets requested."

Another letter sent by defendant, dated June 5th, recites: "Please be advised that until we receive a tally, as required by O. P. A. regulations * * * of the lumber in question we do not intend to make an adjustment of this bill."

After the receipt of defendant's letter of May 17th, plaintiffs referred the same to the company through whom they had ordered the lumber, and on May 25th, plaintiffs wrote the defendant, quoting from the reply received by it. That letter points out that this carload was shipped from Washington and invoiced to them as ¼″ to ⅝″ thick by 4″ in width; that the specifications were according to the order; that no tally was received from the mill on the lumber and consequently that none could be delivered to defendant and that this type of lumber was never sold by tally. The testimony shows that the O. P. A. did not require a tally of this type of lumber but that the board feet could be computed from the weight of the lumber itself.

Mrs. Warfield testified that when she owned the Glo-Fire Company it was not a corporation; that prior to negotiations for the sale of her business in April, 1946, she was looking about for a carload of shimstock and requested plaintiffs to find one for her if it could be had; that she told plaintiffs she was going to sell her business and would talk to Mr. Camp about taking the lumber; that after that, while plaintiffs were endeavoring to locate the lumber for her, she entered into negotiations to sell her business to Mr. Camp; that when plaintiffs notified her they could procure the lumber she took the matter up with Mr. Camp; that she told him about these arrangements with plaintiffs and that he said he wanted the lumber because it was difficult to obtain; that she told the plaintiffs about this agreement; that Camp took over the business on April 14th and the sale was at that time in escrow and was to be completed on April 29. Mrs. Warfield's foreman continued as foreman for Mr. Camp. (Apparently Mr. Camp organized the company called Glo-Fire Corporation. Articles were completed and filed on May 10, 1946.)

F. H. Smith, one of the partners of plaintiff company, testified that Mr. Camp came to the lumber office about two months after the delivery of the lumber and he complained about the number of board feet claimed to be in the carload but did not say he had not purchased it nor that he would not be responsible for it. Plaintiffs rested their case. Motion for nonsuit was denied.

Mr. Camp then testified that about two months prior to April 15th he discussed purchasing Mrs. Warfield's business; that about April 15th he made the deal and gave her a check for $1000; that about April 22nd he recalled her telling him she had ordered a carload of lumber which she could still obtain and he told her "If it was good crating lumber" he would take it; that when he went to his place of business and discovered the lumber he ordered it out, due to its poor grade and that later he and his foreman went to plaintiffs' place of business and told them about it. He testified, however, that he later used some of the lumber by agreement with plaintiff.

Plaintiffs called a witness in rebuttal who testified that about May first, 1946, he approached defendant's foreman about buying all the shimstock they had at their plant; that the foreman told him they were using the lumber and sorting it and that they would sell it in about one week and if he called then they would sell it to him; that he went back at that time and bought "a pile of it", approximately 1500 feet, for $50; that they were to deliver it in a few days; that after a month or so he talked to Camp and told him the foreman said he could not deliver it because of a mix-up in the grade; that Camp then told him he could not have any of it because it was not "even theirs"; that Camp offered him his money back but he refused because he bought that particular shimstock and wanted it; that defendant finally mailed a check to him for his $50.00.

Plaintiffs denied generally all of Camp's claimed conversation with them and specifically denied any agreement about defendant selling any part of the lumber for or on behalf of plaintiffs. They claimed that defendant used or sold all except two or three thousand feet of it when plaintiffs last visited defendant's place of business.

Defendant corporation advances the argument that during the period of escrow Mrs. Warfield published notice of sale of the business under sec. 3440, Civil Code, and since plaintiffs failed to file a claim in said escrow they are now barred from recovery against defendant. Defendant's specifications of error are that the trial court should have granted the motion for nonsuit; that the findings are contrary to the evidence and that judgment should have been in favor of defendant. The main claim is that the evidence is conclusive that there was no sale of the lumber to the defendant because the corporation was not in existence at the time of the claimed sale and that therefore there was no officer of the corporation authorized to transact business for it, citing Judelson v. American Metal Bearing Company, 89 Cal.App.2d 256, 200 P.2d 836; and Robinson v. Chapman Square, Inc., 77 Cal.App.2d 902, 176 P.2d 945. It is further contended that if plaintiff is seeking to recover by reason of a novation, it was neither pleaded nor proved as required, citing such cases as Colley v. Chowchilla National Bank, 200 Cal. 760, 255 P. 188, 52 A.L.R. 569; University of Redlands v. Ford, 56 Cal.App.2d 151, 132 P.2d 238; and Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 57 P.2d 1010.

[1] It is clear from the evidence that Mrs. Warfield originally intended purchasing the lumber for her business when it could be obtained; that it was on order; that at or about this time she was contemplating the sale of the business. The evidence likewise shows that she did discuss the matter with Mr. Camp, the contemplated purchaser, who agreed to accept it when it arrived. The only variance is the condition which he claims he attached to the sale, i. e., that it had to be "good crating lumber". Mrs. Warfield denied that any such conditional acceptance was made by Camp, and stated that she did not notify plaintiffs of any claimed conditional acceptance. Apparently the trial court decided this conflict, as well as the quality of the shimstock, in favor of plaintiffs. Under the well-known rule this finding will not be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301. Mrs. Warfield told plaintiffs that she had "contacted" Mr. Camp and that he had agreed to the arrangements made by her. The evidence is that Mr. Camp's foreman was present with Mrs. Warfield in plaintiffs' place of business when this conversation took place and when the lumber was finally ordered delivered to defendant's place of business. This evidence is undisputed. The lumber was subsequently delivered to the premises where Mr. Camp was doing business and it was retained by the defendant company. Afterwards defendant used some of it and disposed of the great bulk of it by sale. Clearly, there was a liability on the part of Mr. Camp or his corporation to account for the payment. The only question is whether the obligation assumed by Mr. Camp can be lawfully held to be the obligation of the corporation which was formed after the order was placed but before delivery of the lumber was completed. So far as plaintiffs are concerned, they were originally doing business with the Glo-Fire Company operated by Mrs. Warfield under a fictitious name. The manner in which Mr. Camp was taking title to or operating the business was not personally known to plaintiffs. The same Mr. Camp with whom they had dealt through Mrs. Warfield and the foreman was in possession of the premises when delivery was made and the record discloses that he was then president of the Glo-Fire Corporation. The record does not indicate that there were other officers or stockholders interested in it.

[2–5] In support of the findings and judgment we must conclude that Mr. Camp agreed to accept the lumber for and on behalf of the corporation, when formed, without qualification. While the evidence is conflicting there is sufficient evidence to show that the defendant corporation, at least impliedly, ratified Mr. Camp's act in agreeing to accept the lumber when delivered to the corporation, particularly where it was delivered to the premises of the corporation after it was legally formed, where it was operating and doing business, and where the corporation assumed ownership of it by using and disposing of a greater portion of the entire shipment. Apparently the trial court did not believe that the lumber was being sold by the defendant corporation for the benefit of plaintiffs, as suggested by Mr. Camp. It has been held that a contract of a stockholder or member of a corporation, individually made before incorporation, is not the contract of the corporation nor binding on it, unless it expressly or impliedly ratifies it. See Judelson v. American Metal Bearing Co., supra. A contract voidable solely for want of due consent may be ratified by a subsequent consent or by acceptance of its benefits. Commercial Security Co. v. Modesto Drug Co., 43 Cal.App. 162, 184 P. 964; Secs. 1588-1589, Civ.Code; 6 Cal.Jur. p. 93, sec. 57. The trial court was justified in believing that the facts in the instant case brought the transaction within the exception and that the lumber was ordered by Mr. Camp or his agent in behalf of the corporation that was to be formed and that thereafter the corporation, expressly, or at least impliedly, ratified his contract. It is not expressly necessary to plead ratification. 6a Cal.Jur. p. 1189, sec. 678; Zenos v. Britten-Cook Land & Livestock Co., 75 Cal. App. 299, 242 P. 914. The question of lack of pleading novation, therefore, becomes unnecessary to decide.

Judgment affirmed.

BARNARD, P. J., concurs.

Hearing denied; TRAYNOR, J., dissenting.

CARRUTH v. FRITCH et al.

Civ. 16978.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1949.

Hearing Granted Dec. 8, 1949. *

Betty Jane Carruth sued Robert Fritch, Richard Fritch and the Connecticut Indemnity Company to set aside a release executed by the plaintiff for $2,000, on ground that Robert Fritch allegedly represented fraudulently to plaintiff that she had no cause of action for injuries, and to recover for injuries.

The Superior Court of Los Angeles County, Stanley N. Barnes, J., rendered a judgment of dismissal, and the plaintiff appealed.

The District Court of Appeal, White, J., reversed the judgment, holding that action was not barred by limitations, and that failure of plaintiff to restore the $2,000 received for executing the release did not, under the circumstances, preclude plaintiff from maintaining the action.

1. Limitation of actions ⚿100(1)

If fraud enters into a cause of action, the cause of action will not be deemed to have accrued, and limitations will not have begun running until facts are discovered, regardless of form or character of the action. Code Civ.Proc. § 338, subd. 4.

2. Limitation of actions ⚿31, 100(1)

Where owner of automobile allegedly represented fraudulently to guest that she had no cause of action for injuries and induced her to sign release for $2,000 furnished by insurer, three-year limitation statute was applicable from date guest discovered alleged fraud, and action against owner, driver and insurer to have release set aside and to recover for injuries was not barred by one-year limitation statute applicable to an injury action. Code Civ. Proc. §§ 338, subd. 4, 340.

3. Limitation of actions ⚿13

Where owner of automobile allegedly represented fraudulently to guest that she had no cause of action for injuries and induced her to sign release for $2,000 furnished by insurer, owner and driver of automobile and insurer were estopped in action against them to have release set aside and to recover for injuries, to set up one-year limitation statute applicable to injury actions. Code Civ.Proc. §§ 338, subd. 4, 340.

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* Subsequent opinion 224 P.2d 702.

4. Estoppel ⚿52

When, by his act or promise, one person causes another, in reliance thereon, to do or forbear from doing a thing to his detriment, which he would have otherwise performed, person making the promise is estopped from taking advantage of the act or omission of the one inducing the promise.

5. Equity ⚿3

Equity will assert itself where right and justice would be defeated but for intervention of equity.

6. Equity ⚿423

Equity will so mould and adjust its decrees so as to award substantial justice according to the requirements of the varying complications that may be presented for adjudication.

7. Limitation of actions ⚿104(2)

Where owner of automobile allegedly represented fraudulently to guest that she had no cause of action for injuries and induced her to sign release for $2,000 furnished by insurer, there was a concealment of facts on which guest's cause of action for injuries was based, so as to toll limitations. Code Civ.Proc. §§ 338, subd. 4, 340; Civ.Code, § 1572, subds. 4, 5.

8. Release ⚿24(2)

Generally, restoration or offer to restore that received under a release, is a prerequisite to commencement of an action, except where it clearly appears without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, and circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties.

9. Release ⚿24(2)

Where owner of automobile allegedly fraudulently induced guest to sign release for $2,000 furnished by insurer, and owner and driver of automobile and insurer allegedly knew at time of payment to guest that she had incurred such amount for medical expenses, and that guest had no funds, fact that guest failed to restore the $2,000 did not preclude guest from maintaining action to have release set aside and to recover for injuries. Civ.Code, § 1691, subd. 2.

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Edward Raiden, Los Angeles, for appellant.

Eugene S. Ives, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff appeals from a judgment of dismissal entered after a demurrer was sustained to her second amended complaint, plaintiff declining to take advantage of the privilege of further amendment.

Plaintiff alleged in her second amended complaint that on May 17, 1946, she was riding in an automobile owned by defendant Robert Fritch and then being driven by Richard Fritch with the consent of Robert Fritch; that by reason of the wilful misconduct of the defendant Richard Fritch the automobile struck a stone wall, with the result that plaintiff was severely injured. She further alleged that she incurred medical expenses in excess of $2,000 and expected to incur further expense; that she suffered damage in loss of employment of approximately $4,000; that she was hospitalized for a long period, suffered great pain and shock, and some of her injuries will be permanent; that because of her injuries she was required to undergo a hysterectomy.

The instant action was not commenced until March 10, 1948. The applicable statute of limitations is one year from the date of the injury (Code Civ.Proc., sec. 340). In avoidance of the apparent bar of the statute, plaintiff pleaded the following facts:

"That at the aforementioned time and place said Connecticut Indemnity Company had a contract * * * whereby (it) insured said other defendants (Richard and

Robert Fritch) against suit, liability and loss resulting from the negligent operation of the automobile, * * * That in the Month of September, 1946 and prior thereto, the defendant Connecticut Indemnity Company by its agents, servants and employees, contacted the plaintiff herein with a view to adjusting and settling plaintiff's claim * * *.

"That in the month of September, 1946, the defendant Robert Fritch, acting for himself, for Richard Fritch, and for the Connecticut Indemnity Company, with intent to deceive the plaintiff and to induce her to sign a release of settlement of her claim against these defendants, stated to the plaintiff that the defendant Connecticut Indemnity Company would pay her the sum of $2,000.00 on account of her medical expenses and he further stated that the defendants Robert Fritch and Richard Fritch would see that the plaintiff received of the defendant Connecticut Indemnity Company and of the defendants Robert Fritch and Richard Fritch all further and additional medical expenses and that plaintiff would also be compensated for all loss of salary.

"That the defendant Robert Fritch, for himself and for the other defendants, told plaintiff as a friend of long standing that she had no claim at law because she was a guest in his car and that if she proceeded to sue she would not be able to recover.

"That the defendant Robert Fritch, for himself and for the other defendants, represented to the plaintiff herein that the payment of $2,000.00 which she was to receive was payment arising and paid under and insurance policy maintained by said Connecticut Indemnity Company for liability of defendants Robert Fritch and Richard Fritch and that under such policy the plaintiff, being a guest, had no right to recover and that plaintiff could never succeed in an action at law.

"That plaintiff was utterly ignorant of her rights, except as she was informed, to-wit: that because she had been a guest in the car she had no claim or rights against the defendants and that she should settle under the release; that while in this frame of mind, plaintiff signed the release to the defendants and that plaintiff was misled and induced to act under a misconception of her legal rights."

It was further alleged on information and belief that defendant insurance company "had knowledge of the negotiations between plaintiff and defendants." Further, that the negotiations took place approximately four months after the accident and while plaintiff was still suffering from the effects thereof; that she was induced and influenced further into executing the release by the pressing expenses of medical attention. That on December 29, 1947, plaintiff through her attorney notified the individual defendants of further medical expenses and loss and demanded further payment, and on January 7, 1948, was advised for the first time that defendants did not intend to pay her further medical expenses and loss of salary.

Further quoting from the second amended complaint, it was alleged that "at the time the defendants paid the monies over to the plaintiff herein, they knew that the plaintiff had incurred these medical expenses and that she would have to pay the money received to doctors and hospitals to whom she had become liable * * * that plaintiff had no funds * * *, plaintiff would be unable to raise the money necessary to tender back to the said defendants and each of them the amount of money which they had advanced * * * the defendants and each of them had no intention of keeping the agreement and making the further payments for medical expense and loss of salary * * * but * * * were seeking to place the plaintiff in such a position that she could not tender to them the money advanced in the course of their fraud, and relied upon such facts and their fraud to prevent plaintiff from rescinding because of her inability to repay the amount advanced by the defendants and used by plaintiff to pay some of her medical expenses."

It was further charged that the defendants had no intention of keeping their agreement; that the representations were falsely and knowingly made, and induced plaintiff to execute the release.

It was then alleged: "That the plaintiff seeks in this cause of action to set aside the release secured from her by the fraud of the defendants and under all of the aforementioned conditions and circumstances and names the defendant Connecticut Indemnity Company as a defendant because said defendant paid out the money received by plaintiff and holds the releases signed by the plaintiff; and plaintiff seeks no money judgment against any of the defendants in this cause of action; and plaintiff names the defendant Connecticut Indemnity Company in this cause of action as said defendant may be liable ultimately under the policies issued by it to the other defendants."

For a second cause of action plaintiff realleged all the allegations of her first cause of action except the last paragraph hereinabove quoted. The prayer asked that the release be set aside, and that plaintiff have judgment against Robert and Richard Fritch for her general and special damages, arising from the tort complained of.

The defendants' demurrer was based solely on the ground that neither cause of action stated facts sufficient to constitute a cause of action. The points and authorities in support of the demurrer related only to the failure of the complaint to allege a restoration of the amount received under the release (Civ.Code, sec. 1691), and the further point that "the measure of damages would be the further and additional medical expenses and loss of salary, if any, which were allegedly promised and not the general and other special damages pleaded."

The trial court, in a memorandum of ruling, stated, in part:

"The question before the court presently rests on a further question,—what is the gravamen of this action, the plaintiff's personal injuries or the fraud of the defendants? If the former, the one year statute applies (C.C.P. sec. 340). If the latter, then the three year statute applies (C.C.P. sec. 338, subd. 4).

"A reading of the complaint indicates clearly that plaintiff seeks to recover for personal injuries. * * * (Discussion of authorities relied on by plaintiff.) * *."

The court concluded that plaintiff might be able to state a cause of action based upon fraud "where fraud is the gravamen of her action but that is not her pleading in the present case."

[1, 2] Respondents' position, as well as that of the trial court, seems to be that appellant might bring an action based on fraud within three years after the discovery thereof (Code Civ.Proc., sec. 338, subd. 4), but that she cannot bring an action to set aside the release allegedly obtained by fraud and at the same time seek a recovery of damages sustained by her through the alleged negligence of respondent Richard Fritch unless her injuries were sustained within one year prior to the commencement of the action (Code Civ.Proc., sec. 340). Respondents concede that the cases hold that when an action for personal injuries is commenced within one year and plaintiff is met with a release pleaded as a defense, it is proper to proceed to trial and inquire into the claimed fraudulent representations allegedly made by the procurer of the release, and if fraud is proven plaintiff may recover for the personal injuries notwithstanding the release. O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; Jordan v. Guerra, 23 Cal.2d 469, 144 P.2d 349. But, urge respondents, if a plaintiff institutes an action for personal injuries more than one year after the commission of the alleged tort, and to meet the objection of a demurrer based upon the statute of limitations pleads the release and asserts that it was procured by fraud which caused him to refrain from commencing the personal injury action for more than a year after the tort was committed, such plaintiff is not entitled to be heard. We are satisfied that this is not the law. If it were, then the age-old rule that in certain cases of fraud the statute of limitations is tolled would be completely emasculated and set aside. It is settled law in this state that if fraud enters into a cause of action, the provisions of subdivision 4 of section 338 of the Code of Civil Procedure will apply, and the cause of action will not be deemed to have accrued until the facts are discovered, regardless of the form or character of the action. Of what avail would it be to appellant herein to have the release set aside after discovery of the alleged fraud if the statute of limitations were not tolled on the original tort cause of action?

If through fraudulent representations appellant was induced to refrain from taking such action as was then within her power, it must be held that until discovery of such fraud, the applicable statute of limitations was suspended. Otherwise, a defendant, by concealing his fraud, would be able successfully to block recovery by the plaintiff because of the intervention of the statute of limitations. Pashley v. Pacific Electric Co., 25 Cal.2d 226, 231, 232, 153 P.2d 325. In the instant case the second amended complaint alleged that the fraud was discovered in January, 1948. Appellant instituted the present action on March 10, 1948, well within the time limited.

[3, 4] We are further convinced that the facts alleged in appellant's second amended complaint clearly establish that respondents should be estopped to complain that the complaint was not filed within the one-year statutory period. It is unnecessary to here repeat the allegations contained in appellant's second amended complaint. Suffice it to say that the advice given her by respondents and the representations made to her had the effect of lulling her into a sense of security and persuading her not to avail herself of legal assistance in the protection and assertion of her rights. According to the allegations of her second amended complaint, appellant believed and relied upon the statements, representations and conduct of respondents, and as a result did not commence proceedings within the statutory time of one year. The rule is well established that when by his act or promise one person causes another, in reliance thereon, to do or forbear from doing a thing, to his detriment, which he would have otherwise performed, the person making the promise is estopped from taking advantage of the act or omission of the promisee. Calistoga Nat. Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 46 P.2d 246; 37 C.J., pp. 725, 726; 53 C.J.S., Limitations of Actions, § 25.

[5, 6] It is fundamental that equity will assert itself in those situations where right and justice would be defeated but for its intervention. As was so pertinently said in Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 292, 119 P. 82, 85, citing Story's Eq.Jur., secs. 28, 439; 1 Pom.Eq.Jur., sec. 60: "It has always been the pride of courts of equity that they will so mould and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." We are persuaded that the facts alleged in the case at bar are such as to entitle appellant to a trial on the fraud alleged, to the end that the trier of facts may determine whether the release should be set aside as having been fraudulently procured, and that should there be an affirmative finding on that issue, appellant is entitled to a trial on the merits of her original tort action against respondents.

[7] Respondents' contention that because there was no concealment of the facts on which the cause of action for personal injuries was based, the statute of limitations was not tolled, is without merit. Appellant alleged in her second amended complaint that respondents falsely represented to her that she had no cause of action, but in consideration of her signing a release they would pay her the sum of $2,000 on account of her medical expenses and "her further and additional medical expenses, and that plaintiff would also be compensated for all loss of salary." It was further alleged that she believed and relied upon such representations and promises, but that when on January 7, 1948, demand was made for such additional payments, she "was advised as aforesaid that defendants did not intend to pay her further medical expenses and loss of salary." Under section 1572 of the Civil Code, actual fraud may consist of "a promise made without any intention of performing it" (subd. 4) or "any other act fitted to deceive" (subd. 5). Section 1574 of the Civil Code provides that "actual fraud is always a question of fact." If the foregoing allegations be true, then manifestly appellant was thereby induced to refrain from utilizing such means or taking such action as lay within her power, and by which she might have saved herself from loss. This is sufficient to toll the statute of limitations.

Finally, respondents assert that appellant's cause of action is fatally defective because of her failure to comply with subdivision 2 of section 1691 of the Civil Code, which provides that rescission, when not effected by consent, may be accomplished only when the rescinding party makes restoration to the other party of "everything of value which he has received from him under the contract; or must offer to restore the same * * *".

Concededly, appellant in the case at bar has not tendered or offered to restore the $2,000 received by her under the release. With reference thereto, in her second amended complaint, appellant alleged that at the time respondents paid the $2,000 to her "they knew that the plaintiff had incurred these medical expenses and that she would have to pay the money received to doctors and hospitals to whom she had become liable * * * that plaintiff had no funds * * *, plaintiff would be unable to raise the money necessary to tender back to the said defendants and each of them the amount of money which they had advanced * * *."

[8, 9] There are recognized exceptions to the general rule that restoration or offer to restore is a prerequisite to the commencement of an action. We are impressed that the case at bar falls within one of the exceptions to the foregoing rule, that is, "where it clearly appears * * * without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by a final decree fully adjust the equities between the parties." California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 739, 91 P. 593, 595; Lawrence v. Ducommun, 14 Cal. App.2d 396, 399, 400, 58 P.2d 407.

Under the circumstances alleged in the case at bar, we are satisfied that the necessity for restoration or an offer of restoration was dispensed with, as such an offer on the part of plaintiff would manifestly be a vain thing, impossible of fulfillment, for the reasons hereinbefore set forth in the quoted allegations of her second amended complaint, and the respective rights of the parties can be fully protected by the decree or judgment of the court.

Appellant herein had the choice of either suing to recover what she charged respondents promised as consideration for the release or of rescinding and suing on the original tort. She has chosen the latter alternative. Should the trier of facts determine that the release should be set aside for the reasons advanced in appellant's second amended complaint, and should she not prevail on the merits of the original alleged tort, respondents would be entitled to recover what they paid her. On the other hand, should appellant prevail on the merits of the original alleged tort, a credit on the verdict for the amount paid by respondents under the release could be made, and thereby the rights of the latter would be protected. O'Meara v. Haiden, supra, 204 Cal. at page 364, 268 P. 334, 60 A.L.R. 1381.

For the reasons herein stated, the judgment is reversed and the cause remanded with directions to the court below to overrule defendants' demurrer to plaintiff's second amended complaint and to allow defendants a reasonable time within which to answer said second amended complaint if they be so advised.

DORAN and DRAPEAU, JJ., concur.

94 Cal.App.2d 93

BUSINESS WOMEN'S ASS'N v. KNIGHT et al.

Civ. 17116.

District Court of Appeal, Second District
Division 2, California.
Oct. 10, 1949.

Action by the Business Women's Association, a non-profit California corporation, against Glen Knight and others to annul a judgment of a municipal court awarding treble damages as provided by the Emergency Price Control Act because of overcharges in rental accommodations on the ground that the municipal court lacked jurisdiction.

A general demurrer to the complaint was sustained in the Superior Court of Los Angeles County, Charles E. Haas, J., and the plaintiff appealed.

The District Court of Appeal, Moore, P. J., affirmed, holding that the municipal court had jurisdiction, and that inasmuch as plaintiff had not complied with the procedure in the act, it was not entitled either to a trial on the merits of the order or to a stay of further proceedings.

1. War and national defense ⚷205

Where association utilized a clubhouse for hardship cases of indigent women and it had not been certified by the housing administrator as being exempt from the requirements of the Emergency Price Control Act at time judgment for treble damages for overcharges in rent was entered, it was entitled to no consideration as a nonprofit club. Emergency Price Control Act of 1942, § 1 et seq., 50 U.S.C.A.Appendix, § 901 et seq.

2. Courts ⚷489(1)

A municipal court had jurisdiction of an action brought against an association utilizing a clubhouse for hardship cases of indigent women to enforce payment of penalties prescribed by the Price Administrator under the Emergency Rent Control Act for making overcharges for rental of the rooms, notwithstanding the act creates the Emergency Court of Appeals to determine the validity of any regulation or order issued under the act. Emergency Price Control Act of 1942, §§ 203, 204, and (d), 205, and (c, e), 50 U.S.C.A.Appendix, §§ 923, 924, and (d) 925, and (c, e); U.S.C.A.Const. art. 3, § 2.

3. Courts ⚷489(1)

The provision of the Emergency Price Control Act that no tribunal other than the two federal courts specified therein can determine the validity of a regulation or order of the OPA did not deprive any court of competent jurisdiction of the power to enforce an order of the Administrator, the validity of which has not been questioned, but such matters may be determined in an enforcement action by any court having jurisdiction of the subject matter. Emergency Price Control Act of 1942, §§ 203, 204, and (d), 205, and (c, e), 50 U.S.C.A.Appendix §§ 923, 924, and (d), 925, and (c, e).

4. Courts ⚷489(1)

Where association utilizing a clubhouse for hardship cases of indigent women undertook when sued in municipal court for treble damages for overcharges in rental accommodations, to prove the invalidity of the Administrator's action in establishing maximum rents and to show that the act did not apply to it, the municipal court properly rejected the association's attempts, and the association was not entitled either to a trial on the merits of the order or to a stay of further proceedings in the municipal court. Emergency Price Control Act of 1942, § 203, 50 U.S.C.A.Appendix, § 923.

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Nathan Newby, Jr., Gavin Craig and Carl Yanow, Los Angeles, for appellant.

Lee Schwartz, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the judgment of a state court is void by reason of its award of treble damages as provided by the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq., herein referred to as the Act, where the party affected by the order of the OPA has not complied with the procedure outlined in the Emergency Price Control Act for vacating such order.

Appellant, Business Women's Association, herein sometimes designated "BWA," owns and occupies a ten-room house in Los Angeles which it utilizes as a clubhouse for hardship cases of indigent women. In November, 1946, respondents and others filed in the municipal court of the city of Los Angeles an action against appellant for overcharges of rent. The court found that appellant did not operate its premises as a nonprofit California corporation and had failed to comply with OPA rent regulations; that it "had collected certain named sums from each of plaintiffs in said action" and entered judgment against appellant for treble the amounts which those plaintiffs had paid to BWA.

On August 20, 1947, appellant filed the instant action to set aside an annul such judgment on the ground of lack of jurisdiction. By its amended complaint appellant alleged that the Emergency Price Control Act of 1942 did not empower the administrator of the Office of Price Administration "to regulate the charges or prices to be charged for the rental of rooms in a structure owned and operated by a nonprofit, benevolent or educational institution"; that appellant was a nonprofit corporation and therefore did not "come within the scope and regulation of the Rent Control Act"; that the municipal court "had no authority or jurisdiction to entertain said action." A general demurrer to appellant's complaint having been sustained without leave to amend, this appeal is taken from the ensuing judgment of dismissal.

Character of Appellant Corporation Not Involved.

[1] Appellant's character as a nonprofit corporation is not involved. In 1942, pursuant to the Act, the Federal Housing Administrator issued a regulation governing rooming houses, residential hotels, etc. Paragraph 1388.1231, section 1b, subdivision 5 of such regulatory order provided that if the administrator certifies on the written request of the landlord that a club which occupies rooms is a nonprofit organization and is so recognized by a writing of the Bureau of Internal Revenue, and rents its rooms to members only and to their guests who are members of bona fide clubs having reciprocal arrangements for the exchange of privileges, and is otherwise operated as a bona fide club, the regulation shall not apply to the housing of such nonprofit club. The subdivision is emphatic that the exemption of the rooms of such club is created only after the administrator's compliance with specified requirements. Inasmuch as appellant had not been certified by the housing administrator as being exempt from the requirements of the Act at the time the municipal court's judgment was entered, appellant is entitled to no consideration as a nonprofit club.

Municipal Court Had Jurisdiction to Enforce the Regulation.

[2] While appellant admits that under Article III, section 2 of the Federal Constitution, Congress may authorize magistrates or courts of a state to enforce a federal statute yet it blandly contends that the municipal court had no jurisdiction to entertain the action brought by respondents against appellant to enforce payment of penalties prescribed by the price administrator under the Emergency Rent Control Act. It derives this erroneous concept from that provision of the Act creating the Emergency Court of Appeals to determine the validity of any regulation or order issued under the Act. Section 924, 50 U.S.C.A.Appendix, provides that no other court shall have jurisdiction to consider the validity of any such regulation or order or to enjoin or set aside wholly or in part any provision of the Act authorizing such regulations or orders. But section 924 applies only where a party affected by a regulation of the administrator has followed the prescribed procedure for attacking it. The provisions thereof do not support an affected party who has ignored the requirements to be followed by one who desires to be relieved from an oppressive order. Neither does the section (924) inhibit the municipal court from entertaining actions on the claims of tenants who have been charged higher rentals than those fixed by the OPA as the maximum amounts to be charged for the property occupied by them. But despite the fact that neither section 924 nor 925 contains a specific prohibition against a state court's functioning under the Act, appellant contends that the judgment of the municipal court awarding the penalties sued for is void.

Such contention finds no support in either the federal constitution or the decisions. It was contended by potent voices in the Constitutional Convention that state courts should arbitrate all controversies. In the final outcome of the contest over a separate federal system of trial courts the best that Madison could obtain was the clause permitting Congress to "ordain and establish inferior courts." As pointed out in Miller v. Municipal Court, infra, all the acts of the early Congresses provided for suits to be "laid" in the state courts. See revenue laws of 1791, 1794, 1797, 1799, 1806, 1808, 1813; National Bank Act of 1864, 12 U.S.C.A. § 94, Post-Office Act of 1799. The law governing this subject is summed up in the language of a brilliant opinion, to wit: "The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief. * * * rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1, 47, 32 S.Ct. 169, 178, 56 L.Ed. 327, 38 L.R.A., N.S., 44,

Because the Emergency Price Control Act is a legitimate exercise of a "well-nigh limitless" power vested in Congress to declare and wage war," United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302; Henderson v. Kimmel, D. C., 47 F.Supp. 635, and because the federal statutes have covered the field, appellant maintains that "all state laws pertaining to such subject matter are displaced," citing Kelly v. State of Washington ex rel. Foss Co., 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3. The question of state statutes is not pertinent to the issue at hand. What concerns appellant is whether it has complied with prescribed procedure and rules of practice and whether the enforcement of this Act of Congress can be effectuated by a state court. This is answered by section 205(c) of the Act which specifically provides that state courts shall have jurisdiction of all other proceedings and subdivision (e) provides that an enforcement action by either "the buyer or the Administrator * * * may be brought in any court of competent jurisdiction." It is answered also by the sweeping decision of Miller v. Municipal Court, 22 Cal.2d 818, 851, 142 P.2d 297, 316, wherein it was held that "the existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

[3] It is also contended that by reason of the language of section 204(d) of the Act no tribunal other than the two federal courts there specified can determine the validity of a regulation or order of the Office of Price Control. There is no question as to the exclusive jurisdiction of the Emergency Court of Appeals to determine the validity of a regulatory order. But such exclusive power does not deprive "any court of competent jurisdiction" of the power to enforce an order of the administration, the validity of which has not been questioned. Miller v. Municipal Court, supra, 22 Cal.2d at page 828, 142 P.2d at page 300; Lockerty v. Phillips, D.C., 49 F.Supp. 513; Sections 203, 204, 205 of the Act, 50 U.S.C.A.Appendix, §§ 923, 924, 925. Such matters may be determined in an enforcement action by any court having jurisdiction of the subject matter. Bowles v. Wheeler, 9 Cir., 152 F.2d 34. In the cited case the judgment of dismissal was reversed with instructions to hear and determine the issue and to ignore the defendant's objection to the validity of the order in question. Such order was presumed to be valid until attacked by appropriate proceeding for that very purpose.

The Act prescribes a procedure for testing the validity of an order of the administrator. It provides for (1) filing protest by any person subject to the regulation made by the administrator; (2) action thereon within 30 days; or (3) he shall hold a hearing; (4) decision within 30 days after filing protest; (5) review by a board; (6) petition for mandatory relief to the Emergency Court of Appeals by a protestant aggrieved by undue delay, Sec. 923, 50 U.S.C.A.Appendix, also, see Rule 14 of Emergency Court of Appeals, 50 U.S.C.A.Appendix; (7) filing of complaint by a protestant dissatisfied with the administrator's decision denying his protest; (8) "Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule", Sec. 924(a), and "to determine the validity of any regulation or order", etc. Sec. 924(d). Subsequently, the Act was amended by providing that within five days after judgment in any civil proceeding brought under section 205 the defendant may apply to the court in which the action is pending for leave to file in the Emergency Court of Appeals a complaint containing his objections to the validity of any provision alleged to have been violated by the defendant; thereupon, that court may within 30 days enjoin or annul the order, Sec. 204(e), as amended by Sec. 107(b), Stabilization Extension Act of 1944, and in an enforcement action the court must stay the proceeding during the period for filing in the Emergency Court of Appeals or during the pendency of a protest filed prior to the commencement of the enforcement action and stays shall be granted only "upon application made within five days after judgment." Only in the event the order in question is held to be invalid may the enforcement judgment be vacated.

[4] No such procedure was followed by appellant during the pendency of the enforcement action in the municipal court or within five days after judgment. Instead, it undertook there to prove the invalidity of the administrator's action in establishing maximum rents and to show that the Act does not apply to the owner of the property. The municipal court properly rejected such attempts. Miller v. Municipal Court, supra, 22 Cal.2d 818, page 850, 142 P.2d 297. It could not review the order of the administrator. Not even the Emergency Court of Appeals can set aside orders regarding renting prices until after a protest has been filed with the administrator. No protest was filed claiming that appellant was exempt pursuant to paragraph 1388.-1231, section 1b, subdivision 5 of the regulatory order. The municipal court was obliged to presume the validity of the order. Since appellant never protested the established maximum rent by compliance with the procedure outlined in the Act, it was not entitled either to a trial on the merits of the order or to a stay of further proceedings in the municipal court. Therefore, the judgment of that court is not void and the demurrer to appellant's amended complaint herein was properly sustained.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 127

DESCHAMPS v. INDEPENDENT CAB CO. et al.

No. 14108.

District Court of Appeal, First District, Division 1, California.

Oct. 14, 1949.

Rehearing Denied Nov. 12, 1949.

See 210 P.2d 897.

Robert Deschamps sued the Independent Cab Company, Steve Vallerga and others for injuries received while plaintiff was a passenger in a cab which collided with an automobile driven by the defendant Vallerga.

The Superior Court, City and County of San Francisco, Thomas M. Foley, J., gave judgment to plaintiff against the Cab Company and in favor of the defendant Vallerga and granted a new trial as to all parties, and the defendant Vallerga appealed.

The District Court of Appeal, First District, Bray, J., held that the court had no power to make the orders last entered by the trial court and that the orders were void, and reversed the orders.

1. New trial ⇐163(1)

Where notice of intention to move for new trial had been filed and court ordered motions for new trial granted, but record showed no motions for new trial had been made, no hearing set or notice of hearing given, orders were void, although court had power on its own motion to grant a new trial. Code Civ.Proc. § 661.

2. Motions ⇐12, 19

A court cannot grant a motion not made, or one, if made, of which a party has received no notice. Code Civ.Proc. § 661.

3. New trial ⚷163(1)

In determining whether an order granting a new trial is valid, court would look not only at order but record showing proceedings on which it was based, and if fatal defect was apparent from an inspection of judgment roll effect could be urged on either direct or collateral attack.

4. New trial ⚷113

Under statute providing that court has power at chambers to hear all motions made for new trials, court cannot there pass on a motion which has neither been made nor submitted. Code Civ.Proc. §§ 166, 657.

5. New trial ⚷165

Where a court regularly makes a valid order granting or denying a motion for new trial, its jurisdiction is exhausted in that regard, and such order may not subsequently be modified or vacated by court, but the inadvertent making of an invalid order granting or denying a motion when the court lacks jurisdiction of the parties is a recognized exception. Code Civ.Proc. § 473.

6. New trial ⚷165

Where, after notice of intention to move for a new trial had been filed, trial court granted motions for new trial although no motions for new trial had been made or notice given, and motion was made to set aside such order on ground that order was prematurely made without notice, motions or submission, due to mistake, inadvertence or surprise, and was accompanied by an affidavit setting forth facts showing ground, motion was properly granted and court had jurisdiction to make order. Code Civ.Proc. § 473.

7. Appeal and error ⚷933(4)

Where court granted motions setting aside order granting new trial without limiting order to any of grounds on which motions were made, court was presumed to have granted motions on grounds set forth in motions and in affidavit. Code Civ.Proc. § 657.

8. Judgment ⚷392

A person seeking relief from a judgment or order on grounds of mistake or inadvertence has burden of showing why he is entitled to relief, and assumption of burden necessarily requires production of evidence.

9. Judgment ⚷388

Notice of motion of person seeking relief from judgment or order must state grounds on which motion will be made. Code Civ.Proc. § 1010.

10. New trial ⚷165

Where notice of entry of judgment was filed June 18, and order granting motion for new trial on July 7 was invalid as made without notice, and court entered order setting aside motions for new trial on August 9, order entered on December 14 vacating order of August 9 and affirming original order granting new trial based on motions which did not state grounds for relief was void. Code Civ.Proc. §§ 657, 1010.

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Dana, Bledsoe & Smith and Morton B. Jackson, San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion and Reginald M. Watt, San Francisco, for Clark and Independent Cab Co.

Melvin M. Belli, Lou Ashe and John Brettman, San Francisco, for respondent Deschamps.

BRAY, Justice.

Appeal by defendant Vallerga from certain orders made after verdict and judgment in a personal injury action. The facts are agreed upon and presented in the form of a settled statement

Record.

Plaintiff was a passenger riding in a cab operated by defendant Don Clark, doing business as the Independent Cab Company, and driven by defendant Albert Stein. The cab collided with an automobile driven by defendant Vallerga. Plaintiff sued all three for injuries received in the collision.[1]

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[1] Hereafter, for brevity, defendant Stein will be considered with defendant Don Clark doing business as the Independent Cab Company, and both will be referred to as the "cab company."

The jury rendered a verdict in favor of plaintiff and against the cab company in the sum of $15,000, and in favor of defendant Vallerga. On June 18, 1948, plaintiff filed and served a notice of entry of judgment, and also notice of intention to move for a new trial upon all the statutory grounds. Thereafter [2] defendant cab company served on plaintiff and defendant Vallerga notice of intention to move for a new trial, also upon all the statutory grounds.

Neither of these motions was set for hearing. No affidavits or briefs were filed. No hearing was had, nor was either motion submitted. On July 7, the court granted a new trial as to all parties "on the grounds of insufficiency of evidence to justify verdict, and upon all other legal grounds."

Thereafter, Vallerga served and filed a notice of motion, under section 473 of the Code of Civil Procedure, to set aside so much of the July 7 order as granted a new trial as to him. This notice stated that the "Said Motion will be made upon the grounds that the Order granting said motion was prematurely made and entered before submission of the Motion for New Trial made by the plaintiff, without notice to the defendant Steve Vallerga, or to any of his attorneys and without the hearing of any argument in support of or against the Motion for New Trial" and on the further ground that it was made and entered against Vallerga "through mistake and inadvertence" and that he and his attorneys were "taken by surprise." Accompanying the notice was an affidavit of one of Vallerga's attorneys stating that no affidavits or points and authorities were served, no notice of hearing given, and that the order was made without hearing or argument and before the motions were submitted. The points and authorities accompanying the notice cited code sections showing that the granting of the motions "on all other legal grounds" without affidavits was a nullity. It also stated that the court had no way of knowing whether plaintiff would abandon his motion for new trial against Vallerga and whether plaintiff still desired such new trial; also that the plaintiff's motion was never submitted. It then cited Irons v. Superior Court, 10 Cal.App. 2d 523, 52 P.2d 553, to the effect that an order allowing a new trial without notice of the hearing is invalid. Plaintiff then served and filed a notice of motion under section 473 to set aside so much of the order of July 7 as granted a new trial as to the cab company on the grounds that the order was prematurely made. The notice stated that plaintiff joined in Vallerga's points and authorities.

On August 9, 1948, the court entered the following minute order: "* * * the Court ordered the motions of defendant Steve Vallerga, and plaintiff, Robert Deschamps, to set aside order granting a new trial, granted."

On August 16, the 60 days given the court to pass on the motion for new trial expired, as that was the 60th day after filing notice of entry of judgment. However, on August 18, plaintiff and the cab company moved for a new trial based upon their previous notices of intention to move for a new trial. The same day the court, by minute order, granted both motions for new trial. On August 24, following the minute order, a formal order was made. Obviously, both orders were void as the court's time to grant a new trial had expired.

Thereafter plaintiff filed a notice of motion to set aside or determine and to fix validity of orders granting and denying new trials. Defendant Vallerga appeared on the hearing of this motion and objected specially to the jurisdiction of the court to hear it. No affidavits were filed in support of the motion. Plaintiff and the cab company moved the court for an order setting aside the order of August 9 and resinstating the original order granting new trial of July 7. On December 9 a minute order was entered: "In this action, the Court ordered the motion of defendant Independent Cab Company, to vacate and set aside order of August 9, 1948, granting the motions of Steve Vallerga and Robert Deschamps, to set aside order granting a new trial; granted." This was followed by a formal order on December 14, which stated that on the motions of plaintiff and the cab company "that certain order of August 9, 1948, heretofore entered by mistake and inadvertence, is hereby set aside and vacated * * *

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[2] For brevity and to prevent confusion of the important dates, the dates of the various proceedings herein will not be given, unless necessary to this decision.

"It is further ordered that the original orders in this cause made granting a new trial to plaintiff against both defendants and granting a new trial as to defendant Don Clark, doing business as Independent Cab Company, and Albert Stein, shall stand and the same are affirmed; and

"It is hereby ordered and affirmed that plaintiff shall have a new trial against all defendants herein and any orders subsequently made to set original order are declared vacated and are vacated."

Vallerga appealed from both the minute order of December 9 and the formal order of December 14.[3]

Contentions.

Defendant Vallerga contends that the orders of December 14 were void because (1) they attempted to grant a new trial after the court's jurisdiction to do so had expired; (2) the motion upon which they appear to be based did not comply with section 473 and was otherwise improper; also that plaintiff is estopped to question the order of August 9. Plaintiff contends (1) that the orders of August 9 and December 14 were both void, because by the order of July 7 the court exhausted its jurisdiction to modify or vacate the order granting a new trial as to all parties (the cab company makes the same contention but has no legal standing to question the acts of the court as to its codefendant Vallerga, Robson v. Superior Court, 171 Cal. 588, 154 P. 8); (2) that no estoppel lies.

It is clear that the orders of August 18 and 24, purporting to grant a new trial, were made after the expiration of the time in which the court could pass upon the motion for new trial, and are void. Likewise, those portions of the orders of December 14 purporting to grant or confirm a new trial were also void.

Order of July 7 Invalid.

[1] The first question to be determined is the validity of the order of July 7 granting a new trial as to all parties. A mere examination of the order and the record shows its invalidity. It states that "the Court ordered the motions for a new trial" granted. The record shows that there were no motions for a new trial made. The court had the power on its own motion to grant a new trial. But the court did not do this. It purported to grant motions which had not been made. There was on file at the time only the notice of plaintiff and the cab company that they intended to move for a new trial. No hearing was set and no notice of hearing given; no motions made and no submission to the court of anything upon which to act. It was a stronger situation than in Irons v. Superior Court, supra, 10 Cal.App.2d 523, 52 P.2d 553. There the motion for new trial was set for hearing but no notice given the defendant mining company although it apparently was given to the plaintiff and the other defendants. The court held, 10 Cal.App.2d at page 524, 52 P.2d at page 554: "The order allowing a new trial was invalid as to the Pioneer Lucky Strike Gold Mining Company, for the reason that it was granted without notice or knowledge of the hearing thereof, on its part. [Citing cases.] Section 661, supra [Code Civ. Proc.], specifically requires the clerk of court to give the respective parties to an action five days' notice of the time set for the hearing of a motion for new trial."

If an order granting a new trial is invalid for failure to give notice of a hearing regularly set, still more is an order made without even a hearing being set or a motion made.

The cases cited by plaintiff are not in conflict with this conclusion. In Collins v. Nelson, 41 Cal.App.2d 107, 106 P.2d 39, the motion for new trial was ordered submitted on briefs to be filed by the respective parties in three, two and one weeks. However, the next day, without waiting for briefs, the court entered an order reading "The motion for new trial herein, heretofore submitted, is hereby granted." 41 Cal.App.2d at page 111, 106 P.2d at page 41. Upon appeal it was held that the order was valid as the court had the right to decline to receive briefs. The court pointed out, 41 Cal.App.2d at page 113, 106 P.2d at page 42: "Undoubtedly in the case before us the trial judge became cognizant of the fact that if he permitted the time to elapse which he had granted for filing briefs the sixty-day period within which he could rule upon the motion for a new trial would have expired, whereupon he entered his order. When the trial judge directed the filing of briefs he did not thereby divest himself, as claimed by appellant, of jurisdiction to rule on the motion for a new trial until the allotted time for filing briefs had expired. Obviously, all this was procedural and within the control and discretion of the trial judge."

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[3] For brevity these orders will be considered together and referred to as the orders of December 14.

There is a considerable difference between a court refusing to wait for briefs after the motion is submitted and one where the court without such submission acts, not upon his own motion, but upon purported motions which were never made. In Morel v. Simonian, 103 Cal.App. 490, 284 P. 694, the exact procedure followed does not appear. However, the language used would indicate that there was a hearing on the motion for new trial. "Many affidavits were submitted in support of the motion." 103 Cal.App. at page 495, 284 P. at page 696. The court then said: "Complaint is also made that the trial court refused to give appellant the privilege of arguing the motion for a new trial. This is also a matter of discretion resting with the trial court." 103 Cal.App. at page 495, 284 P. at page 696. There is nothing in this case which holds that an order made under the circumstances of our case is a valid one.

[2] The Collins case, supra, does not discuss the Irons case, supra. It seems elementary that a court cannot grant a motion not made, nor one, if made, of which a party has received no notice.

[3] In determining the validity of the July 7 order we must look not only at the order but the record showing the proceedings on which it was based. 1 Freeman on Judgments, 5th Ed., § 375, p. 786; Petition of Furness, 62 Cal.App. 753, 756, 218 P. 61. "* * * if the fatal defect is apparent from an inspection of the judgment roll it may be urged upon either direct or collateral attack and the asserted void portions may be lopped off as dead branches upon the judicial tree. [Citing cases.]" In re Estate of Smead, 12 Cal.2d 20, 25, 82 P.2d 182, 184. There being no motions for the court to pass on, it affirmatively appears on the face of the record that the order is void.

[4] While the court under section 166 of the Code of Civil Procedure has the power "at chambers" to "hear and determine all motions made" under section 657 of the Code of Civil Procedure (the section providing for new trials), this does not mean that the court can there pass upon a motion which has neither been made nor submitted. Long v. Standard Oil Co., 92 Cal.App.2d 455, 207 P.2d 837, cited by plaintiff, does not hold to the contrary. In that case "the motion was argued and submitted". 92 Cal.App.2d at page 457, 207 P.2d at page 838. The judge later handed to his clerk a "Memo of Decision of Defendant's Motion for a New Trial" upon which the clerk entered a minute order granting a new trial. The court held that this was a sufficient direction to the clerk to authorize the minute order. Likewise in Hackel v. Los Angeles Ry. Corp., 31 Cal.App.2d 228, 88 P.2d 178, referred to in the Long case, 92 Cal.App.2d at page 455, 207 P.2d 837, the motion for new trial was made and heard in open court, argued and submitted. It appeared that the order granting a new trial was entered in the minutes by the court on oral instruction of the judge. It was held that this was sufficient.

Order of August 9 Valid.

[5, 6] This brings us to the order of August 9. The attack on the validity of this order is based on the contention that the court in granting it acted on the authority of Irons v. Superior Court, supra, 10 Cal.App.2d 523, 52 P.2d 553, and was

in error in so doing; that the court in its order of July 7 merely made an error of law in thinking that it could make such order without a motion being made and hence could not cure such error of law by a subsequent order. But, as we heretofore pointed out, the Irons case does apply. The further contention that the court exhausted its jurisdiction by the order of July 7 is well answered in that case as follows, 10 Cal.App.2d at page 525, 52 P.2d at page 554: "It is undoubtedly true that, when the trial court regularly makes a valid order granting or denying a motion for new trial, its jurisdiction is exhausted in that regard, and such an order may not subsequently be modified or vacated by that court. [Citing cases.] But the inadvertent making of an invalid order granting or denying a motion for new trial when the court lacks jurisdiction of the parties is a recognized exception to the general rule previously stated." The motion was made on the grounds (1) that the order was prematurely made without notice of hearing, motions or a submission; (2) through mistake, inadvertence and surprise. An affidavit accompanied the notice of motion setting forth the facts showing both grounds of the motion. Thus the moving papers were sufficient upon which to base the motion, and the motion was properly granted.

[7] Even if the order of July 7 was not void and the court had the power to make it without the motions being made or submitted, the court had the power under section 473 to grant relief where it had inadvertently made an order without notice. It is obvious that the order granting the new trial which included "upon all other legal grounds" was inadvertently made as there were no affidavits or showing upon which such an order could have been made. The court in its order of August 9 granted the motions without limiting it to any of the grounds upon which the motions were made. Thereby the court is presumed to have granted it on all the grounds set forth in the motions and affidavit, first, that the order of July 7 was invalid; and secondly, that it was entered through mistake, inadvertence and surprise.

Orders of December 14.

[8–10] This, however, is not true of the orders of December 14. There was no basis for the motion—no showing that there was any mistake or inadvertence in the making of the order of August 9. The notice of motion stated that plaintiff would move the court "to set aside or determine and to fix validity of orders granting and denying new trials." Prior to the filing of this notice of motion a motion to advance the case on the calendar for trial had been made and denied without prejudice to Vallerga's right to move for a determination of the validity of the order granting a new trial as against him. Plaintiff's notice of motion stated that the motion would be made pursuant to this action of the court, and among other things, would be based "upon affidavits and evidence to be adduced." No affidavits were filed and no evidence adduced, other than the records themselves. It is well settled in this state that a person seeking relief from a judgment or order on the grounds of mistake or inadvertence has the burden of showing why he is entitled to the relief "and the assumption of this burden necessarily requires the production of evidence." Hewins v. Walbeck, 60 Cal.App.2d 603, 610, 141 P.2d 241, 245. The notice of motion must state the grounds upon which it will be made. Code Civ.Proc. § 1010. Because of the failure to set forth any grounds upon which the motion would be made, no showing of mistake or inadvertence, the attempt to grant a new trial long after the time to do so had expired, the fact that the order of July 7 was invalid and therefore the order of August 9 was properly made, the court had no power to make the orders of December 14 and they are void.

The orders appealed from are reversed.

PETERS, P. J., and WARD, J., concur.

94 Cal.App.2d 36

CITY OF LOS ANGELES et al. v. LOS ANGELES BLDG. & CONST. TRADES COUNCIL et al.

Civ. 16794.

District Court of Appeal, Second District, Division 3, California.

Oct. 6, 1949.

Hearing Denied Dec. 5, 1949.

The City of Los Angeles, and the Departments of Water and Power of the City of Los Angeles, brought an action to enjoin the Los Angeles Building and Construction Trades Council, an unincorporated association, and others, from striking, picketing, or declaring the department unfair, and engaging in other concerted actions for the purpose of coercing the department.

The Superior Court, Los Angeles County, Clarence M. Hanson, J., granted a preliminary injunction, and the defendants appealed.

The District Court of Appeal, Shinn, P. J., held that on its face the order only forbids action against the city, and only in so far as employees of contractor might engage in activities in order to coerce or intimidate officers of city or induce employees to strike or cease work would their conduct be unlawful, and affirmed the order of injunction.

1. Constitutional law 🔑274

Although the right to picket peacefully for purpose of publicizing truthful facts of a labor dispute, is an exercise of freedom of discussion under Fourteenth Amendment to federal Constitution, the right does not extend beyond bounds of legality and a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. U.S.C.A.Const.Amend. 14.

2. Constitutional law 🔑274
Torts 🔑10(15)

Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike. U.S.C.A.Const.Amend. 14.

3. Torts 🔑10(15)

A strike which runs afoul of statute law or public policy is not entitled to legal protection and may be subject to legal restriction.

4. Injunction 🔑104

Illegality of purpose provides a complete basis for injunctive relief against conduct which would otherwise be deemed a permissible exercise of fundamental rights.

5. Injunction 🔑102

Where illegality of purpose consists of violation of settled public policy, as well as in other cases of illegal conduct, the injured party has a right to be protected from imminent harmful consequence of such action.

6. Master and servant 🔑15(19)

The Labor Relations statutes relate to private industry only and not to public employment. Labor Code, § 923.

7. Master and servant 🔑15(19)

Persons entering public employment do not thereby acquire a right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law or, under established systems, are subject to regulation by governmental bodies. Labor Code, § 923.

8. Municipal corporations 🔑271, 272

City of Los Angeles, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and a public function, irrespective of whether it is acting in a proprietary or governmental capacity. St.1925, p. 1062, §§ 100, 103; St. 1935, p. 2339, § 425.

9. Master and servant 🔑15(19)
Municipal corporations 🔑205
Torts 🔑10(23)

Under charter of City of Los Angeles, vesting in Board of Water Commissioners duty to create necessary positions, fix salaries and duties of employees and providing for Civil Service Commission charged with duty of classifying all non exempted positions in city employ, and providing for selection of employees in classified service on basis of competitive examination, city was not obligated to bargain collectively with union, and employees of water department could not lawfully strike or picket for purpose of enforcing demands as to conditions of employment. St.1925, pp. 1062, 1066, §§ 100, 103, 111; St.1935, p. 2339, § 425.

10. Municipal corporations ⚿244(1)

City officers may not deviate by contract from provisions of city charter controlling conditions of employment.

11. Municipal corporations ⚿62

Under Los Angeles city charter, discretionary powers vested in city authority to establish, classify, and fix salaries for various positions in public employ may not be lawfully abdicated or delegated. St. 1925, p. 1066, § 111.

12. Municipal corporations ⚿244(1)
Torts ⚿10(23)

To the extent that terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for purpose of affecting terms and conditions is not sanctioned by law.

13. Torts ⚿10(23)

Employment in public service frequently entails a necessary surrender of certain civil rights to a limited extent because of dominant public interest in unimpeded and uninterrupted performance of functions of government.

14. Torts ⚿10(23)

Treatment for public employees does not require legal protection for concerted labor action as in case of private employment, for such treatment is in the public field compelled to a considerable extent by law.

15. Torts ⚿10(23)

That legislature failed to enact legislation proposed which would have declared a strike of public employees to be contrary to public policy and misdemeanor would not be considered as supporting union's alleged right to strike or picket city construction projects.

16. Injunction ⚿211

Injunction restraining union members from unlawfully striking, picketing, or intimidating city authorities in performance of their duties, and inducing employees of water department to strike or to interfere with work of department's progress, would not be considered as intended to banish strikes or peaceful picketing by private employees against their employers.

Arthur Garrett, Los Angeles, and Clarence Todd, San Francisco, for appellants.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Water and Power, Cornelius T. Waldo, Asst. City Atty., A. L. Lawson, Deputy City Atty., Alfred H. Driscoll, Deputy City Atty., Los Angeles, for respondents.

SHINN, Presiding Justice.

The question for determination on this appeal involves the right of organized labor to strike, picket, and engage in other concerted labor activities against a governmental, rather than a private, employer.

The action was brought by the City of Los Angeles and its Department of Water and Power, which was engaged in construction and modification work upon some eight major water and electrical projects in the city, to enjoin a group of labor unions from striking, picketing, declaring the department unfair, and engaging in other concerted action for the purpose of coercing the department to comply with certain demands of defendants regarding working conditions on said projects. A preliminary injunction was granted on March 11, 1948, after a hearing of an order to show cause issued on plaintiffs' verified complaint. The appeal is from the injunction, and challenges its validity solely upon constitutional grounds.

By the terms of the preliminary injunction, the defendant unions, and "all persons in active concert or participation with them," were restrained during the pendency of the action or until the further order of the court from "Striking, or calling or inducing a strike against the Department of Water and Power of The City of Los Angeles at any of its projects hereinafter enumerated, or picketing any of said projects, or giving any notice stating or implying that a strike exists at any of said projects or threatening to strike or picket any of said projects or hindering, delaying or interfering with, in any manner or by any means or device, the work upon any of said projects, for the purpose of intimidating or coercing The City of Los Angeles, the Department of Water and Power, the Board of Water and Power Commissioners, the Board of Civil Service Commissioners, or any officer of said City in the performance of their or his lawful duties; and coercing, compelling, inducing or encouraging the employees of said Department of Water and Power, who are employed on said projects, to hinder, delay or interfere with the work on said projects, by strike, walk-out, cessation of work, or otherwise." After describing the projects affected, the injunction concluded with the statement that "Nothing in this order shall be construed as affecting the right of any employee of said Department to abandon or to resign his employment."

The evidence upon which the injunction was granted was contained in plaintiffs' verified complaint, and in three affidavits filed by defendants.

The following facts were before the court: The Department of Water and Power of The City of Los Angeles is a duly constituted department of the city government. It is required and empowered by the City Charter to construct and operate facilities to supply water and electricity to the city and its inhabitants. Approximately $450,000,000 is presently invested in publicly owned water and electric systems under its management and control. In December, 1947, in order to meet the greatly increasing demands being made upon it by reason of the rapid growth of the city, the department was engaged in an extensive construction program to enlarge and improve its facilities. The estimated cost of the eight separate construction projects here involved exceeds $48,000,000. Of these projects, all but two were being built entirely by direct employment and purchase of materials by the department; the two largest projects were being constructed in part by independent contractors. Some 420 persons were directly employed by the department on the several projects, all of whom were classified members of the civil service. Ninety or more of these employees, and nearly all of the employees of the independent contractors, were members of one or more of defendant unions.

Beginning in December, 1947, defendant unions made repeated demands upon the department relating to working conditions. According to the allegations of the complaint, the foremost demand was "that said department require all of said persons so employed directly by it to be or become members of some one of the defendants labor unions, or that the department remove said persons from said projects and employ thereon only members of such a labor union." Other demands alleged were as follows: That the Board of Water and Power Commissioners and Board of Civil Service Commissioners fix and classify the duties of civil service positions in the department in conformity with the craft jurisdictions and job classifications recognized by defendants; that the department provide craft foremen to supervise the work "in conformity with the provisions of the collective bargaining agreements which said defendants have made with private employers"; and that the Board of Water and Power Commissioners fix wages and salaries in accordance with "standards and rules established, approved and recognized by said defendants." Defendants' version of the union demands, as shown by affidavit was that the unions proposed that the department follow a "union policy" on the new construction, by transferring sufficient union employees from repair and maintenance work to the new construction so as to completely man those jobs, and with respect to new employees put only union members on new construction work. Defendants admitted, by affidavit, the other demands allegedly made, and averred in justification therefor that the prevailing system of classification and definition of the duties of departmental employees was being used as a device to avoid payment of wages equivalent to those being paid for comparable services rendered to private employers, in violation of section 425 of the City Charter. After a series of conferences between union and departmental officials, as a result of which the department allegedly made some changes in its overtime pay policies but otherwise rejected the union demands, a strike was called on February 6, 1948. The department's projects were declared to be "unfair," pickets were posted, and all of the union employees withdrew from work. It is not contended that the picketing was not entirely peaceful, nor that the representations made were either false or fraudulent.

The case presents the important question whether organized labor may legitimately strike and picket government itself. The city tacitly concedes that the complaint would not state a cause of action as against an ordinary employer in private industry; McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union Local 1172, 16 Cal.2d 379, 106 P.2d 403; and we are not called upon to determine whether it would be sufficient as against a privately owned public utility or common carrier. See Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union, 31 Cal.2d 441, 446–448, 189 P.2d 277.

[1–5] Although no case has been found, nor has any been cited to us, which affirms that there exists a constitutional right to strike, as distinct from other constitutional rights, we are faced with a clear constitutional issue in respect to the portions of the injunction which restrain picketing and other forms of communication relating to the controversy between the parties. In Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Carlson v. State of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104, the principal was laid down that peaceful picketing for the purpose of publicizing the truthful facts of an industrial labor dispute was an exercise of freedom of discussion which under the Fourteenth Amendment to the United States Constitution, could not be generally prohibited by state action. The right, of course, is not free from limitation. It does not extend beyond the bounds of legality. And as said by Mr. Justice Brandeis in Dorchy v. Kansas, 1926, 272 U.S. 306, 311, 47 S.Ct. 86, 87, 71 L.Ed 248; "a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. * * * Neither the common law, nor the Fourteenth Amendment, confers the absolute right to srike." In International Union, U.A.W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 1949, 336 U.S. 245, 69 S.Ct. 516, 524, 93 L.Ed. 651, citing and quoting with approval from Dorchy v. Kansas, the court said: "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' * * *." In upholding the power of a state to outlaw intermittent, unannounced work stoppages, the court there reaffirmed the principle that to whatever extent there is a right to strike, that right plainly contemplates a lawful strike. One which runs afoul of statute law or public policy is not entitled to legal protection, and may be subject to legal restrictions. See National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599, sit-down strike; Southern S. S. Co. v. National Labor Relations Board, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246, mutiny; United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884, strike creating national emergency; Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N.W.2d 57, 145 A.L.R. 1158, strike to compel hiring of unwanted employees. See also, 31 Am.Jur., secs. 204–221, pp. 934–942; anno. 71 L.Ed. 250–268, citing many cases. In the Thornhill case it was expressly recognized, and subsequent decisions involving a variety of circumstances have affirmed, that limitations may be imposed upon picketing or other concerted action where the objective sought is not a permissible one under the applicable state law, or as viewed from the standpoint of public policy. Hughes v. Superior Court, 32 Cal.2d 850, 198 P.2d 885, certiorari granted 336 U.S. 966, 69 S.Ct. 930, discriminatory hiring of fixed proportion of Negro employees; Northwestern Pac. R. Co. v. Lumber & Sawmill Workers' Union, 31 Cal.2d 441, 189 P.2d 277, interference with common carrier's performance of statutory duty; Park & Tilford Import Corp. v. International Brotherhood of Teamsters, etc., 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426, closed shop contract in violation of National Labor Relations Act, 29 U.S.C.A. § 151 et seq.; James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329, 160 A.L.R. 900, closed shop contract with union with discriminatory membership policy; Riviello v. Journeymen Barbers etc. Union, 88 Cal.App.2d 499, 199 P.2d 400, semble; Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343, elimination of independent businessmen-workers in competition with "closed union"; Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, violation of state antitrust law; Fashioncraft, Inc., v. Halpern, 313 Mass. 385, 48 N.E.2d 1, closed shop in violation of state public policy; Schwab v. Moving Picture Machine Operators Local, 165 Or. 602, 109 P.2d 600, closed shop contract with "closed union"; Markham & Callow, Inc., v. International Woodworkers, 170 Or. 517, 135 P.2d 727, to induce employer to violate union shop contract with certified bargaining agent. While it was said in the Thornhill case, that "[a]bridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." 310 U.S. at pages 104–105, 60 S.Ct. at page 745, our Supreme Court has observed that the protection afforded by the free speech guarantee to disputants in labor controversies is not "necessarily controlled by the clear and present danger test" to the same extent as in ordinary free speech cases. In re Blaney, 30 Cal.2d 643, 648, 184 P.2d 892, 896. Many of the cases upon which defendants rely fall in the latter category. Broad language employed therein, with reference to entirely different circumstances, cannot be deemed decisive of the present controversy, especially where, on its face, at least, such language may not appear to be entirely consistent with essential principles of law that have been developed to meet problems peculiar to the field of labor relations. As the cases cited above illustrate, illegality of purpose provides a complete basis for injunctive relief against conduct which would otherwise be deemed a permissible exercise of fundamental rights. Where such illegality consists of violation of settled public policy, as well as in other cases of illegal conduct, the injured party has a right to be protected from the imminent harmful consequences of such action.

The issues for decision involve public employment. At the outset we may put to one side the authorities dealing with the legality of labor objectives in disputes with private industry, as not being appropriate to our inquiry; for, as was pointedly said in Perez v. Board of Police Com'rs, 78 Cal. App.2d 638, 647, 178 P.2d 537, 543, "[n]othing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison." Accordingly, our inquiry will be directed to the peculiar nature of public employment, and particularly to the legal foundations of such employment in the Los Angeles Department of Water and Power.

The charter of the City of Los Angeles created the Department of Water and Power as a department of the "city government," with the power and duty, among other things, "to construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with water and electric energy * * *." Charter, secs. 70, 220, Stats.1925, pp. 1056, 1095. Control and management of the Department is vested in a Board of Water and Power Commissioners, whose members are officers of the city. Charter, secs. 71, 78, 5, Stats.1925, pp. 1056, 1058, 1039. The Board is charged with the duty to "create the necessary positions in said department, authorize the necessary deputies, assistants and employees and fix their salaries and duties, and fix the salary of the general manager of the department and may require bonds of any or all such employees for the faithful performance of their duties." Charter, sec. 86, Stats.1925, p. 1060. In fixing the compensation of city employees, it is provided that the appropriate authority "shall, in each instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment, in case such prevailing salary or wage can be ascertained." Charter, sec. 425, as amended, Stats.1935, p. 2339.

The Charter further provides for a complete scheme of civil service, under the control and direction of a Board of Civil Service Commissioners, which, among other things, is charged with the duty of classifying all non-exempted positions in the city employ (including all but the highest executive positions in the Department of Water and Power). The Charter requires that "Each class shall include all positions sufficiently similar in respect to the duties and responsibilities therefor in which: (a) The same requirements as to education, experience, knowledge and ability are demanded of incumbents; (b) the same tests of fitness may be used in choosing qualified appointees; (c) the same schedule of compensation may be made to apply with equity. The offices and places so classified by the Board shall constitute the classified civil service of said city; and no appointment to any such offices and places shall be made except under and according to the rules hereinafter mentioned." Charter, secs. 100, 103, Stats.1925, p. 1062. Selection, appointment, and promotion of employees in the classified service is upon the basis of competitive examinations. The Charter also provides that "unskilled laborers, including drivers;" and "persons employed on the construction of public works, improvements or buildings;" may be exempted from the civil service requirements "upon the request of the head of the department in which they are employed, by order of the Board of Civil Service Commissioners, approved by the [City] Council by resolution," but "[a]ny exemption thus made may be terminated at any time by resolution of the Board of Civil Service Commissioners." Charter, sec. 111, Stats.1925, p. 1066.

The employer-employee relationship in the city's service is governed by statutory law and administrative regulation; it is not fixed, either in whole or in part, by contract, as in the field of private industry. The positions which are "necessary" in the Department of Water and Power must be determined by the managing Board and there is no requirement that the number or nature of the positions or the required duties or skills conform to those generally established in comparable private enterprise. The Board of Civil Service Commissioners is not only free, but is under a duty to prescribe positions and classes which, in its view, most nearly accord with the letter and spirit of the civil service law. To be sure, the salaries or wages of city employees must be set at the prevailing rate, but only "in case such prevailing salary or wage can be ascertained." To the extent that the job classifications differ, so too will the wage and salary schedules differ, as between public and private employees; and any lack of uniformity of wage policies as between private employers in comparable enterprises will normally be reflected in the determination of what is the prevailing wage for civil service purposes. The provisions for open and competitive examinations as the basis of employment in the classified service rule out any discriminations in hiring policies in favor of labor union members, and, perforce, forbid a closed or union shop.

[6, 7] Manifestly, the operations of the Department of Water and Power are controlled by the same public law from which its authority to act is derived. In Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741, this court gave full consideration to the distinguishing features of public employment in holding that a city government was not under any legal duty to bargain collectively with a union of municipal transit employees. The legislative policy favoring collective bargaining as to the terms and conditions of labor, incorporated in section 923 of the Labor Code, was there held to be inapplicable to cases like the present one: "Those who enter public employment do not thereby acquire the right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law, or under established systems, are subject to regulation by governmental bodies." 74 Cal.App.2d at page 298, 168 P.2d at page 745. In the Nutter case, it was not necessary to determine to what extent, nor in reference to

what matters, collective bargaining would be permissible if voluntarily engaged in by the city, nor is it necessary to do so here. Not only are all of the asserted demands of defendants nearly within the scope of express Charter regulation, but the complaint alleges that plaintiffs have offered at all times to "discuss" with defendants any of the demands except that for a closed or union shop on its construction projects.

[8] Defendants make the contention that when acting in a proprietary capacity, as the Los Angeles Department of Water and Power is asserted to be acting, the City is subject to the same obligations and liabilities as a private employer, and accordingly the availability to it of injunctive relief against strikes and picketing is the same as that of a private employer. We need not decide whether, in view of the fact that water and electricity are used by both public and private consumers, the Department is acting solely in a proprietary capacity, compare City of Huntingburg v. Morgen, 90 Ind.App. 573, 162 N.E. 255, 257, and Eastern Illinois State Normal School v. City of Charleston, 271 Ill. 602, 111 N.E. 573, 575, L.R.A.1916D, 991, with Christian v. City of New London, 234 Wis. 123, 290 N.W. 621, 623; see also Brush v. Commissioner of Internal Revenue, 300 U.S. 352, 370–371, 57 S.Ct. 495, 81 L.Ed. 691, 108 A.L.R. 1428, for we are of the opinion that no legitimate reason can be found for drawing any distinction, within the framework of the present case, between the governmental and proprietary functions of the City. The distinction was developed by the courts for application chiefly in cases involving the tort liability of municipal corporations, "to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations." City of Trenton v. New Jersey, 262 U.S. 182, 192, 43 S.Ct. 534, 538, 67 L. Ed. 937, 29 A.L.R. 1471. It has no rational application in the present situation. The City, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and public function, irrespective of whether it is acting in a "proprietary" or "governmental" capacity. Irish v. Hahn, 208 Cal. 339, 344, 281 P. 385, 66 A.L.R. 1382. A single civil service system governs all classified positions in the City's service, regardless of whether they involve an exercise of governmental or proprietary functions. Manifestly, all of the city's classified employees, regardless of function performed, must be considered upon the same basis. The legal principles governing the City's obligations respecting the working conditions of Water and Power employees can be no different from those pertaining to any other employees. A contention similar to that made here was squarely rejected by this court in Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 302, 168 P.2d 741, in treating of the duty of a municipality to bargain collectively with a union of city bus line employees. Accord: City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 546.

[9–11] From what has already been said, we think it is self-evident that defendants may not, consistently with the public policy expressed in the Los Angeles City Charter, lawfully either strike or picket for the purpose of enforcing demands as to conditions of employment in respect to which neither the city nor the Department of Water and Power is obligated to bargain collectively. To hold to the contrary would be to sanction government by contract instead of government by law. The charter mandate for non-discriminatory competitive civil service examinations clearly cannot be modified by agreement, whether coerced by economic and moral suasion, or free and voluntary. Likewise, to the extent that the conditions of employment commonly arranged by contract are covered by the provisions of the City Charter, those provisions are controlling and neither the Board of Water and Power Commissioners nor any other city officers, may deviate therefrom by contract. Furthermore, to the extent that the city authorities are vested by the Charter with continuing discretionary powers such as the power to establish, classify (or exempt from the requirements of the classified service), and fix salaries for the various positions in the public employ, and direct the conduct of the work, such discretion may not be lawfully abdicated or delegated. See Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745, 747, 162 A.L.R. 1101; Hagerman v. City of Dayton, 147 Ohio St. 313, 71 N.E.2d 246, 254, 170 A.L.R. 199. Strikes and picketing to accomplish these objectives are unquestionably for an unlawful purpose.

[12] We may add that although the exact question of the validity of strikes and picketing against a governmental employer does not appear to have been squarely decided in any reported decision of a court of last resort, the cases uniformly recognize the validity of the principles of law which we have stated. See Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194, 165 A.L.R. 967 and Congress of Industrial Organizations v. City of Dallas, Tex.Civ.App., 198 S.W.2d 143, both of which are cited and quoted with approval in Perez v. Board of Police Com'rs, 78 Cal.App.2d 638, 178 P.2d 537; Petrucci v. Hogan, Sup., 27 N.Y.S.2d 718; Mugford v. Mayor and City Council of Baltimore, supra; City of Springfield v. Clouse, supra; Hagerman v. City of Dayton, supra. In the Miami case, wherein the court on similar facts reached the same conclusion which this court did in Nutter v. City of Santa Monica, supra, it is said that the familiar terms of industrial conflict, such as "collective bargaining," "strike," and "picketing," "are strange and incongruous terms when attempted to be squared with the governmental process as we know it, or when projected into the field of municipal legislation. * * * While strikes are recognized by the statute to be lawful under some circumstances, it would seem that a strike against the city would amount, in effect, to a strike against government itself—a situation difficult to reconcile with all notions of government." 26 So.2d at page 197. The opinion in the Dallas case expresses the same view, adopting the following language from Railway Mail Ass'n v. Murphy, 180 Misc. 868, 44 N.Y.S.2d 601: " 'The formidable and familiar weapon in industrial strife and warfare—the strike—is without justification when used against the Government. When so used, it is rebellion against constituted authority. * * * To hold otherwise would be to sanction control of governmental functions not by law but by men.' " 198 S.W.2d at page 145. In Petrucci v. Hogan, the court enjoined picketing of municipal employees' homes to compel payment of union dues, saying, "The City is not at liberty to act in derogation of the provisions of the Constitution or the Civil Service Law, and picketing that has for its ultimate object establishment of a 'closed shop' wherein only those shall be employed who are members of the union cannot be viewed as legal." 27 N.Y.S.2d at page 726. All the cited cases either expressly or implicitly acknowledge that to the extent that the terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for the purpose of affecting such terms and conditions is not sanctioned by the law. See also, Teller, Labor Disputes and Collective Bargaining, 1947 Cum. Supp., vol. 1, sec. 171, pp. 113–119, and authorities there cited; Rhyne, Labor Unions and Municipal Employe Law, 1946, pp. 44–51, 138–139, 436, 437, and authorities there cited; note 54 Harv.L.Rev. 1360, 1364–1366. It follows from the authorities previously discussed that since defendants' objectives are contrary to the law and to prevailing public policy, injunctive relief against both striking and picketing to accomplish those objectives is not violative of any Constitutional limitations.

[13, 14] Our conclusion in this respect finds support also in numerous cases sustaining the validity of regulations prescribing, as a condition of public employment, certain restrictions upon rights which such employees would otherwise be free to enjoy as private citizens. See Perez v. Board of Police Com'rs, supra, King v. Priest, Mo.Sup., 206 S.W.2d 547; City of Jackson v. McLeod, 199 Miss. 676, 24 So.2d 319; Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W.2d 310; Hutchinson v. Magee, 278 Pa. 119, 122 A. 234; Carter v. Thompson, 164 Va. 312, 180 S.E. 410; Seattle High School Chapter No. 200 v. Sharples, 159 Wash. 424, 293 P. 994, 72 A.L.R. 1215; People ex rel. Fursman v.

City of Chicago, 278 Ill. 318, 116 N.E. 158, L.R.A.1917E, 1069; and Congress of Industrial Organizations v. City of Dallas, supra, sustaining the right of public authorities to forbid union membership by policemen, firemen, school teachers, and civil service employees in general. See also, McAuliffe v. Mayor etc. of the City of New Bedford, 155 Mass. 216, 29 N.E. 517; Brownell v. Russell, 76 Vt. 326, 57 A. 103; State ex inf McKittrick ex rel. Ham v. Kirby, 349 Mo. 988, 163 S.W.2d 990, and United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754, upholding, as against attack on constitutional grounds as interference with freedom of speech, freedom of suffrage or personal liberty, restrictions upon the political activities of certain public employees. The controlling principle of the foregoing cases is that employment in the public service frequently entails a necessary surrender of certain civil rights to a limited extent, cf. Christal v. Police Commission, 33 Cal.App. 2d 564, 569, 92 P.2d 416, because of the dominant public interest in the unimpeded and uninterrupted performance of the functions of government. Fair treatment for public employees does not require legal protection for concerted labor action generally, as in the case of private employment, for such treatment is, in the public field, compelled to a considerable extent by law. Although the holdings in the above cited cases must be confined to their particular facts the legal principles underlying those decisions are fully and properly applicable with respect to the present case. We may with propriety refer to the observation of Mr. Justice Reed, in United Public Workers v. Mitchell, supra, that the fundamental human rights preserved as against governmental emasculation by the First, and thus also by the Fourteenth, Amendments, "in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery." 330 U.S. at page 95, 67 U.S. at page 567.

[15] Defendants refer to the legislative history of Senate Bill 949 (1947 Legislature), which would have declared a strike of public employees to be contrary to public policy, and a misdemeanor. It was passed in the Senate, but no action upon it was taken by the Assembly. Under these circumstances, the failure of the Legislature to enact this proposed legislation cannot be considered as even remotely supporting defendants' position. Its passage in the Senate would, if anything, tend to support the views we have expressed; whereas mere non-action in the Assembly conveys no implication either way. The point is obviously untenable.

[16] We find no merit in defendants' further claim that the injunctive relief granted is too broad. Reasonably construed, the plain meaning of the language employed merely restrains the defendant unions from conduct we have held to be unlawful, namely, striking, picketing, and like activities where the purpose is to intimidate or coerce the City authorities in the performance of their lawful duties and inducing the employees of the Department of Water and Power to strike or otherwise interfere with the work on the Department's specified projects. No restraints are imposed upon the exercise, by defendants, of any other means at their disposal to publicize their grievances in an attempt to either change the law governing the conditions of employment, or convince the appropriate officers with discretionary powers of the merits of their contentions so that they might exercise their discretion favorably to defendants within the prescribed limits of their authority. In the absence of any evidence whatsoever in the record as to the existence of a labor dispute between any of the independent contractors and its employees, we cannot assume that the injunction was intended, or would be construed to ban strikes or peaceful picketing by such private employees to enforce legitimate demands against their employers. On its face, the order only forbids action against the City. Only insofar as the employees of the contractors might engage in the specified activities in order to coerce or intimidate the officers of the City, or to induce the employees of the City to strike or cease work, would their conduct be unlawful. As has been often stated, it is "impossible to define comprehensively or

with exactness each and every act which may or may not be legally done in carrying on a labor controversy; and it is evident that any attempt so to do would lead into a field of unlimited speculation." Lisse v. Local Union No. 31, 2 Cal.2d 312, 323, 41 P.2d 314, 319. The present injunction adequately deals with the unlawful aspects of defendants' conduct as shown by the facts in evidence. We see no occasion to modify it.

The order of injunction is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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94 Cal.App.2d 254

SANDLER v. GORDON et al.

Civ. 17050.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1949.

Rehearing Denied Oct. 31, 1949.

Hearing Denied Dec. 15, 1949.

Maurice B. Sandler, doing business as the Nursery Diaper Service, sued Nathan M. Gordon, the Craig Laundry, Inc., and others to recover damages for and enjoin defendant's solicitation and serving of plaintiff's customers, and defendant corporation filed a cross-complaint to enjoin unfair advertising by plaintiff for the purpose of destroying competition.

From portions of a judgment of the Superior Court of Los Angeles County, Frederick F. Houser, J., adverse to defendant corporation, it appealed.

The District Court of Appeal, Drapeau, J., modified the judgment and affirmed it as modified, holding that the evidence supported the trial court's finding that plaintiff's sales of diaper services below cost were not made for the purpose of destroying competition or injuring competitors and that evidence established actual damage of $1219.50 to plaintiff, instead of $1400 found by the trial court.

1. Trade-marks and trade-names and unfair competition 🔑68(2.17)

Sales below cost do not violate unfair Practices Act, unless seller intended to injure competitors or destroy competition. Business and Professions Code, § 17043.

2. Trade-marks and trade-names and unfair competition 🔑93(1)

Evidence rebutted statutory presumption that sales of diaper cleaning services below cost were made for purpose of destroying competition or injuring competitors, supported trial court's contrary finding, and established that sales were made to meet competitor's legal prices. Business and Professions Code, §§ 17043, 17050(d), 17071.

3. Trade-marks and trade-names and unfair competition 🔑98

One suing under Unfair Practices Act for damages from and injunction against defendant's solicitation and servicing of plaintiff's diaper service customers after obtaining their names and addresses from lists purloined from plaintiff and furnishing of such services without charge for extended periods for purpose of injuring plaintiff and destroying competition is entitled to recover amount of actual damages sustained in addition to injunctive relief Business and Professions Code, §§ 17000 et seq., 17043, 17082.

4. Trade-marks and trade-names and unfair competition 🔑93(3)

Evidence established actual damage of $1219.50, instead of $1400 found by trial court, for diaper launderer's loss of customers, acquired and serviced by competitor obtaining their names and addresses from such launderer's lists and giving them free services for purpose of injuring such launderer and destroying competition. Business and Professions Code, §§ 17000 et seq., 17043.

5. Trade-marks and trade-names and unfair competition 🔑98

Where corporation, acquiring and servicing competitor's diaper service customers after obtaining their names and addresses from such competitor's lists and furnishing free services to them for extended periods, was guilty of oppression and malice, competitor was properly awarded exemplary, as well as actual, damages. Business and Professions Code, § 17043; Civ.Code, § 3294.

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Fred Horowitz and Alvin F. Howard, Los Angeles, for appellant.

Sydney J. Dunitz and Malcolm Archbald, Los Angeles, for respondent.

DRAPEAU, Justice.

The complaint herein alleges that plaintiff and defendant were both operating diaper laundries in the County of Los Angeles; that plaintiff prepared special lists of names and addresses of his customers which defendant surreptitiously acquired and thereafter solicited such customers without the knowledge or consent of plaintiff and also without advising the customers how their names had been secured; that defendant then extended service without charge for extended periods of time for the purpose of injuring plaintiff and destroying competition, and thereby diverted many of plaintiff's customers to his damage.

Defendant's answer and cross-complaint alleged that since the inception of plaintiff's business, the latter had engaged in unfair and discriminatory business practices by means of advertising, whereby fair and honest competition was destroyed; it being further alleged that to meet such unfair practices, defendant "did offer to persons who had been customers of plaintiff free service for limited periods of time."

Upon the issues thus presented, the court found among other things: That plaintiff prepared and owned lists of customers, which defendant's employee Barr acquired by taking them from plaintiff's delivery truck as instructed by his employer;

That without the knowledge or consent of plaintiff, defendant using such lists located a large proportion of plaintiff's customers and offered and gave them free diaper laundry service;

That such conduct of defendant "was deliberately intended to ruthlessly and seriously injure plaintiff's business, and was prompted by ill will toward plaintiff; and in engaging in such conduct defendant was guilty of oppression and malice";

That a majority of such listed customers accepted defendant's offer and discontinued service with plaintiff;

That plaintiff sold certain service below his cost and below the lowest competitive price, but the purpose thereof was not to injure competitors or destroy competition;

That defendant's conduct was not justified by plaintiff's conduct, defendant's acts going "beyond any acts that might have been committed as so justified";

That plaintiff was damaged thereby in the sum of $1400.00.

Judgment was accordingly entered in favor of plaintiff for $1400.00 actual damages; $500.00 punitive damages; defendant was restrained from soliciting or servicing any of plaintiff's customers from the purloined lists; both parties were restrained from giving or offering to give free serice or cutting prices below cost for the purpose of injuring competitors or destroying competition; and plaintiff was restrained "from advertising in any unfair or misleading manner such as (1) for ten cents per dozen per week he will supply, launder, pick up and deliver diapers, or (2) that for one dollar per week he will supply a complete laundry service or a complete baby diaper service."

Defendant appeals from those portions of the judgment which are adverse to it.

Appellant first complains that the following finding is not supported by the evidence:

"9. That plaintiff sold certain items of service below his cost and below the lowest competitive price, but that the purpose thereof was not to injure competitors or to destroy competition." In this connection it is pointed out that since the sales were made below cost, the presumption arises under section 17071, Bus. & Prof. Code, that they were made for the purpose of destroying competition and injuring competitors, and that the record reveals no substantial evidence to overcome such presumption.

This action was brought under the Unfair Practices Act, Secs. 17000 et seq., Bus. & Prof. Code, section 17043 thereof making it unlawful either to sell at less than cost or give away any article or product, for the purpose of injuring competitors or destroying competition. However, section 17050(d) of the Act permits sales below cost for the purpose of meeting competition.

Appellant by its answer admitted it offered free service to respondent's customers for limited periods of time, but sought to justify such conduct on the ground it was done to meet respondent's unfair practices, to-wit: his advertisements that he would render certain designated services knowing that his cost therefor greatly exceeded the advertised price.

An examination of the evidence presented at the trial discloses that in August of 1947, respondent purchased the Nursery Diaper Service then operating in Long Beach with about 40 customers, the business increasing to 100 customers by October 21, 1947. During this period, appellant was operating the Crib Service as part of its laundry business, covering an extended area with some 4,000 customers of which about 100 were in Long Beach. Robert Gordon, an officer of appellant corporation, managed the Crib Service and in September of 1947, he and Robert Cunningham, owner of the Tidy Didy Baby Laundry of Long Beach, called on respondent to protest with respect to a $1 a week diaper service which respondent was then advertising. According to the witness Gordon, respondent told these men that he was just starting, and in order to increase volume and build up his business, he had to cut prices. Thereafter, appellant "embarked on a plan to protect our interest there," which embodied a plan to take respondent's customers away from him.

Respondent testified that when he bought the Nursery Diaper Service, certain prices for different types of service had been established, to-wit: $1 a week for a twice a week folded bundle and $1.25 per week for three times a week folded bundle; that he raised these prices 25¢ each per week, and introduced another type of service which his predecessor did not have: an unfolded diaper bundle delivered twice a week at $1.00 per week; that he also furnished a metal container for 15¢ per week; that he ascertained what others were charging and taking that into consideration together with the prices that his predecessor had established, as well as the cost to him per month for doing business, and the fact that he wanted to build up his business as soon as he could, he evolved the prices which he charged; that some of them were higher and some were lower than his competitors charged.

With respect to his understanding of the meaning of the ad offering "complete baby laundry service for as low as $1 per week," respondent stated he meant "that my prices started at $1 per week and continued on upward depending upon the type of service the customer desired and the number of times a week a delivery and pick-up were made. * * * I meant that, in our plant, we catered exclusively to babies. We handled no other line of laundry work whatsoever. We have a complete baby laundry service to offer each mother, whether she spends $1 a week with us or whether she spends four or $5 a week, as the case may be."

In answer to the question: "In connection with the price structure you set up for your business and in connection with the advertising you caused to have placed in the newspapers, did you have any intent to injure your competitors?" appellant stated: "None whatsoever." On re-cross examination, respondent testified he intended to get as many customers as he could as the result of his advertising, and from whatever source possible. When asked "Then it was immaterial to you who had the customer at that time and what price they were paying. You were going to sell them for less and get the business?"—respondent replied: "I was going to sell them for my prices."

[1] "The law prohibits, not all sales at less than cost, but only sales which are accompanied by the requisite intention or purpose—i. e., the purpose of injuring competitors or destroying competition. Unless the fact of intention is shown to have existed, the conclusion is that the sale did not constitute a violation of the statute." 11 Cal.Jur.Supp., 1948 Pocket Part, page 75 and authorities there cited.

[2] The testimony hereinabove recited sufficiently rebuts the presumption raised by section 17071, supra, to-wit: that any sales made by respondent below cost were for the purpose of destroying competition or injuring competitors; and substantially supports the trial court's finding complained of. Moreover, the evidence is sufficient to establish that respondent's advertising was placed and the sales were made "to meet the legal prices of a competitor", permitted by section 17050(d), supra.

It is also urged that the finding that respondent was damaged in the sum of $1400 is without substantial evidentiary support and therefore the award in that amount is in error.

[3] Pursuant to section 17082 of the Bus. & Prof. Code, a plaintiff pursuing the remedies under the Unfair Practices Act is entitled to recover the amount of the actual damages sustained by him, in addition to injunctive relief.

[4] On this phase of the case, respondent testified that on October 26, 1947, he had 108 customers, and during the period from October 27 to November 15, he lost 73 customers to appellant; that he talked to as many as he possibly could explaining the situation to them, and between November 18 and December 8, 34 of these customers resumed service with him.

In computing his loss, respondent took the total of all customers he had on October 26, i. e., 108, eliminated therefrom the 39 which were permanently lost, and estimated that the average length of time he had the remaining 34 customers on his books was six and two-thirds months.

Mr. Heyman, a public accountant employed by respondent from September of 1947, testifying from financial statements he had made for respondent for the period in question, stated that the gross loss for customers temporarily lost was $165.54, and that the net loss, figuring variables but not including gas, oil and lubrication, was $74.10 or $62.10 including said items. With respect to the 39 customers which were permanently lost, the witness Heyman computed that the gross revenue to be expected from them would be $282.13 per month; that the net revenue, deducting variable expenses, but not including gas, oil and lubrication, would be $171.81 per month or $153.45 per month with the last three items included.

When interrogated about the cost of oil, gas and lubrication, respondent testified that the bills for these items should have dropped with a lesser number of deliveries, but that actually they were higher during the period, because his truck was doubling back and forth trying to regain the lost customers.

Recapitulating, it seems fair to assume that the actual net loss sustained by respondent on account of the 39 customers which were lost permanently was $171.81 per month for six and two-thirds months or $1145.40; and that the actual net loss sustained by reason of the customers temporarily lost was $74.10, aggregating a total actual damage of $1219.50, instead of $1400, as found by the trial court.

[5] Referring to the claim that punitive damages were improperly awarded, the court found that because of its conduct, appellant was guilty of oppression and malice. In such cases, exemplary damages may be imposed under section 3294 of the Civil Code.

In view of the court's findings hereinbefore recited which are amply supported by the evidence, it is deemed unnecessary to discuss two additional points, to-wit:

1. That respondent does not have clean hands;

2. That respondent is not entitled to damages for loss of patronage secured by illegal advertisements.

The judgment is modified by striking therefrom the figures $1,400.00 in the award of damages and by inserting in lieu thereof the figures $1,219.50, and as so modified, the judgment is affirmed. Each party to bear own costs on appeal.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

WEST KEY NUMBER SYSTEM

94 Cal.App.2d 174

PACIFIC ODORITE CORPORATION OF SAN FRANCISCO v. GERSH.

Civ. 14020.

District Court of Appeal, First District, Division 2, California.

Oct. 17, 1949.

The Pacific Odorite Corporation of San Francisco sued Maury Gersh for the breach of a contract by defendant to purchase plaintiff's business and personal property.

The Superior Court, City and County of San Francisco, Preston Devine, J., gave judgment for the plaintiff and the defendant appealed.

The District Court of Appeal, First District, Dooling, J., held that the evidence sustained the trial court's finding that there was no rescission by mutual consent and affirmed the judgment.

1. Sales 🔑52(7)

In action by seller against purchaser for breach of contract, to purchase business, evidence sustained trial court's finding that no misrepresentation or concealment of the profits of the business was made by seller.

2. Patents 🔑215

In action by seller against purchaser for breach of contract to purchase business, evidence was insufficient to sustain trial court's finding that third party consented to the assignment of a contract with seller for patented articles used in seller's business.

3. Sales 🔑383

In action by the seller against purchaser for breach of contract to purchase business, evidence sustained trial court's finding that there was no rescission of contract by mutual consent.

4. Sales 🔑383

In action by seller against purchaser for breach of contract to purchase business, evidence sustained trial court's finding that seller immediately attempted to resell business after buyer's repudiation and resold business at first opportunity.

5. Sales 🔑383

In action by seller against purchaser for breach of contract to purchase business, resale price was evidence of market value of business sufficient to support judgment for seller.

6. Fraud 🔑18

Concealment, to constitute actionable fraud, must be of a fact materially affecting a transaction.

7. Sales 🔑52(7)

In action by seller against purchaser for breach of contract to purchase business, evidence sustained trial court's finding that seller's alleged failure to disclose negotiations for union contract was not sufficiently material to constitute fraud.

8. Evidence 🔑320

In action by seller against purchaser for breach of contract to purchase business, purchaser's testimony based on statements of seller's office manager, was properly excluded as hearsay.

9. Sales 🔑372, 381

Where buyer repudiated contract to purchase business, buyer could not complain of seller's failure to secure an assignment to buyer of a contract for use of certain patented articles in business, and buyer had burden of proving that third party would not have consented to seller's assignment of contract to buyer.

10. Fraud 🔑50

Burden of proving falsity of a representation is on party asserting it.

Edward N. Jackson, San Francisco, for appellant.

Hubbard & Hubbard, San Francisco (William J. Kretzmer, Jr., San Francisco, of counsel), for respondent.

DOOLING, Justice.

This action was instituted by the Pacific Odorite Corporation, respondent, against Maury Gersh, appellant, to recover damages for the breach of a contract to purchase the former's business and personal property in San Francisco. Gersh, the purchaser, appeals from the judgment entered in favor of respondent, the seller.

On August 23, 1946, appellant visited respondent's attorney, who was also a director and secretary of respondent corporation, informing him that he was interested in purchasing respondent's business and personal property. The purchase price was set at $30,338.91, appellant delivered his check for that amount, and respondent's officer promised to deliver a bill of sale on August 26, 1946. On the designated date, appellant went to the office of respondent's attorney-secretary, made certain objections to the price formerly set, the board of directors of respondent thereat went into special session and set the price at $29,000, and a bill of sale was delivered to appellant, he promising to pay the total purchase price by September 10, 1946.

The bill of sale transferred all of respondent's business to appellant, sold a total of 2635 Odorite Vaporizer Machines, 2400 Vaporant Refill Blocks and office furniture and equipment, and stated that "The purchase price herein agreed to be accepted * * * is a reduction of * * * $1,338.91 from the offer which was made by (appellant) on August 23, 1946 (which is) an adjustment with respect to certain objections made by (appellant) and, in consideration of said reduction, (appellant) now buys said business and property as is, and after having made his own investigation * * *."

[1] Immediately after the bill of sale was delivered to appellant, he went to the office of respondent and was there introduced to the manager as the new owner. Appellant testified that at this time the manager brought to his attention a contract which a labor union proposed to enter into with respondent. According to appellant's testimony this proposed contract, if accepted by the corporation, or its successor, would increase expenses of the business and consequently lower its net profit. Appellant was not apprised of this union proposal at the time he entered into the agreeemnt to purchase the business.

Appellant testified that he did not examine the books of the business until after he had agreed to purchase and he denied that he told anyone he had although a member of the board of directors of respondent testified that appellant stated that he had investigated the business and the bill of sale itself, signed by appellant, states that he had made an investigation. Appellant testified that respondent's attorney made representations to him prior to the sale concerning the profits of the business but this testimony was flatly contradicted and the trial court found in favor of respondent on this issue. Thus the testimony concerning misrepresentation or concealment of the profits of the business was in conflict and the finding of the trial court cannot here be questioned.

[2] The predecessors of respondent corporation had entered into an agreement with one Ruben Davidoff and with Monarch Laboratories, said agreement being made binding upon successors in interest, whereby it was agreed that no assignment of this contract for patented articles used in the business would be made "without the written consent" of Davidoff and Monarch. Respondent's attorney-secretary testified that respondent corporation never received a written consent to an assignment to appellant but did testify that on the day following appellant's original visit to his office he received telephonic consent to the assignment from the manager of Monarch Laboratories. The respondent, however, never communicated with Davidoff nor received his consent to assignment. The trial court's finding that Davidoff did consent to the assignment is

therefore without evidentiary support and must be disregarded.

On August 28, 1946, appellant and his attorney visited respondent's attorney-secretary and informed him that appellant was rescinding the agreement to purchase respondent's business and on August 29, 1946, appellant sent respondent written notice of rescission. At this time appellant was told that respondent would probably seek damages from him. Thereafter according to respondent's officer's testimony the business was operated for the account of appellant until it was sold on March 3, 1947 for the price of $16,940. It was also testified that respondent's attorney-secretary notified appellant's attorney that respondent would hold appellant liable for any damages when the business was resold.

This action was instituted by respondent to recover the difference between $16,940, the price at which the business was sold on March 3, 1947, and $29,000, the price which appellant agreed to pay. The trial court found that appellant had abandoned the business after taking possession thereof, that respondent did not consent to appellant's rescission of the agreement, that because of appellant's abandonment of the business respondent resumed operation thereof until it was resold, that respondent diligently sought to resell the business and property, was unable to sell it until March 3, 1947, received the best offer obtainable, and the sum received constituted the reasonable value of the business at the time of the sale, that respondent made no false or fraudulent statements to appellant, that respondent procured from Davidoff and Monarch permission to make the sale to appellant and entered judgment for respondent for the difference between $29,000 and $16,940 less the profit earned during the period before resale.

[3] The trial court's finding that there was no rescission by mutual consent finds sufficient support in the evidence. While a consent to rescission may be evidenced by conduct, 4 Cal.Jur. 10 Yr.Supp. 167, the retaking of possession of the business by respondent, its operation and resale are not necessarily inconsistent with an intention to hold appellant to his contract, Phillips v. Stark, 186 Cal. 369, 372, 199 P. 509; Holmes v. Robarts, 102 Cal.App. 53, 56, 282 P. 519; Rice v. Navarro, 91 Cal.App. 2d 233, 204 P.2d 633, especially in view of notice to appellant at the time that he orally refused to proceed with the sale that he would probably be sued for damages and later notice to his attorney that after resale such suit would be commenced; and the trial court's inference from the facts cannot be disturbed.

[4] The question of diligence in effecting the resale was likewise for the trial court. Bonan v. Pacific Orient Co., 140 Cal.App. 68, 34 P.2d 1064; Cheda v. Kockos, 28 Cal.App. 374, 152 P. 735. The resale of a business is not ordinarily as easy to effect as a resale of merchandise and the respondent's evidence is that it immediately attempted to make a resale and resold at the first opportunity.

[5] There was no evidence of the market value of the business except the price of resale but the resale price is evidence of market value sufficient to support the judgment. Hamberger-Polhemus Co. v. Lewin, 101 Cal.App. 704, 708, 282 P. 425.

[6-8] The alleged failure to disclose the negotiations for a union contract if sufficient to constitute fraud, was not shown to be material. Respondent's evidence showed that the negotiations were prompted by the fear of one employee that in the event of a sale of the business he might be discharged and that no contract was in fact ever forced on the business by the union. Concealment to constitute actionable fraud must be of a fact materially affecting the transaction, 12 Cal.Jur. 740, and the trial court was entitled to find under the evidence that no such materiality existed. The refusal to allow appellant's testimony of the difference in profits if the union contract had been executed was properly excluded as the hearsay statement of the respondent's office manager. The manager himself was later called by appellant and no attempt was made to prove the facts by him.

[9, 10] The failure to secure Davidoff's consent to the assignment was not pleaded as a failure of performance. It was only

pleaded that respondent falsely and fraudulently represented to appellant that it could assign its rights under the contract whereas the contract contains a clause specifically prohibiting an assignment, and this was also stated as one of the grounds of attempted rescission. Having repudiated the contract appellant cannot complain that respondent did not thereafter perform the idle act of procuring Davidoff's consent to an assignment to him. He did not sustain the burden of proving that Davidoff would not have consented to an assignment to him, as he presumably did to the later purchaser. To establish his defense that respondent represented that it could assign whereas the contract prohibits an assignment it was incumbent upon appellant to prove that Davidoff's consent could not have been obtained since the only prohibition in the contract is conditioned on the failure to give such consent, and the burden of proving the falsity of a representation is on the party asserting it.

Judgment affirmed.

GOODELL, Acting P. J., and RUNNELLS, J. pro tem., concur.

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94 Cal.App.2d 222

MARTIN v. AUERBACH.

Civ. 17136.

District Court of Appeal, Second District,
Division 2, California.
Oct. 19, 1949.

Action by Joseph T. Martin against David Auerbach to rescind an assignment which defendant made to plaintiff of a half interest in a lease of real property and in the business conducted therein.

The Superior Court, Los Angeles County, Ben Rosenthal, J., entered judgment denying plaintiff the relief sought, and the plaintiff appealed.

The District Court of Appeal, Wilson, J., held that the evidence sustained the trial court's findings that the plaintiff's allegations of fraud were untrue and affirmed the judgment.

1. Landlord and tenant 🔑80½

In action by assignee to rescind an assignment of a half-interest in a lease, evidence sustained trial court's finding that assignee's allegations that assignor fraudulently and falsely represented that he was authorized to sell and assign interest in lease and leasehold estate without consent of lessor, were untrue, and that assignee did not believe or rely on vendor's statements.

2. Landlord and tenant 🔑104

The violation by the lessee of a covenant against assignment of a lease does not ipso facto terminate lease or render lease void and lessor has option to declare a forfeiture of lease or ignore breach, and treat lease as subsisting.

3. Landlord and tenant 🔑76(3)

The assignment of a lease, in violation of a covenant against assignment without consent of lessor, is a binding assignment which passes leasehold estate.

4. Landlord and tenant 🔑104

An assignment of a lease, contrary to a provision forbidding the same, is voidable and lessor alone has option to forfeit the lease for breach of covenant and if lessor disregards breach, lease is valid and subsisting as to all other parties.

5. Landlord and tenant 🔑112(2)

Where lease provided that lessee will not assign lease without consent of lessor and that any assignment without lessor's consent shall be void, but lessor with knowledge of assignment, accepted rent and after declaring lease terminated on ground that assignment was unauthorized, continued to accept rent and assignor did not agree to assignee's attempted rescission, assignment remained valid.

6. Appeal and error 🔑172(1)

Where plaintiff did not plead implied warranty, he could not rely on implied warranty on appeal from adverse judgment in action to rescind assignment of lease based on fraud.

7. Appeal and error ⚷882(3)

An appellate court need not consider a theory of a case different from that urged in trial court and presented for first time on appeal.

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Anderson, McPharlin & Conners, Montgomery G. Rice, Los Angeles, for appellant.

Joseph T. Enright, Samuel J. Crawford, Santa Monica, Robert Ogle, Santa Monica, for respondent.

WILSON, Justice.

Plaintiff appeals from a judgment denying relief in an action to rescind an assignment which defendant made to him of a half interest in a lease of real property and in the business conducted therein.

The following facts appear from the settled statement and the findings: In April, 1945, defendant became the lessee of a business property and thereafter conducted a cafeteria therein; the lease was for the term of ten years and among other things provided: "That the lessee will not assign this lease or any interest therein * * * without the written consent of the lessor first had and obtained, and * * * unless such written consent thereto has been so had and obtained any assignment or transfer * * * of this lease or of any interest therein * * * shall *at the option of the lessor* terminate this lease and any such purported assignment (by death excepted) transfer or underletting without such consent shall be null and void." (Emphasis added.)

In August, 1946, the business was submitted to plaintiff by a broker for investigation. Plaintiff made a personal examination of the business and had possession of the lease for approximately ten days before entering into the agreement of purchase. He submitted the lease for examination to two persons who were experienced in the terms and meaning of leases, to a bank in connection with a proposed loan, and received advice concerning it from a licensed real estate agent.

On October 26, 1946, the parties entered into an agreement whereby they became partners in the operation of the business and defendant executed and delivered to plaintiff a bill of sale conveying an undivided one-half interest in the assets of the business and in the lease. The attorney who drafted the partnership agreement advised both parties, "Be sure and contact the landlord." Defendant proposed that they go at once to the lessor but plaintiff declined, saying they could go later.

The consent of the lessor to the assignment was not obtained but on or about November 1, 1946, he acquired knowledge of the sale and assignment and on November 2 accepted rent under the terms of the lease for the month of November. About November 2 the landlord requested and received the partnership agreement and the bill of sale for the purpose of having photostatic copies made and thereafter returned the documents to plaintiff and defendant without objection to the assignment.

On December 2, 1946, a check for the December rent was mailed to the lessor. On December 16 his agent returned the rental check and served on plaintiff a purported notice of termination of the lease. On December 17 plaintiff informed defendant that he was rescinding his agreement and on December 18 gave formal notice that by reason of the notice of termination of the lease he rescinded all his agreements with defendant and offered to return everything of value he had received by reason of the assignment and the articles of copartnership.

[1] The complaint, which is for a rescission of the transaction, is based on allegations that defendant falsely and fraudulently represented that he was authorized to sell and assign an interest in the lease and leasehold estate without the consent of the lessor and that such statements were untrue. Plaintiff's opportunity prior to entering into the transaction to read the lease and to become acquainted with its terms and the advice sought and received by him refute his contention and his testimony that he did not know of the prohibition against its assignment. More-

over the court found that the allegations of fraud are untrue and that it is not true that plaintiff believed or relied upon defendant's statements. These findings are sustained by the evidence.

The court further found that the landlord's notice to quit was based on the alleged ground that the provision prohibiting assignment without his consent had been violated, but that nevertheless, after acquiring knowledge of the assignment, the lessor had received and accepted rent for each and every month from and after November, 1946, to the date of the findings and judgment, October 15, 1948, and that therefore the lease and all its terms are still in full force and effect; that plaintiff was not compelled to vacate the premises on December 18, 1946, or at all; that he abandoned the premises and withdrew therefrom of his own volition; that defendant has at all times and up to the date of judgment remained in possession of the premises and has continued to operate the business.

[2-4] The lease in question does not declare that a violation of its terms renders it void without any affirmative act on the part of the lessor. It expressly provides that an unauthorized assignment shall "at the option of the lessor" terminate the lease and render such assignment null and void. Unless and until the lessor takes action to cancel such a lease it continues in force and the assignment remains valid. It is settled that the violation by the lessee of a covenant against assignment of a lease does not ipso facto terminate the lease or render it void. The lessor has the option to declare a forfeiture of the lease or, ignoring the breach, to treat it as subsisting. Guerin v. Blair, 33 Cal.2d 744, 746-747, 204 P.2d 884; People v. Klopstock, 24 Cal.2d 897, 901, 151 P.2d 641; Chapman v. Great Western Gypsum Co., 216 Cal. 420, 427, 14 P.2d 758, 85 A.L.R. 917; Buchanan v. Banta, 204 Cal. 73, 76, 266 P. 547; Northwestern Pacific R. Co. v. Consumers Rock & Cement Co., 50 Cal. App.2d 721, 723, 123 P.2d 872; Licht v. Gallatin, 84 Cal.App. 240, 245, 257 P. 914. The assignment of a lease in violation of a covenant against assignment without the consent of the lessor is a binding assignment which passes the leasehold estate. Chapman v. Great Western Gypsum Co., supra. An assignment of a lease contrary to a provision forbidding the same is not void but voidable and the lessor alone has the option to forfeit the lease for breach of the covenant. If he disregards the breach the lease is valid and subsisting as to all other parties. Taylor v. Odell, 50 Cal.App.2d 115, 121, 122 P.2d 919, and cases above cited.

The lessor in the instant action, with knowledge of the assignment, accepted the rent for November, 1946, and after declaring a termination of the lease on the ground that the assignment was unauthorized, accepted the rental each month to and including the date of entry of judgment in October, 1948.

[5] Since (1) defendant did not accept and agree to the rescission attempted by plaintiff and (2) the court refused to decree a rescission and rendered judgment in favor of defendant, the assignment to plaintiff remains valid and plaintiff and defendant are in the same position toward each other as they were at the date of the original transaction.

[6, 7] The complaint is based upon alleged fraudulent representations purporting to have been made by defendant and the case was tried upon that theory alone. In plaintiff's brief on appeal he raises the point that there was an implied warranty by defendant that he was entitled to assign an interest in the lease. Since the question of implied warranty was not pleaded it cannot be relied upon in support of the action. Barrios v. Iwaki, 32 Cal. App.2d 198, 200, 89 P.2d 417; Bailey Trading Co. v. Levy, 72 Cal.App. 339, 345, 237 P. 408. Furthermore the action was tried on the sole theory of fraud, hence the contention that there was an implied warranty is not now available to plaintiff. An appellate court need not consider a theory of a case different from that urged in the trial court and presented for the first time on appeal, Grimes v.

Nicholson, 71 Cal.App.2d 538, 543, 162 P.2d 934; Engleman v. Malchow, 91 Cal. App.2d 341, 205 P.2d 413, and in this case will not do so.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 146

PEOPLE v. TORRES.

Cr. 2592.

District Court of Appeal, First District,
Division 2, California.
Oct. 14, 1949.

Hearing Denied Nov. 10, 1949.

Joseph Villagas Torres, was convicted in the Superior Court, Santa Clara County, Wm. F. James, J., of murder in the second degree and he appealed.

The District Court of Appeal, First District, Nourse, P. J., held that the refusal to give an instruction as to whether the defendant had reasonable cause to fear greater peril in the event of an altercation with deceased than he would otherwise because of previous threats against his life or person, was prejudicial error and reversed the judgment and remanded the cause for new trial.

1. Homicide ⇨254

Evidence was sufficient to sustain conviction of murder in second degree. Pen. Code, §§ 187, 188.

2. Homicide ⇨332(2)

The sufficiency of evidence of justification on theory of self-defense or of mitigating circumstances reducing a homicide from murder to manslaughter are questions for jury, with which appellate courts will interfere only in exceptional cases.

3. Homicide ⇨254

Where it is proved that defendant assaulted decedent with a dangerous weapon in a manner endangering life and resulting in death and jury concludes that evidence does not create in their minds a reasonable doubt whether defendant's act may have been justified or its criminal character mitigated by influence of passion or of terror, then no further proof of malice or of intent to kill is required to support verdict of guilty of second degree murder. Pen.Code, §§ 187, 188.

4. Homicide ⇨23(1), 146

Actual intent to kill is not a necessary component of second degree murder and malice is implied from assault with a dangerous weapon in a manner endangering life in the absence of justifying or mitigating circumstances. Code Civ.Proc. § 1962, subd. 1; Pen.Code, § 7, subd. 4; § 1105.

5. Criminal law ⇨835

Under statute providing that if written charges are presented by party the court must either give or refuse them and must endorse its decision on each, a charge not given in its original or modified form is refused. Pen.Code, §§ 1127, 1176, 1259.

6. Criminal law ⇨819

In murder prosecution, that judge asked counsel whether he had overlooked any subject of instruction to jury, and defendant's counsel replied no, did not constitute a withdrawal of instructions presented in writing which had not been given. Pen.Code, §§ 1127, 1176, 1259.

7. Homicide ⇨300(3), 341

In murder prosecution, refusal to give instruction that one who had received information of threats against his life or person made by another is justified in acting more quickly and taking harsher measures for his own protection in event of assault, than would a person who had not received such threats, and if deceased made threats against defendant and because thereof defendant had reasonable cause to fear greater peril than he would have had otherwise, jury was to take such facts into consideration in determining whether defendant acted in manner which a reasonable man would act in protecting his own life or bodily safety, was prejudicial error, particularly in view of instructions given.

8. Criminal law ⚿805(1), 822(1)

Each instruction need not contain a complete statement of the law but it is sufficient that all instructions taken together correctly do so and such rule applies to instructions proposed by a party and refused.

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Emery J. Delmas, San Jose, Edward M. Fellows, San Jose, for appellant.

Fred N. Howser, Atty. Gen., Clarence A. Linn, B. Abbott Goldberg, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was charged with the murder of one Gilbert Moreno. He was convicted of murder in the second degree and appeals from the judgment and from an order denying his motion for a new trial.

It is undisputed that on the night of August 14, 1948, defendant inflicted one stab with his knife into the abdomen of Moreno, by which the aorta was pierced and death caused within a short time. The defense was that defendant had acted without intention to kill and that his action was justified as in self-defense.

Defendant and decedent were both farm laborers of Mexican parentage. At the time of the event defendant was eighteen, decedent nineteen years old. The evidence shows that two weeks prior to the event, on July 31, 1948, both had been engaged in a quarrel and fight, which a brother of decedent started with defendant in a dance hall and bar. Friends of both sides took part and one fellow combatant of defendant was knifed. When the fight was broken up decedent threatened in defendant's presence that he would get (or kill) him. Defendant testified that because of this threat combined with the fight and the knifing he was afraid of decedent and began to carry a knife. He knew of the reputation of decedent in the Mexican community as a marijuana user and troublemaker. Other defense witnesses also testified as to such reputation of decedent and his prior use of a knife to wound or threaten.

On the night of the event defendant was at the carnival at San Jose with friends. When he came out of there together with his friends, decedent and some of decedent's friends were waiting outside near the gate. The testimony of the witnesses for the People was conflicting as to whether they were waiting to go into the grounds or to get into a fight with defendant. When defendant had moved to the sidewalk forty to fifty feet from the gate decedent left his group at the gate and went up to a certain John Lira who was standing near defendant. From that point on there is again a conflict in the evidence. Defendant testified that when decedent was near him decedent challenged him "to finish this out;" that on defendant's refusal decedent started toward him saying that he was going to kill him; that decedent had his right hand in his trouser pocket and defendant could see part of a knife outside the pocket; that defendant was afraid of what would happen to him; that he took a step forward, threw out his arm, stabbed decedent with the knife held in his hand, withdrew the knife and ran. The defense witnesses Chavez and Naus corroborated this testimony in part. Chavez testified that he heard decedent's challenge and saw him move on defendant with his right hand in his trouser pocket and make a motion with his hand as to take out his knife; the witness did not see a knife. The witness Naus, embalmer, testified that when he performed his duties on decedent's body he found an open knife in decedent's right trouser pocket. However the witness John Lira testified for the People that decedent was standing near him, talking with him and not threatening anybody when defendant, whom the witness had not seen there before, struck decedent with his hand in the stomach; he did not see a knife in decedent's hand. Frank Gonzales, also a witness for the People, testified that he saw decedent go up to John Lira and talk to him and that he saw defendant who was standing there, all of a sudden come up and hit decedent in the stomach. The witness was too far away to hear what was spoken but he did not see decedent speak to defendant.

[1-4] Appellant contends that the verdict and judgment are not supported by the evidence, which is said to show that the killing was justified on the theory of self-defense or at most to constitute manslaughter in the absence of the malice required by sections 187 and 188 of the Penal Code for a conviction of murder. We cannot so hold as a matter of law in view of the sharp conflict in the evidence. People v. Garcia, 2 Cal.2d 673, 678, 42 P.2d 1013. The sufficiency of evidence of justification on the theory of self-defense or of mitigating circumstances reducing a homicide from murder to manslaughter are questions of fact for the jury, with which the appellate courts should interfere only in exceptional cases. People v. Wells, 10 Cal.2d 610, 620 et seq., 76 P.2d 493; People v. La Fleur, 42 Cal.App.2d 50, 56, et seq., 108 P.2d 99. When it is proved that defendant assaulted decedent with a dangerous weapon in a manner endangering life and resulting in death and the jury concludes that the evidence did not create in their minds a reasonable doubt whether defendant's act may have been justified or its criminal character mitigated by the influence of passion, e. g, of terror, People v. Logan, 175 Cal. 45, 48, 49, 164 P. 1121, then no further proof of malice or of intent to kill is required to support a verdict of guilty of second degree murder. Of that crime an actual intent to kill is not a necessary component and malice is implied from such assault in the absence of justifying or mitigating circumstances. People v. Doyell, 48 Cal. 85, 95; People v. Williams, 73 Cal. 531, 534, 15 P. 97; People v. Jones, 160 Cal. 358, 370, 117 P. 176; People v. Isby, 30 Cal.2d 879, 889, 186 P.2d 405; People v. Wilson, 36 Cal.App. 589, 597, 172 P. 1116; People v. Hubbard, 64 Cal.App. 27, 34, 220 P. 315; People v. Semone, 140 Cal.App. 318, 323, 35 P.2d 379; People v. Copley, 32 Cal.App.2d 74, 76, 89 P.2d 160; People v. Ross, 34 Cal.App.2d 574, 578, 93 P.2d 1019; People v. Butterfield, 40 Cal.App.2d 725, 729, 105 P.2d 628; People v. Campanella, 46 Cal.App.2d 697, 701, 116 P.2d 633; § 1962, sub. 1, Code of Civil Procedure; § 7, sub. 4 and § 1105, Penal Code. In view of the conflicting evidence here presented we would have to uphold any conclusion to which the jury might have come, whether of justified homicide, manslaughter or second degree murder, except for possible prejudicial defects in the proceedings leading up to the verdict.

[5, 6] Appellant complains of the trial judge's failure to give certain proposed instructions with respect to self-defense. Respondent contends that it is extremely doubtful whether defendant should be heard as to failure to give any instruction because when at the close of his charge to the jury the judge asked counsel: "Gentlemen, have I overlooked any subject of instruction to this jury?" defendant's counsel replied, "No, your Honor, thank you." Respondent contends that therefore the instructions requested but not given were not refused in the sense of sec. 1259, Pen. Code but only not given and that any possible error in failure to give them was invited or consented to by defendant. We do not agree with this contention. Section 1127, Penal Code provides that if written charges are presented by a party the court must either give or refuse them and must indorse its decision on each. Section 1176, Penal Code mentions also the possibility of modifying the charges presented. There are no other possibilities; a charge not given in its original or in modified form is refused. Only when a party withdraws a requested charge does the necessity of a decision by the court as to giving or refusing it terminate. We are not willing to hold that the negative answer to the question of the judge whether he had overlooked any instruction is equivalent to a withdrawal of all instructions presented in writing, which had not been given. The answer does not show such intent. In itself there is nothing objectionable in the court's informal request to the parties to assist him in preventing omissions in his charge. Such conduct would however become a dangerous trap for the parties if we would hold that by their cooperation they assumed the responsibility for any omission that may have taken place.

We have therefore reviewed the failure to give the proposed instructions. A careful comparison of the instructions refused and those given has convinced us that the subject matter of all defendant's proposed instructions which were not given was sufficiently covered by other parts of the charge except with respect to the following requested instruction; "One who has received information of threats against his life or person made by another is justified in acting more quickly and taking harsher measures for his own protection in the event of assault either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence that the deceased made threats against the defendant and that the defendant because of such threats made previously to the transaction complained of, and communicated to the defendant, had reasonable cause to fear greater peril in the event of an altercation with the deceased than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety."

[7, 8] It is conceded that no instruction was given with respect to the influence of antecedent threats on the right of self-defense. Where, as in this case, there is evidence tending to show the making of threats of death or great bodily harm by deceased against the defendant, which are relied on as influencing or justifying defendant's act, instruction on the law of this subject is proper, 41 C.J.S., Homicide, § 382, page 185, and if not covered a correct instruction on the subject proposed by one of the parties should be given. However, respondent argues that the proposed instruction does not state the law correctly. The instruction is taken literally from People v. Graham, 62 Cal.App. 758, 765, 217 P. 823, where it is held that said instruction, which was given, sufficiently covered the subject of another instruction offered but refused. The same instruction was given at defendant's request in People v. Bradfield, 30 Cal.App. 721, 727, 159 P. 443, with slight modifications upheld in that case but not relevant here. Respondent's criticisms of the instruction seem without merit. He mistakenly contends that the expression "assault actual or threatened" is "tautological"; section 710, Penal Code, contains the expression "a person who * * * assaults or threatens to assault another." He further contends that the proposed instruction is incomplete in failing to state that previous threats alone without apparent design presently to carry them into effect do not justify a deadly assault and that the requirement of circumstances justifying a reasonable man in believing himself in immediate danger of bodily harm remain in effect notwithstanding threats. There are two answers to this contention. In the first place the proposed instruction would not tell the jury that under the circumstances mentioned the defendant would be justified in committing an assault with a deadly weapon in self-defense, but only that the jury was "to take such facts and circumstances into * * * consideration in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety." Moreover, the well known rule that each instruction need not contain a complete statement of the law but that it is sufficient that all instructions taken together correctly do so, applies obviously also to instructions proposed by a party and refused. Many more instructions on self-defense were proposed and many were given. The jury were instructed in the language of § 197, sub. 3, Penal Code, that homicide is justifiable in self-defense "when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." The standard of the reasonable man both as to the fear of danger and the measures to be taken in defense was repeatedly called to their attention. To such instructions the one proposed on previous threats was a correct supplement that should have been given. Without a request of respondent to that effect there was no necessity to include a specific negative instruction that threats alone did not justify a deadly assault where the requirements for justification of a deadly assault were in general sufficiently covered so as to leave

no doubt as to their application to this specific point.

The failure to give this instruction may have been prejudicial, particularly in connection with the giving of the following instruction: "* * * if, after a consideration of all of the testimony in the case there is a reasonable doubt in your minds whether the defendant was justified in acting in self-defense under the immediate circumstances surrounding the encounter, then I charge you that under your oaths you are bound to give the defendant the benefit of such doubt." It is true that such instruction did not necessarily exclude the previous threats from the consideration of the jury, as the influence of the threats on defendant's mind and on his evaluation of decedent's conduct on the fatal evening, was part of the immediate circumstances surrounding the encounter. Compare People v. Lee, 34 Cal.App. 702, 711, 168 P. 694. Nevertheless, as there could be no certainty that the jury would so understand the instruction and that the expression "immediate circumstances" would not divert their attention from the previous threats, the giving of the prepared instruction telling them to consider the previous threats was made more important. In a close case with strongly conflicting evidence as the one before us the refusal of the instruction requires reversal.

Appellant contends further that the trial was not had before an impartial jury and that the jury was guilty of prejudicial misconduct which contention is based, as it was at the motion for a new trial, on the affidavits of jurors. The affidavits state variously that the jurors discussed the punishment for second degree murder and manslaughter as a basis of their decision and that the foreman incorrectly informed them that the punishment for second degree murder was one to ten years; that one of the jurors during that discussion said: "What difference does it make how long he serves —he's a Mexican;" that another juror discussed the fact that her husband on one occasion took a knife from one of his Mexican farm hands and that that same juror studied the distinction between manslaughter and murder of the first and second degree in an encyclopedia, discussed it with the other jurors and told them that in the case before them no manslaughter could be found. It is argued that the demeanor of these two jurors shows prejudice against Mexicans, whereas they testified on voir dire that the fact that defendant was Mexican would not prejudice or influence the decision. The affidavits state further that the jury considered the personal knowledge of some of them, not based on evidence in the case, that there were policemen in the neighborhood, whose protection defendant could have invoked. One of the affiants states that he himself made a statement to the other jurors about the presence of such policemen.

However, we need not go into the rather complex questions presented as to admissibility and effect of these affidavits as we have reached the conclusion that a new trial is required at any rate and it seems highly improbable that it would give rise to the assertion of claims of similar irregularities.

The judgment and order are reversed and the cause remanded for new trial.

GOODELL and DOOLING, JJ., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

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94 Cal.App.2d 110

BYER v. ARGUELLO et al.

Civ. 17161.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1949.*

Irvine Byer sued Francisca Arguello, Manuel Arguello, Edward Kramer, Rose Kramer and others for the wrongful death of a three year old child allegedly bitten by dogs belonging to the defendants.

The Superior Court, Los Angeles County, Stanley N. Barnes, J., dismissed the action and the defendants moved to dismiss plaintiff's appeal from the judgment.

* Subsequent opinion 214 P.2d 556.

The District Court of Appeal, Drapeau, J., denied the motion to dismiss the appeal on the ground that the complaint averred that the Kramer dog actually killed the child, and that an averment in the plaintiff's deposition which controverted that allegation did not alone show that no cause of action could be proven.

1. Dismissal and nonsuit ⚷53(2)

Courts have inherent power to dismiss actions on ground that they are fictitious or sham.

2. Dismissal and nonsuit ⚷53(2)

A motion to dismiss an action on the ground that it is fictitious or sham is proper practice, but in each case question arises whether specific facts presented to court constitute grounds for an order of dismissal.

3. Dismissal and nonsuit ⚷53(1)

Before a motion to dismiss may be granted, the record must disclose that no relief can be granted to the plaintiff.

4. Dismissal and nonsuit ⚷53(2)

That allegation of complaint that death of child was caused by child's being bitten by defendant's dog was controverted by plaintiff's deposition stating that defendant's dog did not bite child, did not justify dismissal of action on ground that it was fictitious or sham.

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William S. Palmese and Jesse A. Levinson, Los Angeles, for appellant.

Margolis & McTernan and John W. Porter, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff's three year old child was so terribly bitten by a dog or dogs that he died. Plaintiff's amended complaint alleges that the child was bitten by dogs belonging to defendants Arguello, and by a dog belonging to defendants Kramer. Answers were filed traversing these allegations.

Plaintiff's deposition was taken. In that deposition he testified that he did not contend that the Kramer dog bit the child; further that so far as he knew the Kramer dog did not bite the child at any time. Then he stated that his theory of Kramers' liability was that their dog was in heat, and it was negligence for them to allow the animal to go at large, an attraction for male dogs in the neighborhood where the Kramers and the child lived.

These facts appearing from the file and by affidavits, the Superior Court after denying summary judgment against the plaintiff and in favor of the defendants Kramer, dismissed the action as being fictitious and sham as to them.

Plaintiff appeals, and has filed his opening brief. Defendants move this Court to dismiss the appeal. The motion is made upon the pleadings and affidavits on file, and upon the same grounds urged in support of the motion for summary judgment.

[1, 2] Courts have inherent power to dismiss actions upon the grounds that they are fictitious or sham. Such a motion to dismiss is proper practise, but in each case the question arises whether the specific facts presented to the court constitute grounds for an order of dismissal. Cunha v. Anglo, California Nat. Bank, 34 Cal.App. 2d 383, 93 P.2d 572.

[3] In the present case the complaint specifically alleges that the Kramer dog killed the child. While it is true that the child's father in his deposition testified to facts contrary to the allegations of the complaint which he verified, it is better practise to dispose of issues by trial. Before a motion to dismiss may be granted the record must disclose that no relief can be granted to the plaintiff. People v. Nixon, 34 Cal.2d 234, 209 P.2d 385. From the complaint and the affidavits here under consideration, it can not be said that beyond peradventure of doubt no cause of action can be proven against the Kramers.

[4] Nothing herein contained is to be construed as approving plaintiff's far-fetched theory that a dog in heat not kept within bounds proves negligent liability of the owner for the acts of other dogs attracted to the neighborhood. This decision

is based upon the fact that the complaint avers that the Kramer dog actually killed the child, and that while this averment is controverted by the testimony of the plaintiff on deposition, upon trial of the issue the plaintiff may be able to present testimony to support the complaint. To hold otherwise would be to open a veritable Pandora's box of motions to dismiss actions, based upon statements in depositions contrary to averments in complaints.

The motion to dismiss the appeal is denied.

WHITE, P. J., and DORAN, J., concur.

34 Cal.2d 376

In re WISE'S ESTATE.

LEWIS v. HOWSER, Attorney General.

S. F. 17677.

Supreme Court of California.
Oct. 21, 1949.

Proceeding in the matter of the estate of Ira Wise, deceased, wherein John E. Lewis, administrator of the estate of Eva Effie Jones, petitioned the Probate Court to determine the heirship of Eva Effie Jones to Ira Wise.

From a judgment and order of the Superior Court, of Alameda County, Ezra W. Decoto, J., denying petitioner's motion for leave to file an amended petition and dismissing the petition, the petitioner appealed, opposed by Fred N. Howser, Attorney General of the State of California, intervener.

The Supreme Court, Spence, J., affirmed, holding that a decree of heirship was conclusive against collateral attack although no administrator had been appointed for deceased whose heirship was decreed and that a determination in the proceeding that a brother was not an heir of the decedent automatically determined that his sister was not such an heir.

Prior opinion, 202 P.2d 758.

1. Courts 🔑198

Probate proceedings being purely statutory and special in their nature the Superior Court although a court of general jurisdiction is circumscribed in such class of proceedings by the statute conferring such jurisdiction may not competently proceed in a manner essentially different from that provided.

2. Judgment 🔑475

A decree in Probate will be accorded the same intendments as a final judgment in favor of its validity and it is not open to collateral attack for lack of jurisdiction unless the record affirmatively shows the court transgressed its statutory power to render the decree in question.

3. Judgment 🔑497(1)

The record on appeal from a decree in Probate is the judgment-roll and upon collateral attack it is the only evidence that can be considered in determining the question of jurisdiction.

4. Courts 🔑198

Jurisdiction of Probate Court is a jurisdiction in rem, and is established when the appropriate petition has been filed and a notice required by statute has been given.

5. Descent and distribution 🔑71(7)

An heirship decree was not open to jurisdictional objection on collateral attack that the initial hearing and taking of evidence were held prior to expiration of ten days following posting of notice of a petition to establish heirship, in view of recitals of decree establishing that procedure was in accord with the statutory requirements. Probate Code, §§ 1080, 1200.

6. Descent and distribution 🔑71(7)

Rules respecting conclusive effect of a judgment rendered against a party, who dies after commencement of action and before the rendition of judgment, have no application to heirship proceedings seeking determination of claims of succession to the estate of a decedent, which proceeding is not an ordinary civil action but a specialized proceeding in rem, wherein the res is the right of heirship and distribution, and as to that issue, the decree is binding on the whole world. Probate Code, §§ 1080–1082.

7. Descent and distribution 🔑71(7)

An heirship decree is conclusive against all persons and settles the rights of all persons claiming as heirs of the decedent whether or not they are named in the complaint or personally served with a summons, and whether or not they are individually named in the notice. Probate Code, §§ 1080–1082.

8. Descent and distribution 🔑71(7)

An heirship decree is not one in personam in favor of one of the parties against another but is founded in a specialized proceeding in rem, and when the decree is rendered, it is a solemn declaration of the status of the thing and ipso facto renders it what the decree declares it to be. Probate Code, §§ 1080–1082.

9. Descent and distribution 🔑71(7)

While justice and sound policy require that estate of decedents be distributed to the rightful distributees and that every concern of a probate court be the accomplishment of that purpose, a valid decree determinative of rights of distribution when once final may not be disturbed at the behest of any rightful claimant known or unknown when the decree was rendered, since it is the policy of the law to preserve the inviolability of the final judgment and decrees of courts of law and equity and a valid decree of a court of probate partakes of the nature of such judgments. Probate Code, §§ 1080–1082.

10. Descent and distribution ⚷71(7)

Where notice pursuant to statutory requirements was properly given in heirship proceedings, the heirship decree could not be avoided upon collateral attack because at time it was filed one of the claimant heirs was dead and no administrator to represent her estate had as yet been appointed. Probate Code, §§ 1080–1082.

11. Descent and distribution ⚷71(7)

Where in heirship proceeding statutory notice was published, a determination in the proceeding that a brother was not an heir of the particular decedent automatically determined that the sister was not an heir of such decedent, notwithstanding that at time the heirship decree was filed the sister was dead and no administrator to represent her estate had as yet been appointed. Probate Code, §§ 300, 1080–1082.

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Edward D. Mabson, San Francisco, for appellant.

Fred N. Howser, Attorney General, in pro. per., Richard H. Perry and Leo T. Englert, Deputy Attorneys General.

SPENCE, Justice.

This is an appeal from a judgment dismissing the petition of John E. Lewis, as administrator of the estate of Eva Effie Jones, to establish her heirship to Ira Wise, whose estate was in the course of probate, and from an order denying said administrator leave to file an amended petition. The propriety of the court's ruling depends on considerations of (1) the validity and (2) the conclusive effect of a previous decree of heirship made in the Ira Wise estate proceeding.

On November 23, 1942, Ira Wise died intestate, leaving no issue, surviving spouse or parents. His wife, Emma, had died intestate some six months previously. On May 9, 1945, W. O. Crutchfield, the brother of Emma Wise, filed a petition to establish his heirship to Ira Wise, upon the claim that "there being no issue or surviving parents of [either] Emma * * * or * * * Ira Wise," he, Crutchfield, "as sole surviving heir of said Emma Wise," was "entitled to participate in the estate of said Ira Wise." Notice of the hearing of this petition was posted on the aforesaid filing day, with May 23 appointed as the time when "all persons interested [should] appear and show cause, if any they have, why the said petition should not be granted."

On June 11, 1945, Betty Bly and Earnest Bly filed a petition to establish their heirship to Ira Wise and in challenge of W. O. Crutchfield's relationship claim. They alleged that said Ira Wise "left surviving him as his heirs, Eva Effie Bly Jones [since deceased] and Earnest Bly" as "first cousins" and "Betty Bly [as] the aunt of said Eva Effie Bly Jones and Earnest Bly"; that "Ira Wise died intestate and left no wife, no issue or surviving parents and Betty Bly and Earnest Bly and the estate of Eva Effie Bly Jones * * * are the only persons entitled to participate in the estate of Ira Wise"; that, on information and belief, "Emma Wise did not leave any surviving heirs and therefore W. O. Crutchfield as [her] alleged brother * * * [was] not entitled to inherit from said estate." This petition was signed by "Richard M. Lyman, Attorney for Betty Bly and Earnest Bly and representing the estate of Eva Effie Bly Jones, deceased." (Eva Effie Bly Jones had died on March 4, 1944, and when the Bly petition was filed, no administrator had been appointed for her estate.) Notice of the hearing of the Bly petition was posted on June 12, 1945, with the hearing day set for July 3, and Betty and Earnest Bly designated as petitioners. However, as disclosed by the clerk's minutes of June 21, 1945, Lyman, as counsel for the Blys, "enter[ed] into an oral stipulation with other counsel present" that the Bly petition "be advanced on the calendar and heard in conjunction with the other matters" in the Wise proceedings pending "before the Court [that] day." Accordingly, in the morning session two witnesses were "sworn and examined on behalf of petitioner Crutchfield," and in the afternoon William Jones, the surviving husband of Eva Effie Jones, testified "on behalf of * * * Betty Bly and Earnest Bly." Thereupon "both petitions to establish heirship, one of Crutchfield and one of the Blys [in the estate of Ira Wise], and the petition of Crutchfield for partial distribution [in the estate of Emma Wise]" were by order of the court "continued to August 28, 1945, * * * for further hearing." As then appears from a minute entry dated August 28, 1945, these petitions were heard as scheduled, additional statements were taken, and the court found that W. O. Crutchfield was the "brother of Emma Wise, deceased," and ordered that his "petition * * * to establish heirship in the estate of Ira Wise * * * [be] granted." At the same time the court further ordered that the "petition of Betty Bly and Earnest Bly to establish heirship in the estate of Ira Wise * * * (petition also includes estate of Eva Effie Bly Jones, deceased) be * * * denied."

A decree based on the minute order of August 28 was filed on September 6, 1945. It recited that the two heirship "petitions * * * came on regularly for hearing on the 21 day of June, 1945," with independent counsel "appearing * * * for W. O. Crutchfield" and Lyman, designated as "attorney of record for Eva Effie Jones * * * appearing * * * for Betty Bly and Earnest Bly"; that "proof having been made to the satisfaction of the court that notice of the hearing of said petitions has been given as required by law, testimony both oral and written was introduced * * * by the respective parties"; that the "matter was continued to August 28, 1945," and after "coming on regularly to be heard" that day, it was "submitted for decision." The court then found that "W. O. Crutchfield [was] the brother and sole surviving heir of Emma Wise, deceased" and, as such, "entitled to participate in the estate of * * * Ira Wise, deceased"; that "the allegations in the petition of Betty Bly and Earnest Bly are untrue (save and except the allegation that Ira Wise died intestate and left no wife, no issue or surviving parents) and not supported by proper or competent testimony offered, presented or introduced to establish any right of heirship of said Betty Bly, Earnest Bly or Eva Effie Jones mentioned in said petition as Eva Effie Bly Jones, or to establish any right or interest of said Betty Bly, Earnest Bly and/or said Eva Effie Bly Jones, in the estate of said Ira Wise"; and accordingly, that "said Betty Bly, Earnest Bly and/or said Eva Effie Bly Jones, or either or any of them, are not heirs of said Ira Wise and therefore have no right, title, interest, claim or demand in or to said estate of Ira Wise, and are not entitled to participate in the distribution of said estate of Ira Wise."

No appeal was ever taken from the decree and it long since has become final. A little more than a year after its entry and on November 13, 1946, John E. Lewis, who, after entry of the decree, had been appointed administrator of the estate of Eva Effie Jones, filed a petition to determine if her estate was entitled to share in the estate of Ira Wise. Referring to the denial of the Bly petition on August 28, 1945, the petition of Lewis alleges that at the time of that former heirship proceeding "no proper proof was presented to the court that said Eva Effie Jones was dead, and no person entitled to represent [her] estate * * * was [there] present"; and that "said Eva Effie Jones was the cousin of Ira Wise," and, as such, "entitled to participate in the distribution of [his] estate."

Inasmuch as the court had determined that W. O. Crutchfield was only entitled to a portion of Ira Wise's estate, and there was the possibility of a partial escheat, the state of California intervened in this proceeding and filed its answer to the Lewis petition. It denied the allegations of the petition and alleged: "The petition does not state facts sufficient to enable the court to determine that Eva Effie Jones is an heir of Ira Wise, deceased, for the reason that the subject matter of the petition to determine heirship has previously been finally determined adversely to petitioner's contention." Thereafter Lewis as administrator, requested leave to file an amended petition on behalf of Eva Effie Jones. On June 25, 1947, the court denied this request and dismissed the Lewis petition. From such adverse order and judgment accordingly entered, Lewis has appealed.

Appellant contests the validity of the first decree of heirship upon these grounds: (1) the initial hearing, with the taking of evidence, was held prior to the expiration of ten days following the posting of notice of the Bly petition (Prob.Code, sec. 1200); and (2) the decree was rendered at a time when appellant's decedent, Eva Effie Jones, was dead and no administrator had, as yet, been appointed to represent her interest in the heirship proceeding, with the alleged result that its determination could not be binding upon her estate. Respondent, on the other hand, maintains that appellant's challenge constitutes a collateral attack upon the first decree, which cannot prevail because (1) the record establishes the jurisdiction of the court to act; and (2) as a decree in rem, it is res judicata as to the whole world. In the light of the particular facts of this case and the settled legal principles applicable to heirship proceedings, respondent's position is well taken.

[1-3] "Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided. Smith v. Westerfield, 88 Cal. 374, 379, 26 P. 206." In re Estate of Strong, 119 Cal. 663, 666, 51 P. 1078, 1079; Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 41, 53 P.2d 127. But like any final judgment, a decree in probate will be accorded the same intendments in favor of its validity, In re Estate of Keet, 15 Cal.2d 328, 335, 100 P.2d 1045, and it will not be open to collateral attack for lack of jurisdiction unless the record affirmatively shows that the court transgressed its statutory power to render the decree in question. 1 Freeman on Judgments, Fifth Ed., sec. 305, pp. 602–604; In re Estate of Davis, 151 Cal. 318, 325, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; Kaufmann v. California Mining & Dredging Syndicate, 16 Cal.2d 90, 91, 104 P.2d 1038. The record is the judgment-roll, and upon collateral attack it is the only evidence that can be considered in determining the question of jurisdiction. In re Estate of Eikerenkotter, 126 Cal. 54, 56, 58 P. 370; Sacramento Bank v. Montgomery, 146 Cal. 745, 751, 81 P. 138; Crouch v. H. L. Miller & Co., 169 Cal. 341, 343, 146 P. 880.

[4] The jurisdiction of the probate court is a jurisdiction in rem. It is established when the appropriate petition has been filed and the notice required by the statute has been given. Lilienkamp v. Superior Court, 14 Cal.2d 293, 298, 93 P.2d 1008; Stiebel v. Roberts, 42 Cal.App.2d 434, 438, 109 P.2d 22. In the present case the significant chronology is the filing of the Crutchfield petition on May 9, 1945, and its notice for hearing fourteen days later, May 23 (Prob.Code, sec. 1200), as then giving the court jurisdiction to proceed with the whole matter of heirship in the estate of Ira Wise. Apparently that hearing did not proceed as scheduled but was continued to June 21, in view of these considerations: the Bly petition to establish heirship in that same estate and denying Crutchfield's claims, filed on June 11 and set for hearing on July 3, according to the notice posted on June 12, was, pursuant to stipulation of counsel, "advanced on the calendar" to June 21 to be "heard in conjunction with the *other matters*" in the Wise proceedings pending "before the Court [that] day," among which was the Crutchfield petition as above noted. Such stipulation amounted, in effect, to the recognition of the purport of the Bly petition as "a written statement setting forth [the Blys'] interest in the [Ira Wise] estate"

(Prob.Code, sec. 1080) in challenge of Crutchfield's right to participate therein, and the propriety of the court's determination of the conflicting claims as an integrated adjudication. Accordingly, testimony was taken with respect to the opposing heirship claims on June 21, 1945; a further hearing was had on August 28, 1945, when additional statements were made therein, and the matter was submitted for decision; and the decree determining heirship was rendered on September 6, 1945.

[5] In review of these proceedings as establishing the jurisdiction of the court, the decree recites that "the petitions of said W. O. Crutchfield and Betty Bly and Earnest Bly came on regularly for hearing on the 21 day of June, 1945," with independent counsel appearing on behalf of the respective claimants, and "proof" was "made to the satisfaction of the court that notice of the hearing of said petitions has been given as required by law"—that is, the ten-day prescribed notice on the Crutchfield petition (Prob.Code, sec. 1200), and the Bly petition as an opposing "written statement" (Prob.Code, sec. 1080). As so analyzed, the situation is in nowise akin to the case of Livermore v. Ratti, 150 Cal. 458, 89 P. 327, 330, cited by appellant, where "neither the record nor the recital of the giving of the notice, nor the presumptions in favor of the jurisdiction of the court" could prevail against "evidence" showing that "the giving of an effective notice in the manner * * * recited [was] impossible." Here, the record recites that which was done, such procedure was in accord with the statutory requirements, and accordingly the ensuing heirship decree is not open to jurisdictional objection.

[6] Nor may appellant avoid the binding effect of the first heirship decree because at the time it was filed, his decedent, Eva Effie Jones, was dead and no administrator to represent her estate had, as yet, been appointed. To sustain his position, appellant relies on the following observations appearing in Garrison v. Blanchard, 127 Cal.App. 616, at page 619–621, 16 P.2d 273, at page 274: "A judgment rendered against a party in an action, who dies after its commencement but before the rendition of judgment is voidable and may not be collaterally attacked. A judgment rendered against a party, who died before the action is commenced, is void and may be collaterally attacked. (Citing authorities.) * * * [As] there [is] no defendant over whom the court could acquire or exercise jurisdiction." See also, Conlin v. Blanchard, 219 Cal. 632, 635, 28 P.2d 12. But such rules have no application to heirship proceedings, seeking the determination of claims of succession to the estate of a decedent. So in the heirship proceeding here, the court undoubtedly had jurisdiction of Ira Wise's estate, including the issue of the status of heirship. Such a proceeding is not an ordinary civil action, but a specialized proceeding in rem. 3 Freeman on Judgments, Fifth Ed., sec. 1537, pp. 3153–3156; O'Day v. Superior Court, 18 Cal.2d 540, 544, 116 P.2d 621. The res is the right of heirship and distribution. As to that issue the decree is binding on the whole world. See cases collected in 11B Cal.Jur. sec. 1195, p. 664.

Heirship proceedings are governed by sections 1080–1082 of the Probate Code, outlining a simple and expeditious method for determining who are the righful heirs of an estate and entitled to the distribution thereof. Bales v. Superior Court, 21 Cal.2d 17, 21, 129 P.2d 685. Section 1080 declares: "When the time to file or present claims against the estate has expired, but the estate is not in a condition to be closed, *any person claiming to be an heir* of the decedent *or entitled to distribution* of the estate or any part thereof may file a petition setting forth his claim and praying that the court determine who are entitled to distribution of the estate. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. *Any person* may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed to be denied by each of the other claimants to the extent that they conflict with any claim of the latter." (Emphasis added.) Section 1081 provides that "a trial of the facts must be by jury * * * unless a jury is waived"; and that in the latter event "the court shall hear the petition and any objection thereto that may have been presented, and shall determine who are the heirs of the decedent or entitled to distribution of the estate and shall specify their interests." Section 1082 states: "When such decree becomes final it shall be *conclusive upon the matters determined* during the remainder of the administration of the estate and upon any subsequent proceeding for distribution." (Emphasis added.)

As the reference is above made to section 1200 for the mode of giving notice, the clerk is thereby directed "[to] give notice of the petition * * * by causing a notice to be posted at the courthouse * * * at least ten days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and notifying all persons interested to appear at the time and place mentioned in the notice and show cause, if any they have, why the order should not be made. * * * Proof of the giving of notice must be made at the hearing; and if it appears to the satisfaction of the court that said notice has been regularly given, the court shall so find in its order, and such order, when it becomes final, shall be conclusive upon all persons."

[7-9] So it has been said that such heirship "decree [is] conclusive against all persons" as the "basis for the decree of distribution which [is] to follow", In re Estate of Blythe, 110 Cal. 231, 234, 42 P. 643, 644; it settles "the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons", Title and Document Restoration Company v. Kerrigan, 150 Cal. 289, 307, 88 P. 356, 359, 8 L.R.A.,N.S., 682, 119 Am.St.Rep. 199, and whether or not they were "individually named in [the] notice * * *". In re Estate of Blythe, supra, 110 Cal. 231, 233, 42 P. 643; see, also, 11B Cal.Jur. sec. 1200, p. 671; sec. 1205, p. 676; sec. 1208, pp. 680–681. The decree is not one "in personam in favor of one of the parties against another." Edlund v. Superior Court, 209 Cal. 690, 695, 289 P. 841, 843. Rather, as founded in a specialized proceeding in rem—"not against persons as such, but against or upon the thing or subject matter itself"—the decree, when rendered, "is a solemn declaration of the status of the thing, and ipso facto renders it what the [decree] declares it to be." 11A Cal.Jur. sec. 73, p. 135, and cases there cited. While it may "not be questioned that justice and sound policy requires that the estates of decedents be distributed to persons rightfully entitled thereto, and that every concern and endeavor of a probate court should be to the accomplishment of that purpose", that does not mean that a "valid decree" determinative of rights "of distribution * * * when once final, may be disturbed at the behest of any rightful claimant, known or unknown, when the decree was rendered, for it is the well-settled policy of the law to preserve the inviolability of final judgments and decrees of courts of law and equity, and a valid decree of a court of probate partakes of the nature of such judgments." Edlund v. Superior Court, supra, 209 Cal. 690, 695, 289 P. 841.

[10, 11] Applying these principles to the present case, the record shows an in rem proceeding in which notice, pursuant to the statute, was posted and directed to all persons interested, and in which any person claiming to be an heir of Ira Wise was entitled to appear. Therefore, if Eva Effie Jones was an heir of Ira Wise, then any of her heirs would be persons interested as claimants under section 1080 of the Probate Code and could have participated in the heirship proceeding as it would ultimately affect the distribution of his estate. Accordingly, her interest was not dependent upon presentation through one legally appointed to represent her estate (Prob. Code, sec. 300), but was open to establishment by William Jones, her surviving husband and sole heir, who, upon such premise and as authorized by said section 1080, had the legal right to seek a distributive share in the Wise estate when the prior heirship proceeding was heard. The record shows, in fact, that he did testify in that proceeding on behalf of Betty and

Earnest Bly. Admittedly, his wife, Eva Effie Bly Jones, was the sister of Earnest Bly, so that proof of their relationship to the deceased Ira Wise would be identical as stemming from the same ancestral connection. Yet in the first heirship proceeding Earnest Bly was declared not to be an heir of Ira Wise. That automatically determined that Eva Effie Jones was likewise not so related. Section 1080 was designed to obviate useless and unnecessary repetitive hearings. In re Estate of Horman, 167 Cal. 473, 476, 140 P. 11.

In short, the record in the present case shows that notice was properly given as found by the court, and the decree in the first heirship proceeding, contrary to appellant's contention, stands as a valid adjudication finally settling the disputed distributive rights in the Ira Wise estate and precludes further litigation of the issues there determined. Whalen v. Smith, 163 Cal. 360, 364, 125 P. 904, Ann.Cas.1913E, 1319.

The judgment and order subject of this appeal are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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34 Cal.2d 387

ALMASSY v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al.

L. A. 20478.

Supreme Court of California.

Oct. 25, 1949.

Petition by Alfred G. Almassy for a writ of mandate to compel the Los Angeles County Civil Service Commission and the members thereof to annul two promotional civil service examinations and the corresponding eligible lists promulgated upon the results thereof.

Judgment of the Superior Court, Los Angeles County, Frank G. Swain, J., denying the petition, and the petitioner appealed. Judgment of the Superior Court was reversed by the District Court of Appeal, 200 P.2d 846, and the Civil Service Commission appealed.

Judgment of the Superior Court was affirmed by the Supreme Court, Spence, J., which held that certain evaluation procedure in addition to written tests adopted by the Commission as part of the process of rating candidates for positions to be filled was valid.

1. Mandamus 🔑187(9)

Where the validity of evaluation procedure adopted by Civil Sevice Commission was of importance to the Commission and would probably be relitigated until a final decision was given by the Supreme Court, a decision by the Supreme Court on the merits was proper, though the particular eligible lists attacked in the case before the court had already expired.

2. Officers 🔑26(1)

Evaluation of education, experience and personal fitness as part of promotional examinations conducted by the Los Angeles County Civil Service Commission is not prohibited by either charter or rules of the Commission.

3. Officers 🔑26(1)

Under charter and rules, the Los Angeles County Civil Service Commission has broad discretionary powers in determining subjects of examination for promotion and the qualifications which are to be measured.

4. Administrative law and procedure 🔑224
Officers 🔑11.3

Judicial interference with broad discretionary powers of the Los Angeles County Civil Service Commission in matter of the subjects of examination and qualifications which are to be measured is not justified except on showing of arbitrary, fraudulent, or capricious conduct, or clear abuse of discretion.

5. Officers 🔑26(1)

Evaluation of education, experience and personal fitness as part of examinations conducted by the Los Angeles County Civil Service Commission for promotion to position of senior deputy probation officer was within discretion of Commission.

6. Officers 🔑26(1)

Under charter and rule requiring proper record of civil service examination, showing basis of rating, when oral tests are used, a transcript or stenographic report of entire oral proceeding is not required.

7. Officers 🔑26(1)

Under charter and rule requiring a proper record of civil service examination, showing basis of rating, when oral tests are used, recording of examiner's findings on appraisal sheet during oral interview as part of evaluation process designed to ascertain significant personality factors was sufficient.

8. Officers 🔑26(1)

Charter requirement for open, competitive examinations for promotion in the civil service contemplates a "competitive" examination which is "open" to all who are able to meet the minimum requirements for candidates, as distinguished from mere qualifying examination for one or more picked candidates.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Competitive" and "Open".

9. Officers 🔑26(1)

Oral interviews by examiner to test personal fitness of applicants for promotion in the civil service satisfied charter requirement for "open, competitive examinations" for testing relative fitness of applicants.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Open, Competitive Examinations".

10. Officers 🔑26(1)

Under charter requirement for open, competitive examinations in the civil service, measurable standards must be established for determining general proficiency of candidates for particular position, but fact that such standards are subjective rather than objective does not mean that an oral interview by an examiner to determine personal fitness is not "competitive".

11. Officers 🔑11.7

Civil Service Commission could reasonably conclude that oral interview, as distinguished from a test of technical knowledge, was most appropriate means for evaluating candidate's personal fitness for promotion to position of deputy probation officer.

12. Officers 🔑26(1)

Appraisal form showing basis of personal fitness rating by civil service examiner met requirement of charter and rule for an "open, competitive examination", within discretionary bounds of determination by Commission.

13. Officers 🔑11.7

Use of confidential report of department head in determining personal fitness of candidate for promotion in Civil Service was within discretion of Commission.

14. Officers 🔑11

Civil service is intended to abolish so-called spoils system in matter of appointments, and to increase efficiency of employees by assuring them of continuance in office, together with opportunity of promotion.

15. Officers 🔑26(1)

Within general limitation that civil service examinations must afford fair competition, the Civil Service Commission in determining candidate's suitability for position to be filled should not be proscribed in adopting method of selection which it deems best calculated to produce desired results.

16. Officers 🔑11.7

Civil Service Commission should be permitted to evaluate candidates in matter of education, experience and personal fitness through oral interviews and through reports of department heads evaluating candidates for promotion, as long as safeguards are provided to insure uniform basis of rating, and a record showing basis of rating made.

17. Officers 🔑26(1)

Under charter and rule requirement for an "open," "impartial" and "competitive" examination, an over-all method of testing which accorded weight of 50 per cent to written part and a like percentage to personality evaluation part, in which oral interviews were entrusted to experienced examiners and in which confidential reports of department heads were considered, was sufficient. Code Civ. Proc. § 1963, subd. 15.

◆

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SPENCE, Justice.

[1] Petitioner appeals from a judgment denying his application for a writ of mandate to compel the Los Angeles County Civil Service Commission to annul two promotional civil service examinations and the corresponding eligible lists promulgated upon the results thereof. The problem presented is the validity of certain evaluation procedure, in addition to written tests, adopted by the commission as part of the process of rating candidates for the positions to be filled—an allegedly common practice in the conduct of civil service examinations throughout the state. While it appears that the eligible lists here attacked have already expired by reason of the lapse of the prescribed two-year limit (Charter, art. IX, sec. 34(4); Commission rule XI, sec. 3), the evaluation procedure challenged in the present case is in current use. Its validity is a matter of importance to the commission and would probably be relitigated until a final decision was given by this court. The questions involved in the present case are continuing and "their consideration ought not to be * * * defeated, by short term orders, capable of repetition, yet evading review * * *." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310; also, Federal Trade Commission v. Goodyear Tire & Rubber Co., 304 U.S. 257, 58 S.Ct. 863, 82 L.Ed. 1326; Ford Motor Co. v. United States, 335 U.S. 303, 313, 69 S.Ct. 93. A decision on the merits is therefore proper.

There is no dispute as to the facts, pursuant to the parties' submission of the cause upon stipulation. In August, 1946, petitioner, an employee of the Probation Department of Los Angeles County, participated as a candidate in two promotional examinations for the respective positions of senior deputy probation officer, adult division and juvenile division. He failed to pass either examination, and his name did not appear on the eligible lists as subsequently promulgated by the commission on September 20, 1946. Within the time and in the manner provided by the rules of the commission, he duly prosecuted an appeal to that body, in which he protested the validity of the examinations and the method of their conduct. By decision of December 24, 1946, the commission raised petitioner's final evaluation grade by a slight percentage in each instance but not enough to qualify him with a passing average upon either examination, and denied the appeal in all other respects. Petitioner then brought the present proceeding.

Both in the trial court and upon this appeal, petitioner has maintained that the two promotional examinations in question and the corresponding eligible lists were illegal and void for failure to comply with the controlling provisions of the Los Angeles County Charter and the rules of the civil service commission established pursuant thereto. However, careful analysis of the challenged procedure reveals it to be within the bounds of determination by the commission consistent with the broad powers conferred upon that administrative body to act in the premises.

The charter requires the commission to "prescribe * * * rules for the classified service, which shall have the force and effect of law", art. IX, sec. 34, and which "shall provide * * * for open, competitive examinations to test the relative fitness of applicants for such positions". Art. IX, sec. 34(2). It also requires that the said rules "provide * * * for promotion based on competitive examination and records of efficiency, character, conduct and seniority. Lists shall be created and promotion made therefrom in the same manner as prescribed for original appointment." Art. IX, sec. 34(11). The charter further states: "All examinations shall be impartial and shall deal with the duties and requirements of the position to be filled. When oral tests are used, a record of the examination, showing basis of rating, shall be made. * * * The Commission may call on other persons to draw up, conduct or mark examinations." Art. IX, sec. 36. These last-quoted provisions are incorporated verbatim in rule VII, sections 3 and 10, respectively, of the rules established by the commission, while rule VIII, section 1, repeats the above-quoted provisions of charter section 34(11), with the addition of the following: "The rules governing promotional examinations shall be the same as those governing original entrance examinations except as herein provided." Sections 4 and 5 of rule VIII then provide that in "all promotional examinations each employee shall be given, in addition to all other credits, a credit for efficiency" and "a credit for seniority," each not to exceed "five per cent of the total credits specified for [the] examination" and as "calculated from the Commission's record" thereof.

The "Commission shall prepare, or have prepared under its direction, all examinations", rule VII, sec. 2, which "shall embrace * * * subjects to which weights shall be assigned, the weight given to each subject to represent its relative value in ascertaining the fitness of the applicant. Each subject of examination shall be graded independently; this grade shall be multiplied by the weight assigned to such subject; the sum of the resulting products shall be divided by the total weight of all subjects in the examination, and the resulting quotient shall be the general average which shall be used in determining the order in which the name of the applicant shall appear on the eligible list * * *. Unless otherwise provided in notices posted prior to holding the examination, the average percentage for proficiency required for passing shall be seventy per cent." Rule VII, sec. 9. The "examination papers written by an applicant shall be open to his inspection * * * [but] the references and oral rating sheets shall be deemed confidential and shall not be open to [his] inspection." Rule VII, sec. 13. Provision is made for the taking of a written appeal to the commission for "a change in rating in any part of the examination," and "after consideration of the entire matter the Commission shall make its decision and determine the final rating of the candidate, which determination shall be final for all purposes." Rule VII, sec. 15.

The same procedure prevailed with respect to both of the promotional examinations here in question. As stated in the bulletin announcements, they consisted of two phases: (1) a written test and (2) "an evaluation of the education, experience and personal fitness of each of the applicants, as verified by interview, investigation or references." Each of the two parts was assigned a relative weight of 50 per cent of the total grade. It is not contended here that the examinations were in any way defective or illegal insofar as the written parts are concerned, but objection is made solely to the equally weighted "evaluation" portions as determined by the commission to embrace factors properly subject of consideration in the fixing of the final grading.

The evaluation phase of the two examinations was conducted in the following manner. The candidate was required to fill out an application form, calling for a variety of personal data as well as detailed information concerning the individual's education and experience. He was then interviewed by two experienced examiners, well acquainted with the subjects of examination and the qualifications determined by the commission to be necessary and important in the position to be filled. Each of the examiners rated the candidate on the basis of information contained in his application form, and educed or observed at the interview, as to his education, experience and personal fitness. These ratings were effected by making entries upon "General Qualifications Appraisal Record" forms furnished by the commission. These forms were subdivided into three sections, the first two of which contained blank spaces for entries adapted for rating the candidate upon "Education" and "Experience," respectively. The third section, to which petitioner's objection is chiefly directed, was in the following form:

"Personal Fitness:		Poor	Weak	Acceptable	Good	Superior
Physical Characteristics						
a. Appearance	a.	____	____	____	____	____
b. Voice and Speech	b.	____	____	____	____	____
Intellectual Factors						
c. Alertness	c.	____	____	____	____	____
d. Judgment (Depth and maturity of thinking.)	d.	____	____	____	____	____
e. Ability to express ideas	e.	____	____	____	____	____
Emotional Factors						
f. Poise (Emotional adjustment, stability.)	f.	____	____	____	____	____
g. Social adaptability (Ability to meet people, make social adjustment.)	g.	____	____	____	____	____
Professional Development						
h. Orientation in the field (Knowledge of new trends, current problems.)	h.	____	____	____	____	____
i. Interest in job.	i.	____	____	____	____	____

Final Evaluation:	____	____	____	____	____
	Poor	Weak	Acceptable	Good	Outstanding"

The entries made by each examiner upon such form were subsequently translated by the commission, in accordance with a fixed formula, to a numerical value on the basis of a maximum 100 points possible, and the ratings given by each examiner were then averaged together.

A further consideration in the evaluation phase consisted of a "Confidential Report" which was obtained for each candidate from his department head upon a form furnished by the commission for the purpose. Such form contained blank spaces in which checkmarks were to be entered, indicating the department head's appraisal of the candidate as either "poor," "fair," "average," "very good" or "outstanding," in respect to each of these qualities:

"Personality Factors:
Soundness of judgment
Emotional maturity
Dependability under stress
Adaptability to new situations
Supervision:
Ability to
Instruct employees
Establish effective work relationships
Assume responsibility for work performance
Improve methods of work
Maintain relationships with other agencies
Professional Attitude:
Participation in
Professional activities
Community activities
Special Qualifications:
Understanding of and interest in probation case work with adults
Ability to
supervise adult case workers"

The department head was also requested to indicate by means of a checkmark his "overall evaluation" as to whether the candidate would probably "be inadequate to meet the demands of this position; give a weak performance in this position; meet satisfactorily the requirements of this position; make a contribution which exceeds average requirements; [or] provide an outstanding performance in this position." Several blank lines were left for the "remarks" of the department head at the end of the "overall evaluation." The form was prefaced by the following instructions: "(Indicate, by checking in the appropriate spaces, your judgment of the candidate with reference to the following factors. If your appraisal of the candidate can be strengthened by consulting others who know him, please consult with such persons. Since, for this type of position, so much reliance is placed on information gained in this manner, your careful evaluation of the candidate's qualifications and your frank comments are urged.)" The entries made by the department head were likewise translated to a numerical value on the basis of a maximum 100 points possible.

A total evaluation grade was obtained by combining the rating from the department head's report with the average of the two examiners' ratings in such a way as to give the former a 25 per cent weight and the latter a 75 per cent weight. The final grade upon the entire examination was then computed by averaging the total evaluation figure with the written test mark, giving a 50 per cent weight to each, and adding to the result the candidate's efficiency and seniority credits as provided in the rules. In the adult division examination, petitioner received a mark of 45.19 per cent on the written test, 54 per cent of the evaluation phase, plus total efficiency and seniority credits of 8.55 per cent, so that his final grade was 58.14 per cent. In the juvenile division examination, he received 50.81 per cent on the written test, 54 per cent on the evaluation phase, plus 8.55 per cent for efficiency and seniority, making a final grade of 60.95 per cent. As the result of his appeal to the commission, petitioner's final grades were increased to 61.64 per cent and 64.45 per cent respectively. A final grade of 70 per cent was necessary for passing.

Upon the basis of the foregoing facts, which were incorporated in its findings, the trial court concluded that "an evaluation of education, experience and personal fitness [was] a proper * * * part of * * * the * * * examinations," but that "in making such an evaluation * * * it [was] not proper under [the] Charter and rules to use a confidential report from the department head containing an appraisal of such qualities as the Civil Service Commission had determined to be necessary and important to personal fitness for the promotional positions to be filled." It was finally concluded, however, that "otherwise, the said examinations and each of them, were lawfully, fairly and properly conducted and the lists promulgated from the said examinations are valid and subsisting, were properly promulgated and should not be cancelled or annulled." Judgment thereupon was entered denying petitioner's application for a writ of mandate.

Consideration of the challenged procedure affecting the evaluation phase of the examinations in its bearing upon the ascertainment of the merit and fitness of the candidate for promotion sustains both parts thereof—the oral interviews by the examiners and the department head's confidential report—as within the scope of authorized decision on the part of the commission. Accordingly, in recognition of the validity of the dual aspect of the evaluation process as determined to be "necessary and important" in the overall grading of the promotional examinations in question, it is proper that the judgment be affirmed.

[2-5] The first argument to be considered is the claim that neither the charter nor the commission's rules permit an evaluation of education, experience and personal fitness as part of the examinations. There is no merit to such position. It is manifest from the provisions of the charter and rules above quoted that subject to the limitation that "all examinations shall be impartial and shall deal with the duties and requirements of the position to be filled", art. IX, sec. 36; rule VII, sec. 3, the civil service commission has been given broad discre-

tionary powers in determining the subjects of examination and the qualifications which are to be measured. See Field, Civil Service Law, 1939, p. 86, pp. 132-133; Keller v. Hewitt, 109 Cal. 146, 147, 41 P. 871; Maxwell v. Civil Service Commission, 169 Cal. 336, 338-339, 146 P. 869; Haub v. Tuttle, 80 Cal.App. 561, 569-570, 251 P. 925; Mitchell v. McKevitt, 128 Cal.App. 458, 465, 17 P.2d 789. Judicial interference under such circumstances is unjustified except on a showing of arbitrary, fraudulent, or capricious conduct, or a clear abuse of discretion. Pratt v. Rosenthal, 181 Cal. 158, 163-164, 183 P. 542; Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 63, 110 P.2d 513. No such showing was made in this case; rather, on the contrary, the qualities of personal fitness, and the various aspects thereof, which were to be rated on the examinations in question, appear to have a reasonable bearing upon the "duties and requirements" of the position of senior deputy probation officer, and the trial court found, in substance, that the commission had made a determination to that effect. Such determination was plainly within the bounds of its permissible discretion.

[6, 7] Next to be considered is the point that the examinations were invalid for the reason that the commission failed to make a "proper record of the examination, showing basis of rating," as required by charter and rule "when oral tests are used." Art. IX, sec. 36; rule VII, sec. 3. Such contention relates to the oral interview as part of the evaluation process—an "oral test" or "examination" conducted for the purpose of "rating" the candidates. But giving the quoted provision a fair and reasonable construction rather than a narrow interpretation inconsistent with the broad latitude and discretion conferred upon the commission in its field of operation, it does not appear that the prescribed "record" was lacking here.

At the time of the oral interview, the examiner had before him the filed application of the candidate giving his complete personal history and the General Qualifications Appraisal Record form specifying the qualities which the commission deemed "necessary and important" considerations in his ultimate rating for the position to be filled. The candidate was interrogated only as to his education, experience, and matters bearing upon his personal fitness, and the examiner's findings thereon were recorded on the appraisal sheet according to the personal qualifications itemized for measure. Technical questions for the purpose of testing knowledge were not asked, but the whole purpose of the interview was designed for the ascertainment of personality factors which would affect the efficient discharge of the "duties and requirements" of the desired position. From this standpoint the precise questions and answers were not important to the efficacy of the interview, for the examiner as a trained personnel observer was endeavoring to gauge the personality and attitudes of the candidate as reflected in general pertinent conversation, which would permit rating on the traits designated for appraisal. The commission then translated the rating charter by the examiner into a numerical value, in accordance with a fixed formula and schedule, and such record of the candidate's evaluation was preserved in the event of challenge on appeal to the commission for a revision in rating. While it is true that such appraisal reflected subjective judgments, conclusions and impressions of the examiner as to the candidate's manner, conduct, appearance and allied considerations of personal fitness designated as having significant bearing on his probable competency and efficiency for promotion in the service, the detailed form of itemization of the base topics for grading may properly be classified as compliance with the prescribed "record * * * showing basis of rating." In view of the purpose of the oral interview and the particular factors entering into the completion of the examiner's appraisal according to the form detail, it is difficult to see how a more complete "record" of the "basis of rating" could be achieved without requiring a transcript or stenographic report of the entire oral proceeding. Since the latter type of record is not specified as determinative of the legality of an "oral test" under the language of the pertinent charter provision and rule above quoted, the term will not be so interpreted in derogation of the authority of the commission to conduct this phase of the evaluation process and to make a "record" thereof adequate and in conformity with the practicalities of the situation in showing the "basis of rating" the candidate upon the approved personality factors.

[8, 9] In this connection and in further challenge of the validity of the oral interviews, it is argued that they did not satisfy the charter requirement of "open, competitive examinations" for testing the relative fitness of applicants for the position sought. Art. IX, sec. 34(2). Such contention is without merit, for a "competitive" examination simply envisages that it be "open" to all who are able to meet the minimum requirements for candidates, art. IX, sec. 34(5), as distinguished from a mere qualifying examination for one or more picked candidates. See Webster's New Int.Dict., 2d Ed., Unabridged, p. 545; 15 C.J.S., page 662. So pertinent is the following language in the case of State ex rel. King v. Emmons, 128 Ohio St. 216, 190 N.E. 468, at page 471, where a similar requirement contained in the state constitution with reference to the Ohio civil service law was before the court for interpretation: "What, then, is meant by 'competitive examination'? In a competitive examination, the candidates match their qualifications each against the others, and the final determination is made by rating and comparison. It is open to all who are eligible. In contrast, a noncompetitive examination is one in which the examining authority selects at pleasure such candidates as he may choose and subjects them to examination as he deems necessary." See Vol. 8, Words and Phrases, Perm.Ed., pages 253–254. Consistent with these observations, the candidates for the positions here in question were all tested by oral interviews for the same personality factors—each candidate was pitting his personality traits against those of every other candidate incident to the examiner's process of making comparative evaluations —so that the ratings in consequence of such "open" contest may properly be said to rest on a competitive basis.

[10] To be sure, there must be measurable standards established for determining the general proficiency of the candidates for the particular position, but the fact that such standards were subjective rather than objective does not prevent the classification of the "oral interview" as a "competitive" examination. The various aspects of the personality factors, as previously determined by the commission to be "necessary and important" to the position to be filled, were itemized for consideration by the examiner as the measuring rod and guidepost in his evaluation process as to the personal fitness of the candidate, so that it cannot be said that there was no effective common criterion of base topics underlying the comparative ratings. In this connection, the New York cases cited as legal precedent in their discussion of the conduct of oral examinations pursuant to the constitutional requirement that appointments and promotions in the civil service "shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive," merit careful analysis.

The first case to be noted is Fink v. Finegan, 270 N.Y. 356, 1 N.E.2d 462, 463, where a civil service examination for the position of police surgeon and medical officer was declared void on the ground that the competitive quality required by the state constitution was lacking because of the failure to employ objective standards in the oral phase. The candidate passed the written test but was failed on the oral examination consisting of technical questions of a medical nature, although he answered them correctly. As reason for his failure, the oral examiners reported that "although he was pleasant in manner and bearing and in comprehension fairly quick, he lacked force and executive ability, and was altogether too mild," and it was their unanimous opinion that he would "not * * * make an acceptable P.S. and M.O." 1 N.E.2d at page 463. The candidate asked for a rerating, and in holding that he was entitled to further consideration, the Court of Appeals of New York undertook to lay down certain general limits as to the types of tests to be used and the conditions appropriate therefor. So it was said, 1 N.E.2d at pages 464–465: "A test or examination, to be competitive, must employ an objective standard or measure. Where the standard or measure is wholly subjective to the examiners, it differs in effect in no respect from an uncontrolled opinion of the examiners and cannot be termed competitive. * * * The oral test serves its purpose in a competitive examination. Obviously it may be employed as a test of knowledge. In addition, it may be used to test other qualities. * * * An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary, by other examiners of equal ability and experience. Some positions in the civil service may require that the person who fills them have certain qualities which cannot be measured by existing objective tests. * * * In the case at bar, however, there has been no finding that executive ability and force are qualities necessary for the position, nor did the announcement of the examination reveal that these qualities would be tested. * * * [The] examiners, without warning or notice, and without a finding by the commission that the qualities of force and executive ability are necessary for the positions * * * have eliminated the petitioner on the ground that he lacks these qualities. * * * The Civil Service Law and rules would seem to require that the commission prepare lists of preliminary requirements and subjects of examination and publish them with the notice of examination."

From the above language it appears that the decision in the Fink case was based in part on the fact that while the candidate on the oral examination was questioned solely on technical medical questions, which he answered correctly, he nevertheless was failed thereon for other reasons which were not shown to be in any way material to the position. He had not been told, contrary to the situation here, that he would be graded on certain personality factors as previously determined by the commission to be "necessary and important" to the position to be filled, consistent with the advance bulletin announcing the examination to embrace two parts—a written test and "an evaluation of * * * education, experience, and personal fitness." Furthermore here, at the time of taking the written test, the candidates were informed that each part would carry a weight of 50 per cent in computing the total grade. But, in addition, it is significant that the Fink case recognized that some factors essential to the effective discharge of the duties of a particular position could not be "measured by existing objective tests." This exception was emphasized in the Matter of Sloat v. Board of Examiners, 274 N.Y. 367, 9 N.E.2d 12, 15, 112 A.L.R. 660, where the New York Court of Appeals sustained the legality of oral "interviews" and "teaching" tests given candidates for teaching positions in the public schools of New York City. It there appeared that the "interview test" was given, partially at least, to appraise the candidate's voice for carrying power, distinction, and freedom from defects of speech, and that the "teaching test" was devised to estimate the teacher's ability to maintain order in the class, enlist the interest of the students, and impart knowledge to them. After reviewing the precise ruling in the Fink case and observing that even there "we took pains to point out that we were not condemning, in advance, all oral examinations or tests where evaluation of results must depend in greater or lesser degree upon the opinion of the examiners," the court continued, 9 N.E.2d at page 15, as follows: "* * * The mandate of the Constitution for the ascertainment of merit and fitness, so far as practicable, by competitive examination, may not be transformed into an interdict against the examinations which are best adapted for the demonstration of fitness. It would be impossible to formulate a standard by which such qualities may be defined or measured with entire objectivity. The law does not require the impossible or forbid the reasonable. The record discloses that here the examiners have based determination upon their estimates of qualities which, it is reasonably clear, affect the merit and fitness of a teacher and that this estimate is derived from tests calculated reasonably to show those qualities. Evidently it is not practicable to apply such tests in exactly the same form to each competitor or to make exact comparisons between them. That is true in some degree of every examination, especially of examinations calculated to show intellectual ability and broad cultural learning. Exact definition of the qualities which are essential or desirable may be impossible; exact formula or standard by which such qualities may be measured has never been achieved; mechanical application of any standard is certainly not practicable. Much must be left here to the judgment of the examiners. The test cannot be wholly objective and to the extent that it is subjective the result may depend as much upon the fitness of the examiners as upon the fitness of the candidate. That is a risk inherent in all systems of examination."

In commenting upon the distinction between objective standards and subjective ratings as discussed in the Fink and Sloat cases, the court in Bridgman v. Kern, 257 App.Div. 420, 13 N.Y.S.2d 249, stated at page 257: "The rationale of these decisions is that personality tests should employ objective standards so far as possible. * * * [Where] objective examinations are not * * * possible * * * it should appear that the tests are reasonably calculated to show merit and fitness and not merely to show the unfettered preferences or judgment of the examiners." And in Farrell v. Kern, Sup., 17 N.Y.S.2d 934, the factor of "judgment" was approved as a proper element in an oral test given under the New York City civil service law. After referring to the Sloat opinion for its clarification of "some misconceptions which had arisen from certain expressions in the Fink case taken in their isolation" 17 N.Y.S.2d at page 935, the court distinguished the case before it as follows, 17 N.Y.S.2d at page 936: "Here the Commission endeavored so far as possible to approximate a standard as distant from the mere subjective as the situation permitted in the circumstances. The qualities of fitness which it prescribed in advance for the oral test could not be satisfactorily evaluated by a mere anonymous written examination. The notes of the examiners showing the basis upon which they made their decision were available for review * * *. To make more certain that the personal equation of the examiners would be minimized, four persons simultaneously conducted the oral examination, and they were not limited by any arbitrary restrictions in advance." Thus while it appears that the later New York decisions have not denied the substantial doctrine of Fink v. Finegan, supra, 270 N.Y. 356, 1 N.E.2d 462—that an examination to be "competitive" envisages an objective standard of grading so far as possible, see, also, Andresen v. Rice, 277 N.Y. 271, 14 N.E.2d 65, 70; Cowen v. Reavy, 283 N.Y. 232, 28 N.E.2d 390, 392—the practicalities of varying situations have been recognized as the basis for the relaxation of a rigid adherence to a narrow principle where the employment of subjective estimates would appear to be "best adapted" for the ascertainment of the "merit and fitness" of the respective candidates for the particular position in question. Sloat v. Board of Examiners, supra, 274 N.Y. 367, 9 N.E.2d 12, 112 A.L.R. 660; also, Farrell v. Kern, supra, 17 N.Y.S.2d 934.

[11, 12] Consistent with this "practical" trend in the New York decisions, it must be recognized here that the commission reasonably concluded that the oral interview, as distinguished from a test of technical knowledge, was the most appropriate means for evaluating the candidate's personal fitness and appraising his possession of those traits or qualities which it had determined as "necessary and important" to the satisfactory discharge of the duties of the professional positions in question. Although the various qualities listed for rating by the examiner in determining the candidate's personal fitness were not defined with cumbersome detail, the standards and nomenclature were presumably well understood by the examiner in line with his particular training and experience in psychological measurements and rating techniques, so that a further breakdown of the terms would only appear an unnecessary refinement insofar as effecting any more

uniform application of grading the candidates. While the examiner's judgment on the designated criteria was of necessity subjective, it does not follow that such estimate lacked reliability and validity as a basis of selection. Manifestly, a candidate's personality and attitudes cannot be measured through the mechanical application of fixed standards in the course of an interview, but the pattern thereof must develop in part according to the individual being tested and the precise line of procedure will reflect the skill of the examiner in achieving an appropriate appraisal, including the "final evaluation" factor as a composite picture reflecting the end result of delicate weighing and balancing of the separate judgments on the personality factors. To require the examiner to make extensive notes of all his factual observations and relate the various mental processes by which he reached his ultimate conclusions would seem unnecessary, voluminous documentation that might very well impede the progress of the interview and rob it of much of its desirable flexibility. Each candidate was subject to a like type of oral interview in the general evaluation process, making the competition fair to all. As so analyzed, it would appear that the appraisal form completed by the examiner was as objective as "practicable" by reason of its focusing attention on the specific aspects of personality to be measured; and as a record showing the basis of rating by the examiner, it met the requirement of the charter and rule as an "open, competitive examination" within the discretionary bounds of determination by the commission. To minimize the effect of any personal background and experience on the part of the examiner that might operate to color his appraisal of a candidate, the latter was subject to two interviews by independent examiners and their findings were averaged together to give the rating on that phase of the examination.

[13] Nor was the use of the confidential report of the department head improper as part of the evaluation of the candidate for promotion. It was a contemporary appraisal of the candidate's past performance in the service; and being based on personality factors which, as heretofore itemized, appear to have a valid relation to his readiness for promotion, it was as objective as praticable in listing the points for rating. It is obvious that a written examination could not, and the oral interview might not, reveal the traits of character and personal qualifications covered by such report from the department head. It was translated to numerical value, in accordance with a fixed formula, and it constituted but 25 per cent of the evaluation phase of the examination. Its confidential character was apparently in line with an effort on the part of the commission to insure accuracy and avoid any personal embarrassment that might result from the publication of an unsatisfactory report. The same procedure prevailed with respect to each candidate. As an added record for the ascertainment of "relative fitness" of the candidate for discharging the "duties and requirements" of the position to be filled, the desirability of the procurement of such report was a matter for determination by the commission within the exercise of its discretion.

[14-17] Unquestionably, the ascertainent of fitness and merit for office is the primary objective of the civil service system, and a competent procedure for promotion is an essential part thereof. It has a twofold purpose—"to abolish the so-called spoils system" in the matter of appointment in the service and "to increase the efficiency of employees therein "by assuring [them] of continuance in office regardless of what party may then be in power" together with the opportunity "for promotion to higher positions when vacancies occur [as] the reward of faithful and honest" work. Allen v. McKinley, 18 Cal.2d 697, 705, 117 P.2d 342. Accordingly, the examinations must be according to standards making the competition fair to all; but within this general limitation the commission, in working out the problem of measuring the candidates' suitability for the position to be filled, should not be proscribed in adopting a method of selection which it deems best calculated to produce the desired result. Nelson v. Dean, supra, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467. It cannot be disputed that in private business both oral interviews and references from past employers play an important part

in job placement. The same line of inquiry as to "education, experience and personal fitness" should be open to the commission to secure the best functioning of the civil service system, so long as (1) the safeguard of recognized standards is provided to insure the candidates a uniform basis of rating so far as possible consistent with the subjects determined as appropriate for examination, and (2) a record showing the basis of rating is made. So here, the commission adopted an overall method of testing which appears valid and acceptable in equality of treatment of the candidates and the assessment of comparative ratings under the charter and rule requirement of an "open," "impartial" and "competitive" examination—with a relative weight of 50 per cent given the written part and a like percentage allowed for the various personality factors entering into the evaluation process. Cf. Cowen v. Reavy, supra, 283 N.Y. 232, 28 N.E.2d 390, 392; Rosenstrauch v. Reavy, 174 Misc. 446, 21 N.Y.S.2d 358, 362. The conduct of the oral interviews was entrusted to two experienced examiners, presumably impartial in their rating technique as required in the performance of their official duty, Code Civ.Proc., sec. 1963, subd. 15; and the department head's confidential report, a logical and contemporaneous reference in ascertainment of a candidate's merit for promotion, was still not given an undue weighting in the over-all measure, since it figured but 25 per cent of the total grade allowed for the evaluation phase of the examination. All of these papers were preserved as a record of the examination showing the "basis of rating" in the event of a candidate's appeal pursuant to the rules of the commission. Although the evaluation record did not detail the mental processes by which the examiners or the department head arrived at their respective ratings, enough detail was presented for adequate review consistent with the practicalities of inquiry into personality factors affecting an integral part of the ascertainment of a candidate's ability to perform the "duties and requirements" of the position to be filled. The propriety of such evaluation process coincides with the trend of the New York decisions, as above reviewed, recognizing "practical" considerations in competitive methods of personnel selection for the civil service system.

In determining the problem of the validity of the two promotional civil service examinations here in question, it must be remembered that petitioner does not claim that there was any arbitrary, fraudulent, or capricious action on the part of the commission, or any person acting on its behalf, in the conduct of the examinations, but confines his objections solely to the propriety of the method of procedure adopted by the commission for testing the candidates. In view of the conclusion that the examinations as prescribed by the commission were appropriate to the competitive selection of civil service personnel, and in the absence of any charge or showing that the commission, or anyone acting in this matter, proceeded otherwise than honestly and in good faith in the evaluation process, petitioner cannot prevail in this mandamus proceeding.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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94 Cal.App.2d 240

In re KLINGENBERG'S ESTATE.
KLINGENBERG v. JOHNSON.

Civ. 14085.

District Court of Appeal, First District,
Division 2, California.

Oct. 20, 1949.

Proceeding in the matter of the estate of William Henry Klingenberg to settle the final account and distribution of the administratrix, Ruth Johnson.

The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered a decree providing that Louise Klingenberg, the widow of the deceased, had elected to take under the provisions of the will, and the widow appealed.

The District Court of Appeal, Runnells, J., pro tem., reversed the decree, and held that the intent of the testator indicated that the whole of the community property was to be placed in trust, and the widow was therefore put to an election, and that the evidence failed to show that she had elected to take under the will.

1. Evidence ⚷60, 65

In the construction of a will, it would be presumed that deceased knew, as a matter of law, that he had no power to dispose of his wife's interest in the community property without her consent, and that he did not intend to do so unless the contrary appeared from the terms of the will. Probate Code, §§ 201–203.

2. Wills ⚷782(12)

A widow can only be put to her election to take under a will or under statute by clear manifestation of intent on part of testator to devise the whole community property. Probate Code, §§ 201–203.

3. Wills ⚷782(12)

Where will provided that all property over which testator had power of testamentary disposition was included and that property given to wife was in lieu of her rights given to her by law in their community property and his separate estate and that wife must elect, intent of testator indicated that whole of community property was placed in trust so that widow was required to elect to take under will or under statute. Probate Code, §§ 103, 201.

4. Wills ⚷782(12)

Before a widow can be denied her rights to elect upon distribution to take her half of community property, it must be found that with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with property left her by will that it would be inequitable to permit her to avoid those acts and disclaim her intent.

5. Wills ⚷452

Court should be careful to guard interest of widows in estates of their deceased husbands.

6. Wills ⚷782(12)

Where will manifested an intent to put whole of community property in trust, and evidence failed to support finding that widow elected to take under deceased husband's will, decree would be reversed to permit widow to elect to take either under provisions of will or to take her share of community property. Probate Code, § 201.

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Jay Pfotenhauer, W. Byron Bryant, San Francisco, for appellant.

Cosgrove, Molinari & Tinney, Lloyd J. Cosgrove, San Francisco, for respondent.

RUNNELLS, Justice pro tem.

This is an appeal by Louise Klingenberg, widow of William Henry Klingenberg, deceased, from a decree of settlement of the first and final account and of distribution.

William Henry Klingenberg died August 17, 1946, and left surviving him his wife, Louise Klingenberg, a daughter, Ruth Johnson, and a son, William Klingenberg. His will was dated October 22, 1945, and admitted to probate on September 13, 1946. In accordance with the provisions of the will Ruth Johnson, daughter, was appointed executrix. The estate consisted of real and personal property, and the appraised value thereof was $76,667.74. As a result of her petition for family allowance, the widow was paid by order of Court during the administration of the estate the sum of $150 per month which totaled $3000. The will so far as its terms are material here provides as follows:

"Fifth: I hereby give, devise and bequeath all of my property of every kind and character, real, person(al) and mixed whereever situate and however held in which I have any power of testamentary disposition at the time of my death to my daughter, Ruth Johnson, in trust, however for the following uses and purposes:"

"(C) The trustee shall pay the sum of $100.00 per month out of the net income of the trust estate to my beloved wife, Louise Klingenberg, for and during her natural life.

"(D) The trustee shall pay the sum of $100.00 per month out of the net income of the trust estate to my beloved daughter, Ruth Johnson, and the further sum of $100.00 per month out of the net income of my trust estate to my beloved son, William Klingenberg, during the continuance of this trust."

"(F) If in the absolute and controlled discretion of said trustee the net income from the trust estate should not be sufficient to provide the sum of $100.00 per month to my said wife for and during the term of her natural life said trustee is hereby authorized and empowered as often as it shall be necessary to apply or expend for the use and benefit of my said wife such portions of the principal of the trust estate as said trustee may determine to be necessary to provide said payments of $100.00 per month to my said wife for and during the term of her natural life."

"Sixth: I give and bequeath to my daughter, Ruth Johnson, all of my personal effects such as jewelry, clothing, books and tools.

"Seventh: The provisions herein made for and the property herein given to my wife, Louise Klingenberg, are and shall be taken by her in lieu of all her rights, claims and estates given to her by law in our community property, if any there be and in my separate estate as my surviving widow and my wife shall and must elect as a condition precedent whether she shall take the property and benefits given to her under this Will or all laws in her favor. If she elects to take under the laws in her favor she shall in no event participate or share in my estate under this Will and all gifts, devises, bequests and beneficial interests given to her herein shall thereupon be revoked and become null and void and the interest herein bequeathed to her shall go to the other persons in this Will in the same proportion, shares and manner in which they participate in my estate under the terms hereof."

The inventory does not disclose that there were any personal effects as mentioned in paragraph "Sixth" of the will. It may be noted too that there is no allegation or statement in the inventory, petition for settlement of the first and final account and for final distribution or report of executrix accompanying first and final account, or in the testimony given at the hearing on petition for settlement of account and distribution as to whether the property of the estate was separate or community, or that the widow did not demand her interest in the property of the executrix or that she made an election to take under the will. The court, however, in its decree found "that the estate of the above named decedent consists of community property of said decedent and his surviving spouse, Louise Klingenberg, and that the said surviving spouse, Louise Klingenberg, has not demanded of the Executrix her interest in the community property but elects to take under the provision of the Will heretofore admitted to probate."

Distribution was ordered in accordance with the trust provisions of the will.

Three points are raised on this appeal which for convenience will be considered in the following order:

(1) Was the widow put to an election to take her share of her community property or under the will;

(2) Since no demand was made by the widow for her community half, did she thereby elect to take under the will, or, in other words, was the trial court justified in making such a finding in its decree.

(3) Did the acceptance of a family allowance by the widow constitute an election by her to take against the will.

(1) Probate Code sec. 201 provides: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

[1, 2] In the construction of the will, it will be presumed the deceased knew as a matter of law that he had no power to dispose of his wife's interest in the community property; it will also be presumed that he knew he could only dispose of one-half of the community without his wife's consent;

and further it will be presumed he knew, unless the contrary appears from the terms of the will, that he did not intend to devise or bequeath that interest in the community property over which he did not have power to dispose. In re Estate of Vogt, 154 Cal. 508, 509, 98 P. 265. It is true that the widow can only be put to her election either to take under the will or under the statute by a clear manifestation of intent on the part of the testator to devise the whole community property as to overcome the aforesaid presumptions. In re Estate of Vogt, supra, and cases therein cited.

The court then says in Re Estate of Vogt, supra, 154 Cal. at page 510, 98 P. at page 266: "These rules necessarily imply the qualification that where the intention to dispose of the whole of the community property, and not of a moiety thereof only, is clearly shown by the terms of the will, and the disposition so made is such that the widow cannot take the moiety given her by law without, to that extent, defeating the plain intent of the testator, she will be required to choose between the provisions of the law and those of the will and may take either, but not both. The intention of the testator to dispose of the entire community estate, if clearly appearing from the will, must prevail over all these presumptions. Estate of Smith, 108 Cal. [115], 119, 40 P. 1037. Upon applying these principles to the will in question, we think it clearly appears that the widow was under the necessity of choosing between the inconsistent provisions of the will and the law."

Concerning the interpretation of a will, it was held in Re Estate of Emerson, 82 Cal.App.2d 510, 514, 186 P.2d 734, 736, that: "'It is the testator's intention, and not the ground upon which that intention rests, that must control in the interpretation of his will. A mistaken belief on the part of a testator that he has the unrestricted power to dispose of the property absolutely is immaterial,' In re Estate of Moore, 62 Cal. App. 265, 274, 216 P. 981, 985. The testator's intention that the estate in its entirety, and not merely his community interest therein, should be disposed of by his will was sufficient to put his widow to her election."

In the fifth paragraph of his will the testator employed the words "all of my property of every kind and character, real, person(al) and mixed wherever situate and however held in which I have any power of testamentary disposition." Then in a subsequent paragraph the testator states that the provisions made for and the property given to his wife are in lieu of all her rights, claims and estates given to her by law in their community property and his separate estate, and then follows this pertinent provision: "and my wife shall and must elect as a condition precedent whether she shall take the property and benefits given to her under this Will or all laws in her favor."

Section 103, Probate Code provides: "Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail."

[3] It thus appears that the intention of the testator is clearly indicated to place the whole of the community property in trust, and the widow was therefore put to an election to take under the will or to take the share which the law allowed her under section 201, Probate Code. In re Estate of Vogt, 154 Cal. 508, 98 P. 265; In re Estate of Prager, 166 Cal. 450, 137 P. 37; In re Estate of Bump, 152 Cal. 274, 92 P. 643.

[4-6] (2) There is no evidence to support the finding that appellant elected to take under the will. It does not appear that the widow accepted any benefits under the will, and it was held in Re Estate of McCarthy, 127 Cal.App. 80, 85, 15 P.2d 223, 225, that: "before a widow can be denied her right to elect upon distribution to take her half of the community property, it must be found that, with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid those acts and disclaim her intent. Estate of Smith, 108 Cal. 115,

40 P. 1037." Under the will the widow under certain conditions is entitled to receive $100 a month during her life, but if she takes under the law she is entitled to receive one-half of an estate the appraisal of which is $76,667.74, less funeral expenses and cost of administration. Courts should always be careful to guard the interests of widows in the estates of their deceased husbands. In re Estate of Dunphy, 147 Cal. 95, 105, 81 P. 315. In the instant case, the widow was not represented by counsel except in the matter of a family allowance. The widow has the right to know from the court record itself the nature of the property of the estate, that is, whether separate or community, and she is entitled to this knowledge before making an election. There is not a word in the inventory or in the first and final account indicating whether the property is separate or community. The testimony taken at the hearing of the final account and petition for distribution is completely mute on the subject. The report of the executrix and her final account does not show whether or not a demand was made by the widow and there is no basis for the finding in the decree of settlement of the first and final account and final distribution for the following: "It Further Appearing to this Court that the estate of the above named decedent consists of community property of said decedent and his surviving spouse, Louise Klingenberg, and that the said surviving spouse, Louise Klingenberg, has not demanded of the Executrix her interest in the community property but elects to take under the provision of the Will heretofore admitted to probate."

(3) In view of our conclusion that there is no evidence to support the finding that appellant elected to take under the will, it becomes unnecessary to discuss the contention raised in point 3.

The aforesaid decree is reversed with instructions to the trial court to permit the appellant, if she be so advised, to appear therein and make an election in the premises.

GOODELL, Acting Presiding Justice, and DOOLING, J., concur.

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94 Cal.App.2d 283

HORN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17232.

District Court of Appeal, Second District, Division 3, California.

Oct. 25, 1949.

Proceeding in mandamus by Henry Horn, as administrator of the estate of Regina Lachs Horn, deceased, and another against the Superior Court of the State of California in and for the County of Los Angeles directing the court to order a nonresident to appear and give her deposition in a pending action or if the order could not be made to show cause for refusal to make it.

The District Court of Appeal, Shinn, P. J., directed the writ to issue, holding that a nonresident within the jurisdiction to prosecute litigation instituted by herself must submit to legal process in the course of that litigation and that the writ would issue notwithstanding the nonresident had left the state.

1. Depositions ⚷57

Where claim was asserted by nonresident and another in an action which they instituted against an administrator in connection with which the nonresident had come to California as a party in interest and a necessary witness, the nonresident was not immune from service of process to require her to give her deposition in the action before a notary public.

2. Process ⚷119

One who is within the jurisdiction for the purpose of prosecuting litigation instituted by himself must submit to legal process in the course of that litigation.

3. Mandamus ⚷16(1)

Mandamus would be granted directing Superior Court to order a nonresident to give her deposition in a pending action notwithstanding nonresident had left the state so that any order which the court might make would be unenforceable as long as the nonresident remained out of the state where it was not unlikely that she would return to California in connection with the prosecution of her pending action.

Abraham Gottfried, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

SHINN, Presiding Justice.

An alternate writ of mandate was issued directing the Superior Court of Los Angeles County to order Pauline Lachs Slosberg to appear and give her deposition in a certain pending action or, if said order be not made, to show cause for the refusal to make it.

The matter came on for hearing in this court upon the petition and the return and answer of respondent court. It appears that Mrs. Slosberg and one Joseph Lachs were plaintiffs in an action instituted against petitioners herein, Henry Horn, as administrator of the estate of Regina Lachs Horn, deceased, and Henry Horn, individually, based upon a claim presented to and rejected by said administrator asserting title to certain property which was also claimed by the estate. After notice to her attorneys, Mrs. Slosberg was subpœnæd to give her deposition before a notary public. She appeared before the notary but refused to answer any questions because she had made a motion, which was then pending, to quash the subpœna upon the ground that she was immune from service of civil process for the reason that she was a resident of the City of New York and, at the time she was served with a subpœna, was in California for the sole purpose of appearing as a party in interest and a necessary witness in a matter pending in said court in connection with the administration of the estate. It appears from the petition, and it is not denied, that the proceeding which brought her to California concerned the same property to which she and Lachs asserted title in the action instituted by them. Her motion to quash the subpœna was denied, but nevertheless she refused to answer any questions before the notary at the time to which the hearing had been adjourned. Upon certificate of the notary and affidavit she was cited by the superior court to show cause why she should not answer certain specific questions that had been propounded. Upon a hearing of this matter the court made an order sustaining objections to the questions and declined to order Mrs. Slosberg to proceed with the deposition. A motion to reconsider this ruling was denied.

[1, 2] It is shown by the return to the writ, and is admitted by petitioners, that after the court sustained objections to the questions and refused to order Mrs. Slosberg to proceed with the deposition, and before the hearing of the motion for reconsideration of the ruling, she returned to New York City where she has since remained. Although she is not within the jurisdiction petitioners insist that a writ should be issued for the purpose of annulling the order, which, they say, was made upon the ground that the witness was not subject to process at the time she was served. It was developed upon the hearing in this court that the trial court was not advised at the time its ruling was made that Mrs. Slosberg had returned to New York. It was also made to appear that the court did not base its ruling upon the ground that the questions propounded to the witness were for any reason improper. It therefore appears that the order was, in effect, a ruling that Mrs. Slosberg was immune from the service of process in the deposition matter at the time she was served. It is clear that she enjoyed no such immunity. The claim asserted by herself and Joseph Lachs in the action which they instituted was the one made upon the administrator, in connection with which Mrs. Slosberg had come to California as a party in interest and a necessary witness. In these circumstances, there is an entire absence of the reasons upon which the doctrine of immunity is founded. Manifestly, one who is within the jurisdiction for the purpose of prosecuting litigation instituted by himself must submit to legal process in the course of that litigation.

Our research has disclosed no case in which a litigant has had the temerity to present to a reviewing court a claim of immunity under such circumstances. However, the claim has frequently been urged and immunity denied where the process was issued in litigation incidental to and connected with the proceedings during attendance upon which the nonresident suitor was served. Von Kesler v. Superior Court, 109 Cal.App. 89, 292 P. 544, and cases cited; Lamb v. Schmitt, 285 U.S. 222, 52 S.Ct. 317, 76 L.Ed. 720; Caldwell v. Caldwell, 189 Misc. 845, 70 N.Y.S.2d 601; Sanders v. Smith, 197 Miss. 304, 20 So.2d 663; Annotation 19 A.L.R. 828.

[3] We fully realize that any order which the trial court may make in the matter will be unenforcible as long as Mrs. Slosberg remains out of the state. On the other hand, the petitioner may derive some benefit through the issuance of a writ, inasmuch as it is not unlikely that Mrs. Slosberg will return to California in connection with the prosecution of her pending action.

A writ will issue directing the superior court to proceed further in accordance with the views herein expressed.

WOOD and VALLÉE, JJ., concur.

94 Cal.App.2d 265

MADDOX et al. v. HERRINGTON et al.
JOHNSON v. MADDOX et al.

Civ. 17102.

District Court of Appeal, Second District,
Division 2, California.
Oct. 25, 1949.

Action by A. Maddox and E. Maddox against Hicks Herrington, Gussie Herrington and Bee Johnson to quiet title to a parcel of realty, and last-named defendant filed a counterclaim.

The Superior Court, Los Angeles County, George A. Dockweiler, J., entered judgment for plaintiffs, and defendant Johnson appealed.

The District Court of Appeal, McComb, J., held that the plaintiffs were bona fide purchasers in good faith for value without notice of defendant Johnson's claim to the property and that a disclaimer of any interest in the property signed by defendant Johnson was admissible in evidence as a declaration of a party against his own interests, and affirmed the judgment.

1. Vendor and purchaser 🔑232(1)

Possession of land by one other than grantor puts a purchaser from grantor on inquiry as to rights of possessor, and if, on inquiry, no rights are revealed purchaser takes free of any claim of possessor.

2. Vendor and purchaser 🔑232(1)

Where purchaser, prior to purchase of realty, asked party in possession whether he had any interest in realty, and possessor told purchaser he had none, and signed a disclaimer of any interest in realty, purchaser was a bona fide purchaser in good faith for value without notice of possessor's claim to realty.

3. Evidence 🔑222(1), 272

Extrajudicial admissions or declarations of a party against his own interest as to matter or question in dispute are admissible in evidence. Code Civ.Proc. § 1870, subd. 2.

4. Evidence 🔑215(1), 273(4)

In action to quiet title to realty, disclaimer of interest in realty signed by party in possession was admissible as an extrajudicial admission or declaration of party in possession against his own interest.

Roy H. Smith, John M. Hines, Jr., and Marshall Stimson, Los Angeles, for defendant, cross-complainant and appellant Bee Johnson.

Jefferson & Jefferson, Bernard S. Jefferson, Martha Malone Jefferson, Los Angeles, for respondents A. Maddox and E. Maddox.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to quiet title to a parcel of real property, defendant Johnson appeals.

Facts: In 1927 defendant Johnson entered into a contract to buy a certain parcel of land located in the city of Los Angeles from Mr. and Mrs. Herrington, and at such time took possession of the property. Subsequently a new contract for the purchase of the property was entered into between defendant Johnson and the Herringtons. Neither of the aforementioned contracts was ever recorded.

On or about August 2, 1937, the Herringtons, by grant deed, conveyed the property to Earl C. Brody. The latter in turn deeded it to plaintiffs September 20, 1940.

Questions: First: *Were plaintiffs bona fide purchasers in good faith for value and without notice of defendant Johnson's claim to the property?*

[1] This question must be answered in the affirmative and is governed by this pertinent rule: Possession of land by one other than the grantor puts a purchaser from the grantor upon inquiry as to the rights of the possessor and if, upon inquiry, no rights are revealed the purchaser takes free of any claim of the possessor. (Fair v. Stevenot, 29 Cal. 486, 489, 490; Marlenee v. Brown, 21 Cal.2d 668, 676, 134 P.2d 770.)

[2] In the present case the record discloses that plaintiff A. Maddox, prior to purchasing the property from Mr. Brody, was introduced to Mr. Johnson from whom he inquired whether the latter had any interest in the property. He was told that he had none, and Mr. Johnson signed a disclaimer of any interest in the property, which document was received in evidence. Clearly such evidence sustains the trial court's finding.

Second: *Did the trial court err in receiving in evidence the disclaimer signed by defendant Johnson?*

[3, 4] This question must be answered in the negative. The law is established that extrajudicial admissions or declarations of a party against his own interest as to the matter or question in dispute are admissible in evidence. (Code of Civil Procedure, Section 1870, subdivision 2; Scragg v. Sallee, 24 Cal.App. 133, 142, 140 P. 706.) The disclaimer received in evidence was admissible under the foregoing rule.

In view of our conclusions it is unnecessary to discuss other points argued by counsel.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

94 Cal.App.2d 313

SEALS v. JUBAS et al.

Civ. 16871.

District Court of Appeal, Second District, Division 1, California.

Oct. 27, 1949.

Rehearing Denied Nov. 10, 1949.

Hearing Denied Dec. 22, 1949.

Action by Earl Eugene Seals against Simon V. Jubas and another for personal injuries sustained in a fight between the plaintiff and defendants after an automobile collision.

Plaintiff recovered judgment in the Superior Court of Los Angeles County, Samuel R. Blake, J., and the defendants appeal.

The District Court of Appeal, Doran, J., affirmed the judgment holding that the evidence sustained the verdict for plaintiff.

1. Appeal and error 🔑1002

Where record reveals sufficient evidence despite conflict to support the verdict it will not be disturbed on appeal in absence of prejudicial errors.

2. Assault and battery 🔑35

Evidence sustained verdict for plaintiff for injuries resulting from a fight with defendants after an automobile collision on the ground that evidence established that the kicks were administered to plaintiff by defendants and that a causal connection between the injuries sustained and the fight was established.

Pacht, Warne, Ross & Bernhard and Bernard Reich, Beverly Hills, Frank J. Kashare, Los Angeles, for appellants.

Newlin, Holley, Sandmeyer & Tackabury, Los Angeles, Frank R. Johnston, Los Angeles, for respondent.

DORAN, Justice.

In the within action for damages for personal injuries the jury returned a verdict for plaintiff and from the judgment that followed defendants appeal.

Plaintiff, a truck driver, was backing a truck which collided with an automobile driven by defendant Simon Jubas. An argument resulted and then a fight during which plaintiff alleges, "defendants, and each of them, wrongfully and violently, assaulted plaintiff, struck and beat plaintiff in the face, head and body, knocked plaintiff to the pavement and kicked him in and about the stomach, back and other parts of his body." It is further alleged that as a "result of the aforesaid assault, beating and kicking, plaintiff suffered severe personal injuries consisting of, among others, ruptures of the abdominal viscera; perforation of the small intestine and the omentum of the stomach; internal, abdominal bruises;" as well as other related injuries. It is further alleged that, "on account of the aforesaid injuries, plaintiff was continuously hospitalized for an approximate period of five weeks, has undergone two major abdominal, surgical operations, has had surgical operation on malignant ulcers of both heels".

It is contended on appeal that the verdict, "was against the overwhelming weight of the evidence and must have been reached on the basis of sympathy in favor of the plaintiff and prejudice against the defendants"; that "Plaintiff failed to establish the necessary causal connection between his injuries and the alleged acts of the defendants," and that certain errors relating to admission of evidence and examination of witnesses prejudiced defendants.

[1, 2] The evidence was conflicting as to just what occurred during the fight and, it may be conceded that, as appellant argues, "the jury could have found that the kicks were administered by persons other than defendants". It does not follow however as a matter of law that such a situation demands or justifies a reversal on appeal. An examination of the record reveals sufficient evidence, despite the conflict, to support the verdict. It is well settled that in such circumstances the verdict, in the absence of prejudicial errors, will not be disturbed on appeal.

That the causal connection was also established by sufficient evidence there can be no question. Other contentions as noted above were considered by the trial judge on a motion for a new trial and held insufficient. The same conclusion appears justified on appeal.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

94 Cal.App.2d 262

HAAK v. SOUTHERN CITIES TRANSIT CO. et al.

Civ. 16883.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1949.

Action by Musa Haak against the Southern Cities Transit Company, a corporation, and others for injuries sustained by plaintiff when in alighting from a bus she struck her head on a call box attached to a telephone pole.

Plaintiff recovered judgment in the Superior Court of Los Angeles County, Caryl M. Sheldon, J., and the Southern Cities Transit Company, appealed.

The District Court of Appeal, McComb, J., affirmed the judgment holding that whether plaintiff was contributorily negligent as a matter of law was a question for the trier of fact.

1. Appeal and error ⚷989

Power of Appellate Court begins and ends with determination as to whether there is any substantial evidence contradicted or uncontradicted supporting a questioned finding of fact.

2. Appeal and error ⚷1008(1)

Whether a woman 71 years of age, who in leaving a bus struck her head against a call box located on a telephone pole was contributorily negligent was for the trier of fact notwithstanding that she knew the box was attached to the pole.

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Tripp & Callaway, by Hulen C. Callaway, Los Angeles, for appellant.

Charles A. Thomasset, Los Angeles, and Howard Hemenway, Lynwood, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for personal injuries, defendant Southern Cities Transit Company appeals.

FACTS: Plaintiff, a woman 71 years of age, was a passenger on defendant's bus. She arose from her seat when the bus approached the corner of Long Beach and Compton Boulevards for the purpose of alighting. The bus was stopped opposite and just east of a telephone pole to which was attached a call box located approximately 4½ feet from the ground. Plaintiff in alighting from the bus was required to go to the right of the pole because another lady was entering the bus from the left of the pole. She stepped down two steps and then across from the bus to the curb. While doing so she was watching her steps. As she stepped on the curb she struck her head on the call box causing her serious injury. Plaintiff had noticed the call box on the pole.

QUESTION: Did the trial court commit prejudicial error in failing to find that plaintiff was guilty of contributory negligence as a matter of law?

[1] This question must be answered in the negative. The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support a questioned finding of fact. In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424.

In the instant case the evidence discloses that plaintiff was a woman 71 years of age who stepped from the bus downward two steps then across an intervening area to the curb; that she could not go to the left of the telephone pole in front of her because another passenger who intended to board the bus was standing there; that in descending from the bus plaintiff watched where she was stepping, and having reached the curb, she raised her head and struck it against the call box which was attached to the pole.

[2] Clearly it was a question for the trier of fact whether or not plaintiff, in acting as she did, acted as a reasonably prudent person under similar circumstances similarly situated would have acted. Reviewing the factual situation confronting a woman of plaintiff's age, the fact that she knew the call box was attached to the pole would not of itself have necessitated a finding that plaintiff was contributorily negligent in view of the other circumstances related. The determination of the trier of fact, supported as it is by substantial evidence, that plaintiff was not contributorily negligent is binding upon this court.

Crawford v. Shenango, Valley Traction Co., 102 Pa.Super. 440, 157 A. 40; Lasater v. Oakland Scavenger Co., 71 Cal.App.2d 217, 162 P.2d 486; Bischell v. State of California, 68 Cal.App.2d 557, 157 P.2d 41; Collier v. Los Angeles Ry. Co., 60 Cal.App.2d 169, 140 P.2d 206; Bosserman v. Olmstead, 77 Cal.App.2d 236, 175 P.2d 49, and similar cases cited by appellant are factually distinguishable from the present case and therefore not controlling.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

PEOPLE v. WOODS.

Cr. 4368.

District Court of Appeal, Second District, Division 1, California.

Oct. 26, 1949.

Rehearing Denied Nov. 3, 1949.

As Modified Nov. 9, 1949.

Hearings Granted Nov. 21, 1949, Dec. 5, 1949.*

Charles H. Woods was convicted in the Superior Court of Los Angeles County, Frederick F. Houser, J., of violating statute prohibiting the receiving, holding or forwarding a bet on a horse race, and of violating statute prohibiting the keeping and occupying of an automobile with papers to record a bet on a horse race, and he appealed.

The District Court of Appeal, Doran, J., reversed judgment, holding that evidence was insufficient to sustain conviction under either count.

1. Criminal law ⚷304(2)

That scratch sheets and racing forms, as well as newspapers, are available to all, is common knowledge.

2. Gaming ⚷98(2)

Evidence did not justify conviction under statute prohibiting the receiving, holding or forwarding a bet on a horse race, or under statute prohibiting the keeping and occupying an automobile with papers to record a bet on a horse race. Pen.Code, § 337a, subds. 2, 3.

◆

Chotiner & Chotiner, Beverly Hills, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

DORAN, Justice.

Defendant was adjudged guilty by a jury of two offenses as charged in the information. Count I alleged a violation of subdivision 3 of section 337a of the Penal Code, and Count II a violation of subdivision 2 of the same section.

Subdivision 3, in substance, declares it to be a crime to receive, hold or forward a bet on a horse race, and subdivision 2 declares it to be a crime to keep and occupy an automobile with a paper or papers for the purpose of recording a bet on a horse race. The appeal is from the judgment.

It is contended on appeal that the evidence is insufficient to support the verdict and judgment; that numerous errors occurred during the trial; that the trial was unduly prolonged by continuances; that a private conversation between the court and a member of the jury as well as a witness prejudiced defendant; that the instructions were prejudicial and that conversations between the officers and defendant were received without proof of the corpus delicti.

The record reveals that an officer saw defendant and an individual seated at a cocktail bar; one of them had a scratch sheet and the other a newspaper; that the individual, who incidentally did not appear as a witness, was seen to give defendant a dollar bill; that shortly thereafter defendant went to the 'phone booth and telephoned some one. The foregoing is the only evidence relied on to establish the offense alleged in Count I and the incident covered a period of about twenty minutes.

Following the foregoing incident, the defendant left and went to an automobile parked near by and while seated there engaged in a conversation with a "newsboy", a man about fifty years old. The officer approached near enough to hear the "newsboy" say to defendant, "Give me $2.00 to win on Secret Flight in the 8th at Tanforan", at which time the defendant wrote something on a piece of paper. The officer further testified:

"Q. Did you observe the newspaper boy hand the defendant anything? A. Yes, he handed him money—folded money.

"Q. Could you tell from where you were standing how much it was? A. It was—I observed money. The denomination of one—on one was, $1.00. I couldn't say whether it was $2.00 or $3.00 or what."

Defendant had a so-called scratch sheet in connection with which the officer testified as follows:

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* Subsequent opinion 218 P.2d 981.

"Q. In other words, there is nothing about this document, this scratch sheet, that establishes it as being paraphernalia used only by bookmakers, is there? A. Not only by bookmakers.

"Q. That is right. In other words, a bookmaker could use it, isn't that right? A. Yes.

"Q. And a bettor could use it also, isn't that true? A. That is true.

"Q. And, you know from your experience as a vice squad officer of the Los Angeles Police Department that many bettors are found in possession of these scratch sheets, isn't that true? A. Yes.

"Q. Now, did you find any written notations of any kind whatsoever on this scratch sheet? A. No, I did not.

"Q. You looked for them, didn't you? A. Yes.

"Q. And, the reason that you looked for them is because you knew that as an expert on the subject of bookmaking that bookmakers, as they operate in the County of Los Angeles, commonly write down the results of races on the scratch sheet, isn't that true? A. I have seen them written down, yes, on a scratch sheet.

"Q. Well, that is a common practice on the part of bookmakers, isn't it? A. Yes.

"Q. You didn't find any of those notations at all, did you? A. No."

When arrested, which was a few minutes following the conversation with the "newsboy", defendant had a piece of paper upon which was written, as described by the officer, the following: "A. On this sheet of paper I see the numeral 8, which, in my opinion, would indicate the race—in this particular instance, the 8th race followed by the words 'Sec Fligh' and some scribbling. In my opinion that 'Sec Fligh' would indicate Secret Flight, the name of a race horse."

The evidence for the prosecution consisted of the testimony of two police officers who in addition to the above testified to a confession by defendant.

Defendant's version of what occurred is as follows: "A. He came over to the left side of the machine, I am sitting behind the wheel. He showed his badge first and says, 'Move over.' I said, 'What for?' He said, 'I am a police officer. Get over.' So, I did. He got in and he said, 'I saw you take that bet.' I said, 'Oh, no, you didn't see me take a bet.' He says, 'Get your stuff out of your pocket.' I got it out and he took this paper and he says, 'What is this?' I said, 'I was going to make a bet.' He said, 'Who on?' I told him Secret Flight. He said, 'Let me see this scratch sheet there.' He took that and looked at it, and he says, 'Who was you going to bet with?' I hold him a fellow by the name of Buck. He says, 'What is the phone number?' I gave it to him. He told me to get my stuff back in my pocket. I did. We went to jail."

With regard to the telephone number given by defendant, the officer testified: "* * * I asked him the phone number where he was calling the bets.

"Q. Without any hesitation he gave you the number, isn't that true? A. There was a little hesitation, but he gave me the number.

"Q. When you say 'a little hesitation', how much of a hesitation? A. He seemed rather reluctant to give it.

"Q. Was it more than just a few seconds? A. I don't believe it was, no.

"Q. So, inside the space of a few seconds he gave you a phone number, right? A. That is right.

"Q. You wrote the number right then, isn't that true? A. That is true.

"Q. You subsequently investigated that phone number and satisfied yourself that it was a phone number of a bookmaker, isn't that true? A. I investigated the number two days later, as I recall.

"Q. Two days later? A. Yes."

The bookmaker did not appear as a witness.

[1,2] Defendant's contentions on appeal are not without merit, but a consideration of one is sufficient. As contended by appellant the corpus delicti was not established as a matter of law in either count. That scratch sheets and racing forms are available to all is a matter of common knowledge, as well as newspapers.

Talking about horse races is not a crime. The evidence upon which plaintiff relies is too far fetched to even approach the substantial.

The judgment is reversed and cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

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94 Cal.App.2d 286

MULLIGAN et al. v. WILSON et al.

Civ. 17139.

District Court of Appeal, Second District,
Division 2, California.
Oct. 26, 1949.

Action by James H. Mulligan and another against Philip L. Wilson and another for declaratory relief and construction of the rights of parties under an agreement relating to certain realty owned by the defendants.

The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for defendants and plaintiffs appealed.

The District Court of Appeal, McComb, J., held that trial court's finding allowing defendants 7 percent interest from date of judgment on sum which court determined defendants were entitled to on sale of property before division of balance of consideration received on sale between parties as per agreement, was proper and sustained the other findings and affirmed the judgment.

1. Contracts 🔑192

Where agreement provided that realty purchased by defendants was to stand of record in name of either or both defendants, with understanding that plaintiffs had an interest in any profits and/or income derived out of sale, improvement, lease or rental of property to extent of 50 percent of any moneys or property received in excess of defendants' gross investment in property, plaintiffs' only interest in realty was in profit and/or income derived out of sale, improvement, lease or rental.

2. Joint adventures 🔑1.12
Partnership 🔑20
Trusts 🔑30½(1)

Where agreement provided that realty purchased by defendants, was to stand of record in name of either or both defendants, with understanding that plaintiffs had interest in any profits and/or income derived out of sale, improvement, lease or rental of realty, to extent of 50 percent of any moneys or properties received in excess of defendants' gross investment in realty, agreement did not constitute a partnership, joint venture or trust.

3. Declaratory judgment 🔑342

In action for declaratory judgment interpreting realty agreement providing that realty purchased by defendants was to stand of record in name of either or both defendants with understanding that plaintiff had interest in profits, and/or income derived out of sale, improvement, lease or rental, where no evidence was offered by either party to show any controversy existed between parties as to payments which were to be made by defendants under agreement, no cause of action for declaratory relief relative to payments to be made by defendants was established. Code Civ.Proc. § 1060.

4. Declaratory judgment 🔑341

An applicant for declaratory relief must show that a present controversy exists, and if this fact is not shown a cause of action for declaratory relief is not established.

5. Declaratory judgment 🔑341

Burden is on plaintiff to show that conditions exist which will justify court in exercising its discretionary powers to grant declaratory relief. Code Civ.Proc. § 1060.

6. Interest 🔑39(3)

In action for declaratory relief and for construction of realty agreement providing that realty purchased by defendants was to stand of record in name of either or both defendants with understanding that plaintiffs had interest in profits, and/or income derived out of sale, improvement, lease or rental, to extent of 50 percent of any moneys or property received in excess of defendants' gross investment in property, allowance to defendants of 7 percent interest on their investment from date of judgment was proper.

7. Declaratory judgment 🔑384

In declaratory relief action, trial court has same powers as those exercised by court in an equity suit.

8. Interest 🔑39(3)

All final judgments for recovery of money bear interest from date of entry of judgment.

9. Contracts 🔑192

Under agreement providing that realty purchased by defendants was to stand of record in name of either or both defendants, and that plaintiffs were to have interest in any profits and/or income derived out of sale, improvement, lease or rental of property to extent of 50 percent of any moneys or property received in excess of defendants' gross investment in property and providing that parties agreed to resell property for not less than $85,000, defendants were entitled to purchase property if they were willing to pay price stipulated.

Charles L. Nichols, W. W. Kaye and George Acret, Los Angeles, for appellants.

Wood, Crump, Rogers, Arndt & Evans, by Stanley M. Arndt, Los Angeles for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action for declaratory relief, plaintiffs appeal.

FACTS: Plaintiffs alleged that they entered into a real estate option February 20, 1946, with Mary C. Durant, which read as follows:

"REAL ESTATE OPTION. Los Angeles, California, February 20, 1946, Received of Ann Fleming and James H. Mulligan the sum of Five Hundred ($500.-00) and no/100 Dollars as part payment for the following described Real Property [description].

"The entire price to be paid for above described Real Property is Fifty-Thousand ($50,000.00) and no/100 Dollars, ($50,000.-00—) and to be paid as follows:

"$10,000.00 cash at time of sale and the balance of $40,000.00 represented by a note at 5% interest per annum secured by a first trust deed on said property, Title Insurance & Trust Company to act as trustee, interest to be paid quarterly. Terms of amortization to be such as to fully pay the principal balance on or before five (5) years from the date of exercise of this option in equal annual payments.

"Property to be free and clear of all encumbrances except 1st Taxes (current) to be pro-rated; 2nd Conditions and restrictions of record; 3rd Deed of trust mentioned above.

"A Good and sufficient Deed to be executed and delivered by the said undersigned, Mary C. Durant to said Ann Fleming and James H. Mulligan their heirs or assigns on or before the 20th day of August, 1948, together with a good and sufficient policy of title insurance from Title Insurance & Trust Company, subject to the conditions set forth above.

"Provided, however, that the payment of $50,000.00 is tendered or paid at said date. If the said payment of $50,000.00 is not paid or tendered on or before the 20th day of August, 1946, then this contract to be void and of no effect, and both parties released from all obligations herein, and in that event the said $500.00 paid on this date is to be retained by Mary C. Durant as liquidated damages. * * *"

On August 19, 1946, plaintiffs assigned all of their interest under the foregoing option without recourse to defendant Philip L. Wilson, and on August 20, 1946, plaintiffs and defendants entered into the following agreement with reference to the aforementioned option:

"Agreement

"This Agreement made and entered into on this 20th day of August, 1946, in the City of Los Angeles, County of Los Angeles, State of California, by and between

Philip L. Wilson and Maud N. Wilson, husband and wife, hereafter designated as 'First Parties', and Ann Fleming (a single woman) and James H. Mulligan (a married man), hereinafter designated as 'Second Parties',

"Witnesseth:

"Whereas, Second Parties were the optioners to purchase certain real property [description], and

"Whereas, Second Parties have assigned to First Parties all of their right, title and interest in and to the option agreement and First Parties have complied with the terms of said option agreement by the payment of certain monies, together with the execution of a Deed of Trust for the purchase of the aforesaid property, under the terms and conditions of said option; and

"Whereas, certain agreements in reference to the ownership of the aforesaid real property and the distribution of profits, if any, arising out of the ownership of said property have been orally agreed to by the parties hereto, and it is desired that said oral agreements be reduced to writing,

"Now Therefore, in consideration of the mutual covenants contained herein and for other good and valuable considerations, it is agreed as follows:

"(1) First Parties have deposited with the Security-First National Bank, 5th & Spring Streets, Los Angeles, California, Escrow Department, the sum of Ninety-five Hundred Dollars ($9500.00) in cash, and have executed a Trust Deed in the amount of Forty-Thousand Dollars ($40,000.00), securing five (5) promissory notes each in the amount of Eight Thousand Dollars ($8,000.00) with interest on said notes at the rate of five per cent (5%) per annum, said interest payable quarterly; said cash and Deed of Trust being in full payment of the purchase price of the real property hereinbefore described.

"(2) The property so purchased is unimproved and requires excavation to be brought to the street level. First parties agree that in the event of the necessity of excavating and clearing up the dirt now on the lot, that they will expend a sum of money not to exceed in the aggregate of Nine Thousand Dollars ($9,000.00) for that purpose when, as, and if required. In the event that the cost of said excavating and clearing up is in excess of Nine Thousand Dollars ($9,000.00), Second Parties agree to pay any such excess.

"(3) It is the intent of the parties that the property stand of record in the name of either or both of the First Parties, with the distinct understanding however that Second Parties have an actual and real interest in any profits and/or income derived out of the sale or improvement, lease or rental of said property to the extent of fifty per cent (50%) of any monies and/or properties received in excess of the gross investment in the property by the parties of the First Part.

"(4) It is agreed between the parties at this time that it is the contemplation of said parties to re-sell said property for a sum of money not less than eighty-five thousand dollars ($85,000.00), with the distinct understanding however, that if all parties agree, a lesser amount may be accepted for said property.

"(5) First Parties agree that books and records in connection with the cost, expenses, and income, if any, arising out of said property will be open and available to Second Parties or a representative selected by them. * * *"

Plaintiffs further alleged that an actual controversy had arisen with respect to the interpretation of the agreement of August 20, 1946, and sought a declaration of their rights under it.

TRIAL: Both parties contended at the time of trial that the decision of the court was to be based solely and entirely upon an interpretation of the agreement of August 20, 1946.

JUDGMENT: The trial court entered this judgment:

"It is ordered, adjudged and decreed that the respective rights, duties and obligations of the parties herein in and to that certain real property [description], and in and to that certain written agreement dated August 20, 1946, in which defendants herein are first parties and plaintiffs herein are second parties, a copy of which is attached to the complaint herein as Exhibit 'B', are as follows:

"1. Defendants Philip L. Wilson and Maud N. Wilson are the owners of said real property.

"2. Plaintiffs James H. Mulligan and Ann Fleming have no right, title or interest in and to said property save and except such rights as are given them by that certain agreement dated August 20, 1946 hereinabove referred to, which rights are as hereinafter set forth and not otherwise.

"3. Defendants Philip L. Wilson and Maud N. Wilson are entitled to and have the right to sell said property at any time $85,000.00 or more can be secured for said property. Said defendants are entitled to have said property purchased for themselves through an agent or dummy for $85,000.00 or more and are entitled to purchase the rights of plaintiffs under said contract on the basis of a purchase price of $85,000.00 or more for the entire property, provided that no available purchaser known to defendants will pay more for said property.

"4. In the event of such a sale or acquisition of said property, plaintiffs and defendants are each entitled to receive, as hereinafter set forth, 50% of any moneys or property received in excess of defendants' gross investment in the property, which said gross investment amounts at the present time to $20,815.08. In the event of the sale of said property or the acquisition of plaintiff's rights by defendants, there shall first be deducted from the purchase price of the entire property the costs of such sale (including costs of giving notice, real estate commission, documentary stamps, title policy and escrow fees) and from the balance there shall first be repaid to defendants the sum of $20,815.08, together with interest at 7% per annum from date of this judgment, together with any amounts paid by defendants subsequent to date of trial for taxes, lighting assessments, interest, principal payments, and other expenses of said property in excess of rentals received by defendants and the balance of the purchase price shall be divided one-half to plaintiffs and one-half to defendants. In the event that defendants receive, subsequent to trial, for rents from said property, more than they pay out, then the amount of $20,815.08 hereinabove referred to shall be reduced accordingly.

"5. There has been no bad faith on the part of defendants. There is an obligation on all of the parties to said agreement to use good faith in carrying out said agreement.

"6. Said agreement is a valid, subsisting agreement and the rights of the parties therein are as hereinabove set forth * * *"

[1] *QUESTIONS*: First: *Did the trial court err in holding that plaintiffs' only interest in the property was in the profit and/or income derived out of the sale, improvement, lease or rental of said property?*

This question must be answered in the negative. Paragraph 3 of the agreement supports the trial court's finding, whose interpretation is in accordance with the rule as announced in Fritz v. Gilbert, 8 Cal.2d 68, 70, 63 P.2d 291, and Prey v. Stanley, 110 Cal. 423, 426, 42 P. 908. Therefore the trial court properly found that defendants could resell the property without consulting plaintiffs if they obtained $85,000.00 or more for it. (See paragraph 4 of the agreement which supports such finding.)

[2] Second: *Did the agreement constitute a partnership, joint venture or trust?*

This question must also be answered in the negative. Fritz v. Gilbert, 8 Cal.2d 68, 63 P.2d 291, held that a similar agreement did not constitute a joint venture. Coward v. Clanton, 122 Cal. 451, 454, 55 P. 147, decides that a like agreement did not constitute a partnership, and Prey v. Stanley, 110 Cal. 423, 426, 42 P. 908, held that an analogous agreement to that in the present case did not constitute a trust agreement.

[3] Third: *Did the trial court err in not making a finding as to the payments defendants were obligated to make upon the property as set forth in the agreement?*

This question must likewise be answered in the negative and is governed by these rules:

[4] 1. An applicant for declaratory relief must show that a present controversy exists, and if this fact is not shown a cause of action for declaratory relief is not established. (Merkley v. Merkley, 12 Cal.2d 543, 547, 86 P.2d 89.)

[5] 2. The burden of proof is upon plaintiff to show that conditions exist which will justify the court in exercising its discretionary powers to grant declaratory relief pursuant to section 1060 of the Code of Civil Procedure. (Merkley v. Merkley, supra.)

In the present case no evidence was offered by plaintiffs or defendants to show that any controversy existed between the parties as to the payments which were to be made by defendants under the agreement in question. Plaintiffs failed to sustain the burden imposed upon them under rule 2, supra, and therefore under rule 1 they did not establish a cause of action for declaratory relief. The trial court was correct in not making a finding relative to the payments to be made by defendants pursuant to the terms of the agreement.

[6] Fourth: *Did the trial court err in allowing defendants 7 per cent interest from the date of the judgment on the sum of $20,815.08, to which the court determined defendants were entitled upon the sale of the property before division of the balance of the consideration received upon such sale?*

[7, 8] This question must be answered in the negative. (1) In a declaratory relief action the trial court has the same powers as those exercised by the court in an equity suit. (Adams v. Cook, 15 Cal.2d 352, 362, 101 P.2d 484.) (2) All final judgments for the recovery of money bear interest from the date of the entry of judgment. (Cases cited in 14 Cal.Jur. (1924) p. 676, note 14.)

In the present case the judgment was a final one and therefore under rule (2), supra, defendants were entitled to interest on the sum of money allowed them from the date of the entry of judgment.

[9] Fifth: *Did the trial court err in construing the agreement to provide that defendants could purchase the property?*

This question must also be answered in the negative. Under paragraph 4 of the agreement between the parties it was expressly provided that the property might be sold at any time for the sum of not less than $85,000.00. This being true there was no restriction as to who the purchaser should be, and if defendants were willing to pay at least $85,000.00 for the property they were entitled to purchase it.

Since the trial court expressly found that each of the parties must exercise good faith as to the other no question upon such subject is presented to this court at the present time.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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94 Cal.App.2d 246

FLECKNER et ux. v. DIONNE et al.

Civ. 14142.

District Court of Appeal, First District,
Division 2, California.
Oct. 20, 1949.
Hearing Denied Dec. 15, 1949.

Wilbur G. Fleckner and another sued Edward G. Dionne, a minor, and others, for injuries allegedly sustained in automobile collision due to alleged negligence of named defendant in operating automobile, and sued P. D. Pangracs for selling intoxicating liquor to defendant driver of automobile.

The Superior Court, Santa Clara County, Leonard R. Avilla, J., sustained named defendant's demurrer with leave to plaintiffs to amend. Plaintiffs declined to amend, and judgment was entered that plaintiffs take nothing as against named defendant, from which judgment plaintiffs appealed.

The District Court of Appeal, First District, Goodell, J., held that the sale of liquor to the minor defendant by the named defendant was not the proximate cause of the plaintiff's injuries, and affirmed the judgment.

Dooling, J., dissented.

1. Intoxicating liquors ⚷306

Where complainant alleged that defendant owner and operator of a tavern sold intoxicating liquors to minor codefendant and permitted codefendant on premises, and that defendant knew codefendant was a minor, and was already under influence of intoxicating liquor, and had an automobile on or near premises which he would drive, and that thereafter minor codefendant did, in intoxicated condition and under severe influence of liquor, drive on highway negligently and recklessly, and propelled his automobile in such a manner so as to cause the same to collide violently with automobile in which plaintiffs were riding, complaint did not state cause of action against tavern owner. Gen.Laws, Act 3796.

2. Intoxicating liquors ⚷291

Alleged sale of intoxicating liquor by tavern owner to minor, who allegedly while under influence of intoxicating liquor, drove automobile and collided with plaintiff's automobile, was not proximate cause of plaintiff's injuries.

◆

Joseph A. Bonacina, San Jose, for appellants.

Robt. L. Lamb, Robert A. Haughwout, San Francisco, for respondents.

GOODELL, Acting Presiding Justice.

The demurrer of respondent Pangracs, sued as Richard Roe, was sustained with leave to amend. Plaintiffs declined to amend, and judgment was entered that plaintiffs take nothing as against Pangracs, from which this appeal was taken.

The complaint is in three counts. It alleges that the defendants so negligently operated their Ford sedan on El Camino Real as to cause it to collide with the automobile driven by Wilbur G. Fleckner. The first count is based on bodily injuries sustained by the latter and the second on injuries to Mrs. Fleckner.

The third count is the one by which respondent Pangracs was brought into the case. It incorporates paragraph I of the first and second counts, which simply contains the usual allegations respecting fictitious defendants. It then alleges on information and belief that the five fictitious defendants owned, maintained, conducted and operated a tavern in Sunnyvale and that on the evening in question between 9 and 10 p. m. defendant Edward G. Dionne, a minor, was a patron of the tavern and purchased and was sold and given intoxicating liquors and was allowed to consume the same therein; that the fictitious defendants knew that he was a minor, and sold the intoxicating liquors to him while he was already under the severe influence of intoxicating liquors; that they knew also that he had upon or near the premises an automobile and would thereafter drive and propel it; that defendants and their servants, agents and empolyees knew and should have known and foreseen that the driving of the automobile by him in his then intoxicated condition could and would result in harm and damage to others upon the highway. That the sale and serving of intoxicating liquor to him, was and did constitute a negligent disregard of the rights of plaintiffs, to their damage.

It alleges that thereafter defendant Edward G. Dionne "did in the said intoxicated condition and under a severe influence of liquor drive upon the said highway, unlawfully, negligently and recklessly and that he did propel his automobile in such a manner so as to cause the same to collide violently with the automobile in which plaintiffs above named were riding, all to their injuries and damage as hereinabove set forth."

It alleges further, "That all the said damage was a proximate and direct result of the unlawfulness, negligence, recklessness of the defendants, John Doe, Jane Doe, Richard Roe, First Doe Company, a copartnership and Second Doe Company, a corporation, as herein above set forth, which said negligence joined and cooperated with the unlawfulness, carelessness, negligence and recklessness of the defendant, Edward G. Dionne, and produced the injuries and damages hereinabove alleged."

In his demurrer to the third count respondent specifies that no cause of action is stated in that it is too remote and cannot be determined in what manner any actions of defendants were the proximate cause of the alleged injuries.

The question presented for decision sufficiently appears from the allegations of the third count and the ground of remoteness raised by the demurrer.

Appellants are not able to supply any authority in this state supporting their position. On the other hand whenever our courts have had occasion to say anything at all touching the question, the court's language has indicated a view such as that expressed in the decisions of other states where the question has arisen.

In Lammers v. Pacific Electric R. Co., 186 Cal. 379, 199 P. 523, 525, the court held that the expulsion of the plaintiff from the train was not the proximate cause of the injuries which he received some six hours later and three-quarters of a mile away. However, in that case the court did say: "The only connection between the ejection and the injury would be the fact that if there had been no ejection there would have been no injury. The sale of the whisky to the plaintiff would come nearer being a proximate cause of the injury than the ejection from the railway train. The peril arising from the ejection ceased the moment the passenger left the position where he could be struck by defendant's trains, while the peril arising from the use of the intoxicating liquor continued in operation up to the time of the injury and contributed thereto, and yet *it has been uniformly held, in the absence of statute to the contrary, that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication.* Joyce on Intoxicating Liquors, § 421; Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 3 L.R.A. 327." (Emphasis added.)

In Hitson v. Dwyer, 61 Cal.App.2d 803, 143 P.2d 952, plaintiff sued a tavern owner for injuries sustained while within the defendant's tavern, where he had been sold intoxicating liquor while obviously intoxicated. He alleged that he fell from a stool to the floor and was then dragged by the defendant and an employee. The court said, 61 Cal.App.2d at page 809, 143 P.2d at page 955, "* * * in the absence of a showing to the contrary, the proximate cause is not the wrongful sale of the liquor but the drinking of the liquor so purchased. 30 Am.Jur., sec. 611. If our view be correct it becomes apparent that plaintiff has alleged both an actionable and nonactionable wrong, and the defendants' special demurrer was properly sustained." The nonactionable wrong was the sale of the liquor, while the actionable wrong was the dragging of plaintiff across the floor.

In neither of these two cases was the language which we have quoted necessary to the decision. However, what the court says in each of them is in accord with the holdings in other jurisdictions on the question, Whether on not the *sale* of the liquor is a proximate cause.

The opinion in the Lammers case qualifies its statement respecting "uniform" holding by saying "in the absence of statute to the contrary". In this connection many of the states have enacted Civil Damage Acts which greatly extend and enlarge the liability of saloon-keepers and tavern owners. Such legislation is discussed in Joyce on Intoxicating Liquors, sections 420–497. Illinois, for instance, has had a Dramshop Act, Ill.Rev.Stat.1949, c. 43, § 1 et seq., for many years, which repeatedly has come before its courts. A case involving that act was Hyba v. C. A. Horneman, Inc., 302 Ill.App. 143, 23 N.E.2d 564, cited in Hitson v. Dwyer, supra where the court said: "The common law gave no remedy for the sale of liquor, either on the theory that it was a direct wrong or on the ground that it was negligence which would impose a legal liability on the seller for damages resulting from intoxication." Numerous cases say the same thing and it is needless to cite them.

California has no Civil Damage Act.

In Seibel v. Leach, 233 Wis. 66, 288 N.W. 774, 775, the action was for property damage and personal injuries. One of the defendants, Landerman, was a tavern owner who sold intoxicants to Leach. The latter while intoxicated drove his car into plaintiff's car. Landerman's demurrer to the complaint was sustained, and in affirming the judgment the court said: "The common law rule holds the man who drank the liquor liable and considers the act of selling it as too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink. The decision in Demge v. Feierstein, supra [222 Wis. 199, 268 N.W. 210], sets forth the law controlling in the case at bar."

The facts of that case and of this are substantially the same.

Seibel v. Leach was, as this is, an action on behalf of a third person. Demge v. Feierstein, 222 Wis. 199, 268 N.W. 210, 212, supra, was not such a case but was brought by a widow whose husband had been sold intoxicating liquor by the Feiersteins, tavern owners, after she had given them oral notice not to let her husband have any more liquor. After leaving the tavern he lost control of his car and was fatally injured. The general demurrers of the tavern owners (and their bondsman) were sustained, and in affirming the judgment the court said: "The cases are overwhelmingly to the effect that there is no cause of action at common law against a vendor of liquor in favor of those injured by the intoxication of the vendee. Black, Law of Intoxicating Liquors, c. 13, § 281; Buntin v. Hutton, 206 Ill.App. 194; Healey v. Cady, 104 Vt. 463, 161 A. 151; Coy v. Cutting, 138 Kan. 109, 23 P.2d 458; State v. Johnson, 23 S.D. 293, 121 N.W. 785, 22 L.R.A.,N.S., 1007; Kraus v. Schroeder et al., 105 Neb. 809, 182 N.W. 364, 365."

Appellants argue that the Alcoholic Beverage Control Act, Gen.Laws, Act 3796, makes it unlawful to sell intoxicating liquor to a minor or to a person already intoxicated. It is alleged in appellants' complaint herein that defendant Dionne was both. In Waller's Adm'r v. Collinsworth, 1911, 144 Ky. 3, 137 S.W. 766, 44 L.R.A., N.S., 299, Ann.Cas.1913A, 510, the sale of liquor upon which the action was based was illegal because (a) made in local option territory (b) to a minor. The action was brought by the administrator of a decedent who had been shot by a companion after both men had become intoxicated in Collinsworth's store on liquor which he had sold them. The constitutional and statutory provisions under which the action was prosecuted fixed liability only if the wrongful act was the proximate cause of the injury or death. The court held that the illegal sale of the liquor was not the proximate cause of Waller's death.

Further, on the question of the illegality of the sale, appellants rely on Dunlap v. Wagner, 85 Ind. 529, 44 Am.Rep. 42, which was likewise relied on in Seibel v. Leach, supra. In distinguishing it, the court in the latter case said, 288 N.W. 774–775: "Our attention is called to many cases in jurisdictions where statutes have been enacted making provision for such liability where one has become intoxicated by illegal sale of liquor. The case of Dunlap v. Wagner * * * is illustrative of the basis of appellant's contention. There a liquor dealer, unlicensed to sell liquor at retail, sold to a customer who consumed the liquor on the premises and became helpless. Because he was too helpless to drive the team which became frightened, a runaway occurred, and a horse he had borrowed was killed. The liquor seller was held liable for the value of that horse. In its decision the supreme court of Indiana did say that a dealer under such circumstances 'may well be deemed guilty of an actionable wrong independently of any statute.' However, this statement is immediately followed by the ruling 'but we have a statute which provides that every person shall have a right of action for an injury resulting to person or property against one who shall, by selling intoxicating liquors to another, have caused the intoxication of the person by, or through whom, the injury is done.' The inapplicability of cases of that character to the facts here presented readily appears because we have no similar statute, and because 'in view of the common-law rule, it has been necessary, where opinion favored the creation of such a cause of action, to enact civil damage laws.'"

[1] In Tarwater v. Atlantic Co., Inc., 1940, 176 Tenn. 510, 144 S.W.2d 746, 748, plaintiff was an employee of a contractor engaged in painting defendant's property. Defendant distributed a large quantity of free beer to the contractor's employees on the job, who became "highly intoxicated". One of plaintiff's fellow employees while intoxicated dropped a large plank on him, injuring him, and he sued the owner who had donated the beer.

The question whether the furnishing of the free beer was the proximate cause of plaintiff's injuries was raised by demurrer, and the court in affirming the judgment for defendant said: "The defendant's act in furnishing the beer created a situation which afforded an opportunity to plaintiff's fellow employee to intoxicate himself voluntarily, and the voluntary act of the fellow employee was the proximate cause of the injury."

[2] In the absence of Civil Damage legislation in this state, and with such views as have been expressed by our courts on the subject, Lammers and Hitson cases, supra, coinciding with the holdings in other jurisdictions where the questions have been directly passed upon, we are satisfied that the sustaining of the demurrer of respondent Pangracs was correct.

The judgment is affirmed.

RUNNELLS, Justice pro tem., concurs.

DOOLING, Justice.

I dissent. I frankly admit that the cases from other jurisdictions are all to the effect that in the absence of statute no remedy exists against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated be liable to a third person later injured by the intoxicated person's conduct; and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances and it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct. McEvoy v. American Pool Corp., 32 Cal.2d 295, 299 et seq., 195 P.2d 783; Mosley v. Arden Farms Co., 26 Cal.2d 213, 218 et seq., 157 P.2d 372, 158 A.L.R. 872; Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001.

The complaint in this action alleges in effect that the defendant Pangracs (sued as Richard Roe) sold to the defendant Edward G. Dionne, a minor, intoxicating liquor knowing that he was already intoxicated, knowing that he had an automobile on or near the premises and knowing that he would thereafter drive the automobile. It is further alleged that defendant Pangracs knew or should have known that the driving of the automobile by Dionne in an intoxicated condition could and would result in damage to others on the highway, that the injuries to plaintiffs resulted from a collision with the car driven by Dionne while in an intoxicated condition and that the damage to plaintiffs was a proximate result of Pangracs' negligence in selling the liquor to Dionne.

Despite the unanimity of decision in other jurisdictions to the contrary these allegations in my opinion are sufficient to state a cause of action. We have conduct alleged on the part of the defendant Pangracs which would increase the intoxication of Dionne and the allegations that Pangracs knew that Dionne would drive his automobile when he left the premises and knew or should have known that his driving in an intoxicated condition would imperil the safety of others on the highway. This is sufficient to establish negligence in the sale of the liquor. We have the further allegations that the foreseeable happened and plaintiffs were injured by Dionne driving his automobile while intoxicated. Under the cases above cited this establishes proximate cause.

The cases are legion that the owner of an automobile entrusting it to an intoxicated driver or to one known to be addicted to intoxication may be liable for damages resulting to third persons from the intoxicated person's driving. Knight v. Gosselin, 124 Cal.App. 290, 294, 12 P.2d 454; Department of Water and Power v. Anderson, 9 Cir., 95 F.2d 577; R. J. Reynolds Tobacco Co. v. Newby, 9 Cir., 153 F.2d 819; Tolbert v. Jackson, 5 Cir., 99 F.2d 513; Powell v. Langford, 58 Ariz. 281, 119 P.2d 230; Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A.L.R. 1132; Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432, 163 A.L.R. 1413; Chaney v. Duncan, 194 Ark. 1076, 110 S.W.2d 21; V. L. Nicholson Const. Co. v. Lane, 177 Tenn. 440, 150 S.W.2d 1069; Levy v. McMullen, 169 Miss. 659, 152 So. 899; Crowell v. Duncan, 145 Va. 489, 134 S.E. 576, 50 A.L.R. 1425; Brady v. B. & B. Ice Co., 242 Ky. 138, 45 S.W.2d 1051; Worsham-Buick Co. v. Isaacs, Tex.Civ.App., 56 S.W.2d 288; Baader v. Driverless Cars, 10 La.App. 310, 120 So. 515; Crisp v. Wright, 56 Ga.App. 338, 192 S.E. 390; Owensboro Undertaking & Livery Ass'n v. Henderson, 273 Ky. 112, 115 S.W.2d 563.

I confess to an inability to distinguish these cases in principle from the case before us. If it is negligence to entrust an automobile to an intoxicated person or one addicted to intoxication why is it not negligence to furnish liquor to a person to the point of intoxication knowing that he is going to drive an automobile while in that condition? The reasoning of the cases that it is the drinking of the liquor and not the selling of it which causes the injury does not impress me. As well say in the cases last cited that it is the driving of the automobile which causes the injury and not the entrusting it to the intoxicated person. In either case if his intervening act is reasonably foreseeable the chain of causation is not broken by the act of the person intoxicated.

Hitson v. Dwyer, 61 Cal.App.2d 803, 143 P.2d 952, is distinguishable. There the drunken man sued for injuries to himself. Under settled rules of contributory fault I concede that he could not recover.

I would reverse the judgment.

Hearing denied; CARTER, J., dissenting.

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94 Cal.App.2d 260

DEARING v. FESSLER et al.

Civ. 17168.

District Court of Appeal, Second District,
Division 1, California.

Oct. 25, 1949.

Hearing Denied Dec. 22, 1949.

Action by Bessie M. Dearing against Arthur H. Fessler, Iona M. Fessler and another to recover damages for the cutting of trees on plaintiff's property.

From an order granting the named defendants' motion for new trail, entered in the Superior Court of Los Angeles County, Clarence M. Hanson, J., after a verdict for the plaintiff against the named defendants, the plaintiff appeals.

The District Court of Appeal, Drapeau, J., affirmed the order, holding that the third defendant need not be served with notice of motion for new trial and that, since decision on such a motion rests within discretion of trial judge, the failure to file affidavits in support of motion was not ground for reversal of order.

1. Appeal and error 🔑544(3)

Where no reporter's transcript of trial proceedings had been furnished to reviewing court, review was limited to the judgment roll.

2. Appeal and error 🔑907(3)

On appeal from order granting new trial, where review was limited to judgment roll, all intendments were in support of the order.

3. New trial 🔑136

Where judgment in favor of one defendant had become final, it was unnecessary to serve him with notice of motion for new trial filed by remaining defendants against whom verdict had been rendered.

4. Appeal and error 🔑1169(3)

Where some of grounds of motion for new trial were not required to be supported by affidavit, failure to file affidavits in support of motion did not require reversal of order granting motion. Code Civ.Proc. § 658.

5. Appeal and error 🔑977(3)
New trial 🔑6

Granting of motion for new trial rests within discretion of trial judge, and an appellate court will not interfere with his action unless manifest abuse of discretion clearly appears.

◆

Joseph L. Fainer, Ludwig H. Gerber, Los Angeles, for appellant.

Pettee & Sheldon, Pasadena, William J. Clark, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff had five cypress trees growing on the rear of her lot in Alhambra. Defendants entered upon plaintiff's property and cut down the trees. Two of the defendants were owners of the abutting property at the rear, along the line of which the trees were growing. The remaining defendant was a tree surgeon employed by the other two defendants to fell the trees.

Plaintiff sued, and the case was tried by jury. Verdict was in favor of the tree surgeon and against the plaintiff, and in favor of the plaintiff and against the other defendants for $1,250. The tree surgeon being eliminated, the neighbor defendants will hereafter be referred to as "defendants."

Judgment was made and entered in accordance with the verdict. This judgment was vacated as to the defendants, but not as to the tree surgeon, by minute order dated September 3, 1948. Judgment nunc pro tunc was made and entered October 26, 1948, against the defendants and not the tree surgeon.

Defendants moved for a new trial, which motion was granted. From the order granting the new trial plaintiff appeals.

No reporter's transcript of the trial proceedings has been furnished to this Court, and the appeal must be decided upon the judgment roll alone. Judge Hawkins, assigned from another county, presided at the trial; Judge Hanson made the order granting the new trial.

The order specified that it was made upon the following grounds: "the verdict is against the law; error in law occuring at the trial; irregularity in the proceedings of the adverse party by which these defendants were prevented from having a fair trial; newly discovered evidence."

[1, 2] This review being limited to the judgment roll, Consolidated Produce Co. v. Takahashi, 52 Cal.App.2d 753, 127 P.2d 281; Sievers v. Pacific Gas & Electric Co., 57 Cal.App.2d 455, 134 P.2d 850, and all intendments being in support of the order, 2 Cal.Jur. 520, Sec. 259; Sacre v. Imperial Water Co., 206 Cal. 13, 272 P. 1044, it must be affirmed.

[3] Plaintiff argues that the notice of motion for a new trial was not served upon the defendant tree surgeon; therefore the court had no jurisdiction to make the order. Judgment as to the tree surgeon had been entered and had become final, and he, therefore, was no longer an adverse party whose rights might be affected on the hearing of the motion for a new trial. "The failure to serve a given party will not deprive the court of jurisdiction to grant the motion in so far as it can be granted without affecting the rights of the party not served." Caruthers Building Co. v. Johnson, 174 Cal. 20, 24, 161 P. 985, 987.

[4, 5] It is further argued that the order must be reversed because no affidavits were filed in support of the motion for new trial. Reading of the order indicates that some of the grounds upon which it was made did not have to be supported by affidavit. Code Civ.Proc. § 658. "It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. * * * Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict; * * * and the order will be affirmed if it may be sustained on any ground * * *." Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, 340.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

94 Cal.App.2d 310

BRADLEY v. BRADLEY.

Civ. 13960.

District Court of Appeal, First District,
Division 2, California.
Oct. 27, 1949.
Hearing Denied Dec. 22, 1949.*

Action by Agatha V. Bradley against James A. Bradley for divorce on the ground of extreme cruelty.

Plaintiff recovered an interlocutory decree in the Superior Court of Contra Costa County, Hugh H. Donovan, J., and the defendant appeals.

The District Court of Appeal, Dooling, J., affirmed, holding that the issue of condonation in corroboration of acts of cruelty, could not be raised for the first time on appeal.

1. Divorce ⚿179

In action for divorce where the case was tried on theory that condonation was not in issue, the husband after an adverse interlocutory decree could not change his theory on appeal to plead condonation to the disadvantage of the wife.

2. Divorce ⚿127(3)

All acts of cruelty testified to by wife seeking a divorce need not be corroborated.

3. Divorce ⚿184(6)

In action for divorce, remoteness of acts of cruelty by husband which were corroborated was a question resting largely in the discretion of the trial court.

4. Divorce ⚿179

In action for divorce, question of corroboration of acts of cruelty by the husband must be urged in the trial court and cannot be urged for the first time on appeal.

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J. Elwood Andresen, Oakland, for appellant.

Francis P. Healey, Richmond, for respondent.

DOOLING, Justice.

Defendant appeals from an interlocutory decree of divorce granted to his wife on the ground of extreme cruelty. The parties were married in 1936 and separated in 1947. The only grounds urged on appeal are a claimed condonation by resumption of marital relations after a previous separation of the parties in 1944 and the fact that the only acts of cruelty which were corroborated occurred prior to the date of the asserted condonation.

It appeared from the testimony that the parties had been separated in 1944 and had resumed marital relations in the same year. The length of the separation in that year was not established and the fact of separation developed only incidentally in the testimony of the parties. Condonation was not pleaded and no suggestion was made to the trial court of condonation. Indeed counsel for the appellant participated in a discussion of the settlement of the property rights of the parties after the close of the testimony from which the trial court was entitled to assume that he was not objecting to the sufficiency of the evidence to support a decree of divorce.

Appellant now relies on a statement in Hamburger v. Hamburger, 60 Cal.App.2d 530, 537, 141 P.2d 453, 456, that: "If the evidence, however, shows condonation, it is the duty of the court even without a pleading, to find to that effect."

In the Hamburger case the court pointed out immediately following the above quoted language that: "Irrespective of the general nature of the complaint, the case was tried * * * upon the theory there was condonation in 1938, and that revocation of such condonation was an issue to be determined in the case."

[1] The transcript in the case before us contains not a suggestion that condonation or revocation of condonation was an issue. If the point had been suggested by appellant counsel for respondent might have met it. The case having been tried on the theory that condonation was not an issue appellant under settled principles cannot now change his theory on appeal to the disadvantage of respondent. 2 Cal.Jur. 237; Munfrey v. Cleary, 75 Cal.App.2d 779, 785, 171 P.2d 750.

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* Subsequent opinion 211 P.2d 638.

[2-4] The incidents of cruelty which were corroborated occurred in 1941 and 1942 and one in 1944, whether before or after the separation of that year the record does not make entirely clear. All acts of cruelty testified to by the plaintiff need not be corroborated. Serns v. Serns, 70 Cal.App.2d 527, 529, 161 P.2d 417; McGann v. McGann, 82 Cal.App.2d 382, 386-387, 186 P.2d 424. The remoteness of the acts which were corroborated was a question resting largely in the discretion of the trial court and the question is one which must be urged in the trial court in any event. Bernstein v. Bernstein, 73 Cal.App. 2d 601, 605, 167 P.2d 229.

Decree affirmed.

GOODELL, Acting P. J., concurs.

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94 Cal.App.2d 301

PEOPLE v. CARMELO.

Cr. 730.

District Court of Appeal, Fourth District, California.

Oct. 26, 1949.

Rogelio Medina Carmelo was convicted in the Superior Court of San Diego County, Joe L. Shell, J., of two crimes of incest, and he appealed.

The District Court of Appeal, Barnard, P. J., affirmed the judgment and order, and discussed assignments of error with respect to certain evidence and instructions. The court found no reversible error, and held that the testimony of the prosecuting witness was sufficiently corroborated and supported the convictions.

1. Incest 🔑14

Evidence supported convictions for incest. Pen.Code, § 285.

2. Criminal law 🔑369(2)

Evidence of similar acts with other persons is ordinarily inadmissible in prosecution for sex offenses; but when evidence in question is relevant to issues in case and is otherwise admissible, it need not be excluded merely because it reveals commission of an offense other than that charged.

3. Criminal law 🔑369(2)

Where father accused of incest contended that participation of daughter was voluntary, evidence of another offense by way of attempt against second daughter was relevant to prove that father overcame resistance and secured continuance of relationship through fear aroused by threats to perform the same act on the second daughter. Pen.Code, § 285.

4. Criminal law 🔑1172(1)

In prosecution of father for incest arising out of relations with 20 year old daughter, charge that jury could consider evidence as to relationship with "child" in question on occasions other than that involving offenses charged, if objectionable as telling jury that daughter was undeveloped mentally and should be treated as a child, was not prejudicial since jury saw and heard complaining witness and full facts were before it. Pen.Code, § 285.

5. Criminal law 🔑1170½(1)

Where there was no evidence or indication of bad faith on part of district attorney in calling defendant's wife to the stand, receiving wife's testimony and compelling defendant to object was not reversible error. Pen.Code, § 1322.

6. Criminal law 🔑407(1)

Generally, nothing with respect to accusatory statements can be admitted into evidence where there is a flat denial by defendant; but where response is other than a flat denial, and replies made are evasive and where replies are not those to be expected from an innocent man and are susceptible of being construed as evasive, the evidence is usually admitted and the matter left to the jury.

7. Criminal law 🔑1169(12)

In prosecution for incest, admission of evidence as to defendant's actions and replies in response to accusatory statements made to him was not prejudicial error. Pen.Code, § 285.

8. Criminal law 🔑822(12)

In prosecution for incest wherein defendant claimed daughter's participation was voluntary, giving of instruction pointing out difference between assent and consent, which was part of series of instructions relating to an accomplice and to fact that accomplice testimony must be corroborated which were responsive to the issues, was not objectionable as intimating that the case was one of passive submission on the part of one who could not make an intelligent choice. Pen.Code, § 285.

9. Criminal law 🔑829(10)

In prosecution for incest, requested instruction to effect that evidence of accomplice should be received with distrust was properly refused as covered by given instructions. Pen.Code, § 285.

10. Criminal law 🔑742(2)

In prosecution of father for incest arising out of relations with daughter, question whether daughter was a willing participant and hence an accomplice was for the jury. Pen.Code, § 285.

11. Criminal law 🔑511(2)

Corroborative testimony of prosecutrix in incest prosecution need not establish actual commission of the offense, but need only tend to connect accused with commission thereof. Pen.Code, § 285.

12. Criminal law 🔑511(1)

In incest prosecution, testimony of prosecutrix was sufficiently corroborated. Pen.Code, § 285.

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Johnson & Johnson, San Diego, for appellant.

Fred N. Howser, Attorney General, William E. James, Deputy Attorney General, for respondent.

BARNARD, Presiding Justice.

The defendant was charged with two crimes of incest alleged to have been committed on October 26, 1948, and on October 29, 1948. A jury found him guilty on both counts and he was sentenced to imprisonment, the sentences to run concurrently. He has appealed from the judgment and from an order denying his motion for a new trial.

The defendant lived with his two daughters in a small house in La Jolla which he owned. The complaining witness was not quite twenty years old in October, 1948, and her sister was a year younger. The mother of the two girls died when they were quite young. The defendant remarried but his second wife left him in 1942.

The complaining witness testified that her father began to have sexual relations with her when she was thirteen years old. There is evidence that the defendant started the relationship by the use of undue influence, and that it was continued both because of his threats and because of her desire to protect her sister. These threats were repeated on a number of occasions and in one instance in 1946, when she refused to accede to his wishes, the defendand made some sort of an attempt against the sister. There was considerable evidence of such threats, including the use of a gun on one occasion, and of fear on the part of the prosecuting witness.

After the occurrence on October 29, the prosecuting witness went to Arcadia. She later returned to her father's house spending considerable time with a friend. There is evidence that the complaining witness refused to continue the relationship, since her sister was then away from home, and that the defendant became very angry. In December, 1948, he went on a rampage and destroyed a large part of the furniture in his home and then phoned to the complaining witness telling her she ought to see what he had done. She reported the matter to the police and they came out and arrested the defendant for malicious mischief. Before they left the scene the defendant stated to one of the arresting officers that he wished his daughter was dead. When asked his reason for this statement, he replied: "There is a whole lot more to this than you fellows know." Later that evening the complaining witness told her story to the officers and the charges here in question were preferred.

[1, 2] It is not, and could not well be, contended that the evidence is insufficient to support the conviction. It is, however, earnestly contended that various errors of law require a reversal with an order for a new trial. It is first contended that the court erred in permitting evidence of another offense upon the person of the sister of the prosecutrix. This relates to the occasion in 1946, when the complaining witness refused to accede to the defendant's wishes and he made some sort of an attempt against the sister. The evidence does not clearly disclose just what occurred, but apparently the defendant at least attempted to commit the same crime with the sister. Immediately thereafter, the defendant told the complaining witness that this would not have happened if she had "behaved" herself. It is contended that the admission of this testimony constitutes reversible error under the rule laid down in People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307, and many other cases, that evidence of similar acts with other persons is ordinarily inadmissible. While the general rule is well established there is a well-recognized exception when the evidence in question is relevant to the issues in the case and otherwise admissible. Under these circumstances, it need not be excluded merely because it reveals the commission of an offense other than that charged. People v. Sanders, 114 Cal. 216, 46 P. 153; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1.

[3] In the instant case, the defendant relied not only upon a denial that he committed the acts in question but also upon an attempt to prove that the prosecuting witness had been a voluntary participant in the crimes and was, therefore, an accomplice. The prosecution was attempting to prove that the participation of the complaining witness was not voluntary and that the defendant overcame her resistance and secured a continuance of the relationship through arousing her fear and through various threats, including particularly a threat on his part to do the same thing with the sister if the prosecuting witness refused. Aside from the general question of intent, this evidence was relevant and material on the important issue as to whether or not the prosecuting witness was an accomplice, having acted voluntarily. The evidence here attacked was introduced for this purpose, and the prosecution made no effort to go into details as would have been done in any attempt to prove a separate offense. Under these circumstances, the matter came within the exception to the general rule, and the admission of this evidence may not be held to have been erroneous.

[4] It is next contended that the court assumed facts not shown by the evidence and invaded the province of the jury by one clause of an instruction given. In this instruction the jury was told that the defendant could not be convicted of the offenses charged unless it was found that he committed those specific offenses; that he could not be convicted of another offense with which he was not here charged; and that "You may, however, consider any evidence as to the conduct and relationship between the defendant and the child in question on occasions other than that involving the offenses charged" for certain limited purposes. The only complaint made is that the court thereby told the jury that this complaining witness was a "child" when the facts show that she was a mature woman of the age of nearly 20 years. It is argued that the jury would unquestionably take this word as indicating that the court intended to tell the jury that she was undeveloped mentally and should be treated as a child, and that prejudice was inevitable. This conclusion does not reasonably follow. It was stipulated that the complaining witness was the daughter of the defendant, and the word "child" is often used to describe that relationship. There was evidence that the illegal relationship had continued over many years and the complaining witness was a

child in every sense of the word when it began. The jury saw and heard the complaining witness, the full facts were before it both as to her age and mental development, and no possible prejudice could have resulted.

[5] It is next contended that the court erred in receiving in evidence the testimony of the wife of the defendant. In the only evidence thus received this witness told her name, where she lived and who was living with her. As soon as it appeared that she was the wife of the defendant an objection to her further testimony was sustained. While no error appears in connection with any testimony given by this witness, it seems to be contended that the district attorney was guilty of misconduct in calling her to the stand and thus compelling the defendant to object to her testimony. The district attorney argued that her testimony was admissible under section 1322 of the Penal Code. Whether or not he was right, there is no evidence or indication of bad faith on his part. Moreover, in People v. Klor, 32 Cal.2d 658, 197 P.2d 705, 708, the court said: "Recent authority is to the effect that if the prosecution desires to use the husband or wife of the defendant as a witness the proper procedure is to offer the spouse as a witness, subject to the claim of privilege by the defendant." No reversible error appears in this connection.

It is next contended that the court erred in permitting evidence as to the defendant's actions and replies in response to accusatory statements made to him. At the time of his arrest the defendant stated to an officer that he wished his daughter was dead. In reply to a question as to why he felt that way, he replied: "There is a whole lot more to this than you fellows know." Later that evening the prosecuting witness told her story to the officers. The next day two other officers had a talk with the defendant. One of them testified that he asked the defendant why he broke up his furniture and he replied: "Well, I was just mad"; that when he told him about the charge which his daughter had brought the defendant "said that if he was found guilty he was tired anyway and he might just as well have a good rest. He said he would plead not guilty"; that in this conversation the defendant did not deny his guilt; and that "he never did say no to us. He just said he was going to plead not guilty." The other officer testified with respect to this conversation that when the first officer told the defendant that he had been accused by his daughter of having sexual intercourse with her over a number of years the defendant replied "that he did not know why she would make such a statement, that if he was found guilty that he could use a long rest because he was tired. He had worked hard all his life and to my knowledge that is the substance of that conversation." The defendant's version of this conversation, given on the stand, is as follows: "* * * he told me of the charge on my daughter that she was putting on me and I think I smiled to him and I didn't say anything, I just moved my head and he said, 'What do you think of it?' and I told him I didn't know. He asked me if my daughter was mentally all right and I says, 'No, as far as I know.' And then he asked me if I had—that if I would get it off my chest it would go a lot easier on me and I looked at him and laughed and didn't answer and then he asked me again, he says, 'It will be a lot easier if you tell us all about it,' and I said, 'No, I aint got nothing to say.' Right after that he told me, he says, 'You are going to be sent up for a long time.' I told him if I have to go that it is a long time I have been working hard all my life and I needed a rest and maybe that was the way I got it. That was all the conversation I had with the officer."

[6, 7] The general rule with respect to accusatory statements is that nothing can be admitted into evidence where there was a flat denial. However, the rule is otherwise when the response is other than a flat denial and where the replies made are equivocal or evasive. People v. Peterson, 29 Cal.2d 69, 173 P.2d 11; People v. Wade, 71 Cal.App.2d 646, 163 P.2d 59. Where the replies are not those to be expected from an innocent man and are susceptible of being construed as equivocal and evasive the evidence is usually ad-

mitted and the matter left to the jury. People v. Gordon, 61 Cal.App. 98, 214 P. 276; People v. Bradley, 23 Cal.App. 44, 136 P. 955. In view of the evidence here, including the defendant's own version of the conversation, it cannot be held that prejudicial error appears in this connection.

[8] It is next contended that the court erred in pointing out to the jury in one instruction the difference between assent and consent. It is argued that the court thus intimated to the jury that this was a case of passive submission on the part of one who could not make an intelligent choice, that the instruction was inapplicable in this case, and that it served only to accentuate the court's prior reference to this woman as a child. The instruction complained of was given as a part of a series of instructions relating to an accomplice and the necessity that the testimony of an accomplice be corroborated, which were responsive to the issues raised. As a part of these instructions the court told the jury that if the complaining witness was compelled by force or threats to participate in these acts, or if her consent was induced by fraud, deceit or undue influence so that she did not willingly consent to the incestuous conduct then she was not an accomplice. As a part of an instruction which followed, telling the jury what was necessary to constitute consent, the court defined consent and assent saying: "In law, consent differs very materially from assent. The former denotes a free will, a positive state of mind, a positive cooperation in act or attitude. Assent, however, means mere passivity or submission and does not amount to consent." This was a part of full instructions upon the whole subject, and no error appears.

[9] It is next contended that the court erred in refusing to give an instruction requested by the defendant to the effect that the evidence of an accomplice should be received with distrust. The requested instruction defined an accomplice and then concluded with the words: "The testimony of an accomplice is to be viewed with distrust and suspicion and 'the law imposes upon you the duty of receiving the evidence of an accomplice with distrust.'" This instruction was refused as otherwise covered. In connection with the instructions covering the entire accomplice matter the court had defined an accomplice and also gave this instruction: "You are instructed that the fact that a person is an accomplice in the commission of a crime goes to his or her credibility as a witness and to the weight of his or her testimony. You are further instructed that the testimony of an accomplice is to be viewed with care, caution and suspicion." In our opinion, this sufficiently complied with the legal requirement.

[10] It is next urged that the court erred in refusing to give a requested instruction that the complaining witness was an accomplice. It is argued that there was no conflict in the evidence, that it conclusively appears that the complaining witness was a willing participant in these crimes, and that as a matter of law she was an accomplice. While this question is not of great importance under our views with respect to the defendant's final point, the evidence here was sufficiently conflicting to justify the court in leaving this issue to the jury. In view of the evidence that these acts began when the prosecuting witness was very young, of the things then told her by her father, of his subsequent threats and her fear and of her long continued attempts to protect her sister, and of what happened on at least two occasions when she attempted to break off the relationship, the question was one which was properly left to the jury as one of fact.

[11, 12] Finally, it is contended that there was no sufficient corroboration as to the commission of the acts charged on October 26 and 29, respectively. It is argued that the testimony of two doctors regarding the physical condition of the prosecutrix was not sufficient of itself to constitute corroboration, and that the testimony of the younger daughter does not relate directly to the two dates on which it was charged the offenses were committed. The general rule of what is required in such a case and the extent to which corroboration must go are fully established, and is not

questioned here by the defendant. It is well settled that such corroborative testimony need not establish the actual commission of the offense but need only tend to connect the accused with the commission thereof. The testimony of the prosecuting witness was strongly corroborated in many particulars which need not be repeated here, by the testimony of her sister. It was further corroborated by the testimony of two doctors who testified that her organs were similar to those of a married woman. Under the circumstances here appearing, the defendant's equivocal statements when first arrested and when first accused of these crimes, and the evidence of his conduct at other times, may also be considered as corroborative of the testimony of the complaining witness. It appears to us beyond question that her testimony was amply corroborated. People v. Henderson, 34 Cal.2d 340, 209 P.2d 785.

The judgment and order appealed from are affirmed.

GRIFFIN, J., concurs.

MERCHANTS SERVICE CO. v. SMALL CLAIMS COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 14001.

District Court of Appeal, First District, Division 2, California.

Oct. 14, 1949.

Hearing Granted Dec. 12, 1949.*

The Merchants Service Company, a corporation, sued the Small Claims Court of City and County of San Francisco, state of California, and Ivan L. Slavich, clerk of said Small Claims Court, for writ of mandate to compel the clerk to accept a claim for filing.

The Superior Court, City and County of San Francisco, Edw. P. Murphy, J., overruled defendants' demurrer to petition and ordered writ to issue and defendants appealed.

The District Court of Appeal, Dooling, J., affirmed the judgment, holding that suit was not based on assignment so as to preclude plaintiff under statute from maintaining suit in Small Claims Court.

Goodell, Acting P. J., dissented.

Courts 🔑175

Where merchandise was bought from retailer under purchaser's agreement requiring all payments to be made to a corporation described therein as creditor, suit by corporation on agreement in small claims court could be maintained by corporation as "third party beneficiary", and recitation that retailer quitclaimed title to corporation, which recitation was below and part of printed document containing purchaser's agreement, did not preclude maintenance of suit as being based on an assignment. Code Civ.Proc. § 117f.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Third Party Beneficiary".

John J. O'Toole, City Atty., San Francisco, C. Wesley Davis, Deputy City Atty., San Francisco, for appellant.

John H. Brill, San Francisco, for respondent.

DOOLING, Justice.

Respondent petitioned in the Superior Court for a writ of mandate to compel the clerk of the Small Claims Court in San Francisco to accept for filing therein a claim for $14.13. The defendants demurred, thereby submitting the matter "on the papers of the applicant". Sec. 1094, Code Civ.Proc. The demurrer was overruled and the court ordered the writ to issue. This appeal was then taken.

The ground of the clerk's refusal was that the claim was based on an assignment. Section 117f, Code Civ.Proc., provides that "No claim shall be filed or prosecuted in such small claims court by the assignee of such claim."

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* Subsequent opinion 216 P.2d 846.

A copy of each of the two papers constituting the claim was attached to the petition in mandate. The only question presented for decision was and is whether these two papers show that the claim was based on an assignment.

Exhibit A is on the form provided by the clerk for the use of claimants, consisting of an affidavit and order as prescribed by sec. 117b, Code Civ.Proc. This shows that Mrs. Wilma Bradford, defendant, is indebted to plaintiff, Merchants Service Company, in the sum of $14.13 for money due under a written contract; that a demand was made and refused and nothing paid; and giving the residence of defendant and the place of business of plaintiff.

Exhibit B is a printed form containing questions calling for information respecting the financial responsibility and resources of a prospective customer. Below this form it appears that the subject of the sale was a ladies' ring for the price of $12.50 plus 38 cents sales tax and "Service and/or Excise Taxes" $1.25, total $14.13, and that the sale was on "Budget Account Terms $1.00 each week Beginning January 17, 1948." Printed on the reverse side is the purchaser's agreement, signed by Mrs. Wilma Bradford. This document is reproduced in full below, omitting a form to be executed by co-signers or guarantors and which was not executed.[1]

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[1] "The undersigned hereby acknowledges receipt from the concern named of merchandise and/or services described on reverse side, for which payment is to be made to the Merchants Service Company, hereinafter called Creditor, in the sum there specified on the terms set forth. Receipt of said merchandise in good order, satisfactory fit and construction in every detail is hereby acknowledged by the undersigned.

"If any representation herein made by the Undersigned is false or if the Undersigned defaults in any payment or violates any of the conditions of this agreement, the unpaid balance hereunder shall immediately become due at the option of the Creditor.

"Should Creditor institute action to recover the purchase price or any part of it, the title and right of possession of any merchandise referred to shall remain in the Creditor until paid for, with the right of repossession before or after judgment rendered, until satisfaction of such judgment. The Undersigned agrees to return the merchandise purchased and referred to on demand should the Undersigned be in default in any payments or have made any material misstatement in connection herewith, and agrees to pay the Creditor a reasonable amount for any actual damage suffered thereby. Should this contract be placed in the hands of an attorney or collection agency for collection or breach of contract, the Undersigned agrees to pay all actual court costs, collection expense including collection agency fee and attorney fees incurred, with or without suit.

"The Undersigned agrees to make all payments under this contract at the office of the Merchants Service Company. In the event of default by Undersigned in any of the obligations herein, Creditor may, without notice of (sic) demand, enter any premises where said merchandise may be found and take possession thereof and at its option sell said merchandise at public or private sale, and the proceeds thereof, less the expense of repossessing and selling said merchandise, shall be credited upon the amount unpaid hereunder, or without such sale there may be credited upon the amount unpaid the fair market value of said merchandise at the time of such repossession, and in either event, in consideration of the use and depreciation of said merchandise. Undersigned agrees to pay forthwith any remaining unpaid balance hereunder. In no event shall Creditor be entitled to receive in excess of the original purchase price unless Creditor elects to reclaim the merchandise, in which event Undersigned shall be released from all further liability.

"The Undersigned hereby agrees that the period of the running of the statute of limitations on the within account will be extended ten (10) years from date hereof.

"The Undersigned agrees to insure said chattels against loss by fire, theft, damage and mysterious disappearance in favor of the Creditor or its assignee and furnish Creditor or its assignee with a copy of the insurance policy. Should the Undersigned fail to furnish the Creditor or its assignee with a copy of its insurance policy, the Creditor or its assignee may insure the above described chattels at the expense of the Undersigned and the Undersigned agrees to pay the premium on said policy within thirty (30) days after demand thereof.

Immediately below and as a part of the same printed document appears a form of relinquishment and quitclaim signed by the merchant, Sol Michaels, which gives rise to the claim that Merchants Service Company is attempting to sue as assignee in violation of sec. 117f, Code Civ.Proc.[2]

The case was submitted to the trial court on the pleadings so that we have not the benefit of extrinsic evidence to show that the transaction in any respect differed from what it appears to be on its face. From the face of the documents executed by the parties the respondent appears to be suing as a primary creditor of the purchaser, Mrs. Bradford, and not as an assignee.

Mrs. Bradford purchased a ring from the seller, Sol Michaels, and promised Michaels in writing over her signature that "payment is to be made to the Merchants Service Company." This brings her contract directly within the provisions of section 1559, Civil Code: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

In J. F. Hall-Martin Co. v. Hughes, 18 Cal.App. 513, 516, 123 P. 617, 618, the court said of a contract for the benefit of a third party: "While such contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party."

In other words the third party beneficiary's rights against the promisor arise directly from the contract, flow immediately from the promisor's promise contained in the contract, and are primary and in no sense derivative See Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 244, 73 P.2d 1163, collecting earlier cases; 4 Cal.Jur., 10 Yr.Supp., Contracts, sec. 279, pp. 202-205.

On the face of the contract signed by the purchaser she obligated herself to pay the

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"The Undersigned hereby waives all right for a change of venue and expressly consents to any suit for collection being filed in San Francisco. Time is of the essence of this agreement.

"This contract may be assigned or sold and all rights and conditions of the Creditor or assignor shall inure to the benefit of the purchaser or assignee.

"Dated Jan 10, 1948

"Signed: Mrs. Wilma Bradford
"(Buyer)"

[2] "We hereby relinquish, disclaim, and quitclaim any right, title, or interest in and to the merchandise or demands therein described unto Merchants Service Company. We guarantee that the above contract is a valid, bona fide and subsisting agreement; that all laws have been complied with; and that all signatures appearing thereon are genuine and are of the persons of whom they purport to be and that such persons are competent to make this contract. It is specifically represented that no part of this contract arose out of any delinquent account previously on our books; that all merchandise as set forth thereon as having been sold has been delivered to the Debtor; and/or that all services agreed to be performed have been rendered and completed to the personal satisfaction of the Debtor, after which I/we shall not be responsible for the payments on this contract. The debtor is not obligated to us or our assignee on prior purchases. Additional credit will not be granted to any Debtor until the balance on a prior contract has been paid in full or unless such additional credit has previously been approved by Merchants Service Company. Should we violate this provision Merchants Service Company may elect to require us and we hereby agree to pay to Merchants Service Company any balance due it from the Debtor on a prior contract or Merchants Service Company may elect to collect and retain the entire balance due from the Debtor including the amount due from the Debtor of such unauthorized sale. We agree to act as agent to collect the money due on this contract until notified to the contrary by Merchants Service Company, and we shall immediately remit same to Merchants Service Company, and prior to such remittance shall hold such collections and/or deposit same in a place of or account separate and distinct from collections and/or funds of our own, and such receipt and/or collections shall be and remain the property of said Merchants Service Company. Merchants Service Company by, or through its agent, shall have a right to examine my and/or our books of account at any reasonable time.

"(Firm Name) Sol Michaels
"915 Pierce St."

Merchants Service Company and the Merchants Service Company sues her not as an assignee but directly upon her original promise as a third party beneficiary. The legislature has not seen fit to prohibit a suit in the small claims court by a third party beneficiary and the court is not at liberty to write such a prohibition into the statute.

Were it not for the document of relinquishment and quitclaim reproduced in note 2 there would be not even a colorable ground to argue that Merchants Service Company is suing as an assignee.

But nothing in this document signed by the seller Michaels can change or affect the primary obligation which the purchaser had previously assumed to the Merchants Service Company by her contract. She was already bound by that contract to make the payment to Merchants Service Company. The language: "We hereby relinquish, disclaim and quitclaim any right, title or interest in and to the merchandise or demands therein described unto Merchants Service Company" cannot operate to transer to Merchants Service Company the primary right that it already clearly had as third party beneficiary to collect and receive the payments from the purchaser under her express contract with the seller. It does serve other obvious purposes. It deprives the seller of the power to rescind the contract before collection by the third party beneficiary. It also vests in the third party beneficiary the seller's interest in the merchandise sold so that the third party beneficiary may legally retake the property and exercise the other rights with respect to it provided for in the contract in the event of the purchaser's default.

The quoted language may arouse some suspicion that the true transaction is actually not what it appears to be on the face of the documents. If so that is a matter for proof by extrinsic evidence and no such proof was made in this proceeding. Taking the documents by their four corners, as we must in the absence of other evidence, the trial court put the proper construction upon them.

It is still open to the defendant in the small claims court to prove, if such be the fact, that the transaction is not what it appears to be on its face and that Merchants Service Company in fact is suing as assignee and not as third party beneficiary.

Judgment affirmed.

RUNNELLS, J. pro tem., concur.

GOODELL, Acting Presiding Justice.

I dissent.

It will be noted that the draftsman of the writing signed by Sol Michaels studiously avoided the use of the word "assign", but that of course does not keep it from being an assignment.

Taking the language at its face value, the "demands therein described" which are *relinquished* and *quitclaimed* had already arisen, since it speaks in the past tense. It shows that the contract of sale had been consummated, for Michaels guarantees that "The above contract *is a* valid, bona fide and *subsisting* agreement" (emphasis added) and that the merchandise sold *had been delivered.* The "demands therein described" constitute a chose in action, consisting of the right to receive from the buyer the deferred payments of the purchase price which became owing to the seller, Michaels, as soon as he delivered the ring.

It is true the writing signed by the buyer shows that the relation of debtor and creditor exists between her and the Company, but the same relation certainly had first existed between her and Michaels, *otherwise Michaels had no "demands" to relinquish.* The "relinquishment" is meaningless unless it transferred something; the paper must of course be read by its four corners. The buyer's obligation to pay arose immediately the ring was delivered. It had been delivered (as shown above) *before* Michaels signed the relinquishment. The debtor-creditor relation between the buyer and the Company shown in the writing over the buyer's signature, arose only because of Michaels' "relinquishment" to the Company of the buyer's obligation to Michaels to pay for the ring. The Company thereafter stood in Michaels' shoes.

Such debtor-creditor relation, however, is not necessarily the criterion. The real question is whether the claim which respondent sought to file was that of an assignee. The plaintiff's ownership of the chose in action and its right to sue thereon was derived only by the *relinquishment* of Michaels' right to the deferred payments, hence it was derived by assignment pure and simple. While on its face it appears to be an original promise of the buyer to the Company, there could be no basis for such a promise and no consideration therefor unless Michaels had assigned his right to the purchase money.

Section 117f does not confine its prohibitions to assignees *for collection* or assignees *for the purpose of suit.* It prohibits the filing by any and every assignee, and there seems to be good reason why the word "assignee" should be given a broad meaning and held to mean *anyone who stands in the shoes of the original creditor.* It may well be that when the legislature enacted section 117f (or the parent section, 927f) it felt that to permit assignees to sue would only add, unfairly, to the recognized advantages which plaintiffs have in small claims actions, discussed in Superior Wheeler Cake Corp. v. Superior Court, 203 Cal. 384, 387, 264 P. 488, for it is self-evident that an assignee suing day after day on such transactions would have a decided advantage over an inexperienced defendant doing his or her best to struggle through a trial without the aid of an attorney. This would seem to be at least one of the reasons for the legislation.

The plaintiff's papers in this case (Exhibits A and B) show, and counsel admitted at oral argument, that it was a three-party transaction. Such a transaction, if it gets into litigation, might conceivably develop into a three-cornered contest in which, readily enough, a defendant would be faced in court (as a practical matter, although not technically) by two adversaries instead of one. The small claims sections provide no machinery for such a contest and do not contemplate it. In the instant case if the buyer claimed, for instance, that there had been a breach of warranty in the sale of the ring—a defense certainly available to her against the company—that issue would have to be tried out, and it was doubtless the intention of the legislature that such issues should not be litigated except as between the two original parties to the transaction.

The barring of respondent from the Small Claims Court by no means deprives it of a remedy or a forum. It can file and prosecute its assigned claim in the Municipal Court. Schwartz, Inc., v. Burnett Pharmacy, 112 Cal.App.Supp. 781, 785, 295 P. 508, see, also, Superior Wheeler Cake Corp. v. Superior Court, 203 Cal. 384, 387, 264 P. 488, and Prudential Ins. Co. v. Small Claims Court, 76 Cal.App.2d 379, 382, 173 P. 38, 167 A.L.R. 820. By invoking mandate petitioner claims that "the law specially enjoins", sec. 1085, Code Civ.Proc., the filing of its claim, and by such petition it attempts to avail itself of the advantages given to plaintiffs by the "cumulative" remedy, see Superior Wheeler Cake Corp. v. Superior Court, 203 Cal. 384, 386, 264 P. 488, which the small claims section afford to claimants other than assignees.

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94 Cal.App.2d 315

PHOTOCHART v. DEL RICCIO.

Civ. 17115.

District Court of Appeal, Second District,
Division 1, California.
Oct. 27, 1949.

Action by Photochart against Lorenzo del Riccio for declaratory relief and for damages with respect to an agreement licensing use of a patented device for photographing contests of speed.

From a ruling sustaining a general demurrer entered in the Superior Court of Los Angeles County, Stanley N. Barnes, J., and from the ensuing judgment of dismissal, the plaintiff appeals.

The District Court of Appeal, White, P. J., dismissed the attempted appeal from the

ruling on demurrer, reversed the judgment and remanded the cause with directions, holding that the complaint set forth a controversy between the parties with respect to rights under the licensing agreement entitling the plaintiff to declaratory relief.

1. Appeal and error ⚷102, 782

An appeal could not be taken from a ruling on demurrer, and attempted appeal therefrom was dismissed.

2. Patents ⚷211(1)

A patent license agreement stating that licensor would give assistance, cooperation and scientific advice in furtherance of licenses did not obligate the licensor to bear half the expense incurred by licensee in prosecuting infringers of patent.

3. Patents ⚷211(1)

The bare grant of a patent license is no basis for implying a covenant on part of licensor to share costs of prosecuting infringers by licensee.

4. Patents ⚷211(1)

In absence of an express covenant, a patent licensor is under no obligation to prosecute infringers or to contribute to cost of such suits brought by licensee.

5. Declaratory Judgment ⚷389

The fact that a declaratory judgment would or might be adverse to plaintiff's contentions is no ground for denying declaratory relief.

6. Declaratory Judgment ⚷235

A complaint alleging that patent licensor threatened to declare forfeiture of license agreement if licensee failed to prosecute patent infringers, and seeking declaration that licensee was under no duty to bring suit against infringers, set forth a controversy with respect to rights under license agreement entitling licensee to declaratory relief, although licensee might not be entitled to the relief sought.

7. Declaratory Judgment ⚷313

A complaint for declaratory relief is legally sufficient if it sets forth facts showing existence of actual controversy relating to legal rights and duties of parties under a written instrument and requests that these rights and duties be adjudged by court.

8. Pleading ⚷243

A plaintiff has right to amend when it appears that a cause of action could be stated.

◆

J. Wesley Cupp, Los Angeles, for appellant.

Don Marlin, William H. Levit, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] In an action for declaratory relief and for damages, a general demurrer to plaintiff's amended complaint was sustained without leave to amend, and from the ensuing judgment of dismissal plaintiff prosecutes this appeal. The attempted appeal from the "ruling on demurrer" must be dismissed.

It appears from the amended complaint that plaintiff, Photochart, a corporation, is the assignee of The Photochart, a partnership; that in June, 1941, plaintiff's assignor entered into a contract with defendant, Lorenzo del Riccio, who, as the inventor of and holder of certain patent claims to a camera device for photographing the finishes of horse races and other contests of speed granted to The Photochart an exclusive license to use said device, and which contract provided for the payment of certain royalties. It was further alleged that as the result of a dispute and extensive litigation between plaintiff's assignor and defendant, a supplemental agreement was entered into in April, 1946, in consideration of which plaintiff's assignor dismissed an action then pending against defendant. By the supplemental agreement defendant agreed, among other things, to give "such assistance, cooperation and scientific advice as will contribute to the perpetuation, publication and furtherance in all respects of the licenses which are the subject of this contract." Quoting further from the first cause of action of the amended complaint, it is charged:

"That certain infringements of the patent rights of the plaintiff and defendant have occurred and further infringements are anticipated; that plaintiff is now prosecuting certain actions for the infringement of said patents against third persons and that expenses are being, and will be, incurred in the future by reason of the necessity to protect the patent rights of the defendant Lorenzo del Riccio and the interest plaintiff has in said patent rights under the said licensing agreements; that defendant del Riccio has asserted and continues to assert that by the interpretation of said supplemental contract, he is not obligated to lend any financial assistance toward the protect [ion] of the patent rights; that the cost of prosecuting said litigation is great.

"That Lorenzo del Riccio is seeking to terminate said license agreements, copies of which are annexed hereto as Exhibits A and B, and has served upon plaintiff Photochart notices that plaintiff Photochart has breached said agreements and has, in another action before the above-entitled Court, filed a cross complaint alleging that said license agreements have been terminated by breaches committed by plaintiff Photochart and in the event that plaintiff Photochart should fail to bring suits against infringers or fail to prosecute suits heretofore filed and such failure so to do would amount to a breach of said license agreements, said Lorenzo del Riccio would serve upon plaintiff a notice of breach and would attempt thereby to terminate said license agreement."

It was then alleged in the first cause of action that an actual dispute and bona fide controversy existed, and that the questions to be decided by the court were:

"What are the rights, privileges and duties of all the parties under the supplemental contract, and what effect, if any, the provisions of said supplemental contract will have upon the licensing agreement hereinbefore entered into?

"Who has the duty to protect the patents involved from infringement?

"Does plaintiff have any obligation to sue infringers?"

It is further alleged that plaintiff contends that the clause of the supplemental agreement whereby defendant agreed to give "assistance, cooperation and scientific advice" etc., includes financial assistance whenever necessary to protect the patent rights from infringement; that plaintiff contends it is under no duty to bring suits against infringers.

In the second cause of action it is alleged that plaintiff has filed two infringement suits in the federal courts in which del Riccio voluntarily joined as co-plaintiff, and that plaintiff has been damaged in the sum of $11,158.34 by reason of the failure of defendant to contribute, as demanded, one-half of the costs and attorney's fees incurred or paid by plaintiff, as well as other expenses and amounts paid out for the use and benefit of the defendant.

The amended complaint concludes with a prayer for a declaratory judgment that the supplemental contract is valid, and that defendant is liable financially "for a contributory portion of reasonable expenses" incurred by plaintiff in protecting the patents; that defendants will also be liable for all further reasonable expenses under the contracts during the terms thereof; that plaintiff is under no duty to bring suits against infringers and that its failure to bring suits will not constitute a breach of contract or of any duty to defendants. Plaintiff further sought judgment under its second cause of action for the sum of $11,158.34.

[2-4] The demurrer to the second cause of action was properly sustained. The relief sought by this cause of action was a money judgment upon the theory that the defendant licensor was under a contractual obligation to bear half the expense of prosecuting infringers of the patent. Examination of the original and the supplemental contract attached as exhibits to the amended complaint disclose that no such obligation exists. The defendant licensor agreed to give such "assistance, cooperation and scientific advice, as will contribute to the perpetuation, publication and furtherance in all respects of the licenses which are the subject of this

contract." Neither the quoted language nor any other language in the contracts in question would justify a holding that the licensor had agreed, expressly or impliedly, to bear a share of the costs of prosecuting infringers. Nor can a covenant so to do be implied from the bare grant of a license. In the absence of an express covenant, a licensor is under no obligation to prosecute infringers or to contribute to the cost of such suits brought by the licensee. Lathrop v. Rice & Adams Corp., D.C., 17 F.Supp. 622, 628; Ellis, Patent Assignments and Licenses, p. 721, sec. 690.

[5] An entirely different situation is presented by the ruling on plaintiff's first cause of action. The demurrer was general only, and by the judgment it was merely adjudged that, the demurrer having been sustained, plaintiff take nothing by its action. The effect of such a judgment is only to deny the relief prayed for, that is, to deny declaratory relief. The fact that a declaratory judgment would or might be adverse to the plaintiff's contentions is not a ground for denying declaratory relief. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747.

[6] The first cause of action, while possibly not a model of pleading, nevertheless alleges in substance that the defendant threatens to declare a forfeiture of the contract should the plaintiff fail to prosecute patent infringers or fail to prosecute suits heretofore filed. In the absence of declaratory relief, the plaintiff must declare at its own risk whether it is under any duty to initiate or prosecute infringement suits, at the peril of being declared, after the fact, of having defaulted on its agreement. It must be assumed, for the purposes of a demurrer, that such threats have been made, and thus it would clearly appear that a controversy exists.

It is not necessary or proper for this court at this time to determine what the rights of the parties are under the contract. It is enough to say that it was error to dispose of plaintiff's first cause of action by sustaining a general demurrer thereto.

[7] A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 678, 151 A.L.R. 1062. As heretofore stated, the court should not dispose of the case on demurrer merely because the plaintiff is not entitled to a favorable declaration. As stated in the cited case, "The purpose of a declaratory judgment is to 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation.' * * * To hold that a plaintiff on the wrong side of a controversy is not entitled to the security and relief against uncertainty which a declaratory judgment affords would require us to read into the statute a limitation not there present. * * *"

This being the rule, the only ground upon which the demurrer to the first cause of action could have been properly sustained would be that no cause of action for declaratory relief, was set forth, that is, that no "justiciable controversy" was shown. The facts alleged are that defendant threatens to declare a forfeiture unless the plaintiff performs certain acts which the plaintiff contends it is not required to perform under the contracts between the parties. If this is not a "controversy", then why should the defendant object to an adjudication? See Tolle v. Struve, 124 Cal.App. 263, at page 269, 12 P.2d 61.

[8] Further, we are persuaded that the complaint in the instant cause certainly comes within the rule which affords to a plaintiff the right to amend when it appears that a cause of action could be stated. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; Wilkerson v. Seib, 20 Cal.2d 556, 127 P.2d 904. The demurrer was general only. The complaint, although it might have been vulnerable to special demurrer, set forth the elements of a cause of action.

The attempted appeal from the "ruling on demurrer" is dismissed.

The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer to the first cause of action and allow defendants a reasonable time within which to answer in the event they be so advised. Neither party to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

In re NEWTON'S ESTATE.

KUCHEL, Controller, v. NEWTON.

Civ. 16821.

District Court of Appeal, Second District, Division 1, California.

Oct. 20, 1949.

Hearing Granted Dec. 15, 1949.*

Proceeding in the matter of the estate of Arthur B. Newton, deceased, wherein the widow of the deceased, Beverly M. Newton, filed objections to a part of the report of the Inheritance Tax Appraiser.

The Superior Court of Los Angeles County, Harold B. Jeffery, J., sustained the objections of the widow, and Thomas H. Kuchel, Controller of the State of California, appealed.

The District Court of Appeal, Drapeau, J., affirmed the order, holding that property situate in New York transferred by the exercise of a special power of appointment by a deceased residing in California was not subject to inheritance tax.

1. Courts 🔑97(5)

When United States Supreme Court speaks with reference to a matter governed by the federal Constitution, every court in the land is bound thereby.

2. Courts 🔑97(6)

The decision of a state court of last resort construing a state law is conclusive and presents no federal question.

3. Taxation 🔑878(2)

Property having its situs in New York transferred by special power of appointment to wife of donee under will of donee, who was a resident of California at death, was not subject to California inheritance tax. Gen.Laws, Act 8495, § 1, subd. 2; § 2, subds. 6, 7.

◆

James W. Hickey, Chief Inheritance Tax Attorney, Sacramento, Morton L. Barker, Senior Inheritance Tax Attorney, Los Angeles, Vincent J. McMahon, Assistant Inheritance Tax Attorney, Sacramento, for appellant.

Leon W. Delbridge, Pasadena, Brady & Nossaman, Los Angeles, for respondent.

McCutchen, Thomas, Matthew, Griffiths & Greene, Los Angeles, amici curiae in behalf of respondent.

DRAPEAU, Justice.

Charles E. Newton died a resident of New York October 19, 1921. By his will he provided for a testamentary trust, including a power of appointment which is as follows: "As to the said four-fifths part of my said residuary estate, to pay the net income thereof equally to my two sons, Charles E. Newton, Jr., and Arthur B. Newton, during their joint lives, and upon the death of either, to pay one-half of the said principal sum of said four-fifths unto the *sru*vivor of them to whom I give, devise and bequeath the same absolutely. As to the remaining *on*-half of said principal sum, I give and grant unto my son who shall first die the power and right to give, devise and bequeath the same by his last Will and Testament, to his wife and children, or any or either of them."

The property of the trust estate consists of intangibles, and has always been situate in the state of New York. The will was admitted to probate and the trustees function under the laws of that state.

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* Subsequent opinion 221 P.2d 952.

Arthur B. Newton, the son, made his will in the state of New York while a resident thereof, May 2, 1930, and exercised the power of appointment in favor of his wife. Later he came to California, and died a resident of this state, March 11, 1943. He was the first of the two brothers mentioned in the father's will to pass away. Hereafter Arthur B. Newton will be referred to as the decedent.

During probate in California of decedent's estate the Inheritance Tax Appraiser reported to the Superior Court that decedent and his widow held in joint tenancy a home and furnishings and $61.99 cash; also that some months prior to death decedent transferred an automobile to his wife, of the value of $1,575, which should be taxed.

In addition to the foregoing items, the report presented to the Court, to be taxed, $412,510.30, the value fixed by the Appraiser upon the transfer pursuant to the power of appointment.

Objections to the latter part of the Report of the Inheritance Tax Appraiser were filed by the widow. These objections were sustained by the Superior Court.

The only question involved in this appeal is whether the appointment by the decedent donee may be taxed by the state of California. If the property which goes to the widow by appointment is taxable, the inheritance tax will be $31,119.27; if not, her tax will be $14.08.

The foregoing facts are not in dispute; and are quite similar to those in Re Estate of Bowditch, 189 Cal. 377, 208 P. 282, 23 A.L.R. 735, decided in 1922. Indeed, the only material difference is that the power in this case is special, and the power in the Bowditch case is general. Objector relies upon the Bowditch case, which holds that the power of a donee, a resident of California, to direct disposition of the corpus of a testamentary trust is not "property" within the purview of the California Inheritance Tax Act, Gen.Laws, Act 8495, when the situs and corpus of the trust are in another state.

The State Controller relies upon Graves v. Schmidlapp, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948. The Schmidlapp case was decided in 1942, twenty years after the Bowditch case.

The opinion in the Bowditch case cites United States v. Field, 255 U.S. 257, 41 S.Ct. 256, 65 L.Ed. 617, 18 A.L.R. 1461, in support of its holding of nontaxibility. In 1926 the United States Supreme Court in Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567, 47 S.Ct. 202, 71 L.Ed. 413, followed United States v. Field. But in 1942 the same eminent Court, in Graves v. Schmidlapp, supra, expressly overruled Wachovia Bank & Trust Co. v. Doughton. Hence, the State Controller argues with ability and forcefulness that the Bowditch case stands overruled in California.

[1] Of course, when the United States Supreme Court speaks with reference to a matter governed by the Federal Constitution every court in the land is bound thereby. The Schmidlapp case held that the Fourteenth Amendment does not deny to the several states the right to tax the exercise by a donee of a power of appointment when the situs of the property is in a state other than the residence of the donee decedent. "This transmission of wealth at death by a resident is not a forbidden source of revenue to the state." [315 U.S. 657, 62 S.Ct. 875.]

[2] But the Schmidlapp case does not direct the state of California to tax or not to tax the exercise of such a power. The decision of a state court of last resort construing a state law is conclusive and presents no federal question. Stebbins v. Riley, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884, 44 A.L.R. 1454; Castillo v. McConnico, 168 U.S. 674, 18 S.Ct. 229, 42 L.Ed. 622; Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506, 58 S.Ct. 295, 82 L.Ed. 392; McGregor v. Hogan, 263 U.S. 234, 44 S.Ct. 50, 68 L.Ed. 282; Bailey v. Magwire, 22 Wall. 215, 89 U.S. 215, 22 L.Ed. 850, 11 Am.Jur. 742. Therefore, unless changed by statute, the Bowditch case is still the law of Cali-

fornia, binding upon this and every other court in the state except our own Supreme Court.

Having come to this conclusion, it is unnecessary to determine the interesting question of liability for inheritance tax of a transfer under a special power, as in this case, or under a general power, as in the Bowditch case.

Has the state of California by statute changed the rule set forth in Estate of Bowditch?

Section 2, Subdivision 7, of the inheritance Tax Act of 1935, as amended in 1941, Stats.1941, Ch. 177, p. 1222, and which was the law in effect on March 11, 1943, the date of Arthur B. Newton's death, reads as follows:

[7] "Whenever any person or corporation shall be given a general or limited power of appointment by virtue of any disposition of property made before or after 5 p.m. of June 25, 1935, such gift of power of appointment shall, under the provisions of this act, including Subdivision (10) of this section, be deemed a taxable transfer made from the donor of said power to the donee thereof at the date of the donor's death, except that:

"(a) Where the donor of a power of appointment died prior to 5 p.m. of June 25, 1935, and the power is exercised thereafter, the exercise of said power of appointment shall be deemed a transfer taxable as provided in Subdivision (6) of Section 2 of the Inheritance Tax Act of 1921, as amended in 1929."

As stated, Arthur B. Newton's father, the donor, died October 19, 1921. Therefore it is argued that sub-paragraph (a) as quoted authorizes and directs taxation of this transfer of property.

Other sections of the Inheritance Tax Act which the Controller suggests should be read in connection with this inquiry are as follows:

"(6) Whenever any person, trustee or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made, shall be deemed a transfer taxable under the provisions of this act, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will." Subdivision 6, Section 2, of the Inheritance Tax Act of 1921, as amended in 1929, Stats.1929, Ch. 844, pp. 1836, 1837.

"A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, * * * in the following cases:" Section 2, and Subdivision 2 of Section 1, Stats. 1941, Ch. 177, pp. 1220, 1221.

"(2) The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, * * * and shall include all intangible personal property of resident decedents within or without the State or subject to the jurisdiction thereof, * * *." Section 1, Subdivision 2, Inheritance Tax Act of 1935, stats. 1935, Ch. 358, p. 1266.

[3] When read in connection with the Bowditch case, it is apparent that there is nothing in the statute law of California which constitutes a legislative mandate to the Superior Court to order a tax in cases like this. Nor may any other conclusion be reached by speculation as to the legislative intent. It would seem that if it had been the intent of the Legislature to tax such transfers as this, the language employed in the Inheritance Tax Act would have been explicit to that effect. Moreover, it may properly be assumed that the Legislature intended to follow the Bowditch case, with its implication of fairness to taxpayers, protecting them against the possibility of double taxation—first in the state where property is situate, and, secondly, in the state where the power of appointment becomes effective.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

In re WILLIAMS' ESTATE.

WILLIAMS v. WILLIAMS.

Civ. 17175.

District Court of Appeal, Second District,
Division 1, California.

Oct. 27, 1949.

Hearing Granted Dec. 22, 1949.*

Sebastian Williams, executor under the will of Editor Williams, deceased, petitioned for probate of the will, and Octavia Williams filed objections to the executor's final account after probate.

From a judgment and order of the Superior Court of Los Angeles County, Alfred E. Paonessa, J., sustaining the objections and directing distribution of one-fourth of the estate to contestant as testator's widow, the executor appealed.

The District Court of Appeal, White, P. J., reversed the judgment, holding that contestant's prayer for establishment of her alleged half-interest in property of the estate, notwithstanding her default in testator's divorce action, wherein complaint alleged that there was no community property and decree granting testator divorce made no provision respecting parties' property rights, was a collateral attack on such decree and could not be maintained.

1. Judgment ⚷112, 134

A defendant, making default after being served with summons and complaint, is presumed to have admitted all facts well pleaded in complaint, and subsequent judgment for plaintiff is complete adjudication of all of parties' rights embraced in prayer for relief and arising from facts stated in complaint and becomes in effect a contract between parties that judgment shall be final respecting everything properly embraced within allegations of complaint and such prayer.

2. Divorce ⚷254

While status of parties to divorce action is determined by final judgment therein, judgment embodied in interlocutory divorce decree becomes final as to parties' property rights after expiration of every period within which attack could have been made thereon by motion or appeal.

3. Divorce ⚷255

A prayer by will contestant for decree in probate proceeding, establishing her alleged interest as testator's widow in property which had been judicially determined not to be community property by decree granting testator a divorce in action wherein wife defaulted after being served by publication with summons and complaint alleging that there was no community property of parties, was a collateral attack on such decree and could not be maintained.

4. Courts ⚷85(3)

The District Court of Appeals is bound by rules that defendant, defaulting in divorce action after being served with summons and complaint by publication, should be held to be apprised of facts on which he is required to act as stated in complaint and presumed to admit all facts well pleaded therein, and must apply such rules until they are disapproved by Supreme Court.

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Newton Van Why, Los Angeles, for appellant.

Gavin Morse Craig, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from that part of the decree of distribution in the Estate of Editor Williams, Deceased, which directs distribution to respondent Octavia Williams, as widow of decedent, of one fourth of his estate, as comprising one half of the community property of decedent and respondent.

The record reveals that decedent and respondent were married in 1922 in the state of Mississippi. They lived together until 1929 when decedent shot his wife and fled. Although a warrant was issued for his arrest, decedent was never apprehended. He and respondent corresponded with each other until 1934, the latter's communications being sent in care of the former's aunt who in turn forwarded them to decedent. From the time decedent left respondent in 1929 she was never aware of his actual whereabouts, although she had heard from a friend that he was somewhere in Los Angeles, and since 1934 she heard nothing from him direct. She learned of his death shortly after it occurred.

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* Subsequent opinion 223 P.2d 248.

It appears that decedent came to Los Angeles in 1934 where he lived with one Gertrude Williams until her demise in 1945. Whether the latter was aware of the subsisting marriage between respondent and Octavia Williams does not appear in the record. Decedent and Gertrude Williams were both employed and earning money.

On June 8, 1944, they opened a joint bank account with an original deposit of $1,200.00. At the time of the death of Gertrude Williams, about the middle of the year 1945, this joint bank account was in existence, at which time the balance in the same was $492.10. Who made the various deposits in such account is not shown by the evidence.

On January 4, 1945, Gertrude Williams purchase certain real property for the total consideration of $4,750.00, making a down payment thereon into escrow of $1,000.00 and executing a promissory note secured by a deed of trust on said property for the balance of $3,750.00. Decedent was not mentioned in the transaction. The initial payment of $1,000.00 into escrow was made by check drawn by Gertrude Williams on the foregoing joint account. Title to the property was conveyed to her. From the time of purchase of the property until the death of Gertrude Williams she and decedent lived together on the property. During this time monthly payments amounting to $750.00 were made on the promissory note, but by whom does not appear. Gertrude Williams also owned a Pontiac automobile registered in her name and appraised in the estate now under consideration at $340.00.

Gertrude Williams died testate in 1945, leaving all her property to decedent herein, designated in her will as "my husband." This will was duly probated and in due time her estate, which included the aforesaid real property and automobile, was distributed to decedent herein. The latter died testate April 9, 1947, leaving a will by which he devised all his property to his brother J. P. Williams. His estate of the foregoing real property appraised at $5,000.00; the Pontiac automobile appraised at $340.00, which had been distributed to him from the estate of said Gertrude Williams, deceased; United States Savings bonds in the joint names of Gertrude Williams and decedent, appraised at $479.00; and cash in the sum of $539.49, apparently the balance remaining in the former joint bank account with Gertrude Williams with some small addition thereto.

Following the death of Gertrude Williams, decedent herein filed a divorce action in Los Angeles against his wife, Octavia Williams, respondent herein. Summons and complaint were served by publication and on May 24, 1946, an interlocutory decree of divorce was entered. In the divorce complaint it was alleged there was no community property belonging to the parties and the decree makes no provision respecting any property rights of the parties. Decedent Editor Williams died during the interlocutory year and following his death and at the expiration of a year after the entry of the interlocutory decree, decedent's attorney in the divorce action, apparently in ignorance of his death, caused a final judgment to be entered on June 4, 1947. According to her uncontradicted testimony, respondent herein had no knowledge of the divorce action until after the death of her husband.

The foregoing will of decedent herein, Editor Williams, was duly probated and upon the filing of the final account respondent, Octavia Williams, filed objections thereto, contending that the property in said estate was community property of herself and decedent and that as his widow, she was entitled to one half thereof. The Court sustained her contentions and ordered distribution to her of one half of said one half, that is to say, of one fourth of the entire estate, both real and personal.

From such judgment the executor prosecutes this appeal and urges that the same should be reversed for the following reasons: (1) That the findings of the trial court are not supported by the evidence; (2) that the judgment is contrary to law.

We are satisfied that the judgment must be reversed as being contrary to law because of the necessity of applying the doctrine of collateral estoppel. Restatement of the Law, Judgments, § 68.

[1] The record reflects that in the divorce action filed by decedent against respondent herein following the death of Gertrude Williams, the complaint alleged there was no community property belonging to the parties. Respondent herein was duly served by publication and made default in the divorce action. The interlocutory decree declared the decedent was entitled to a divorce on the pleaded ground of cruelty and that a final judgment should be entered one year thereafter. In the case of Brown v. Brown, 170 Cal. 1, 5, 147 P. 1168, 1170, strikingly similar to the one at bar, the rule is thus enunciated by the Supreme Court: "Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief." To the same effect are the cases of Brown v. Brown, 170 Cal. 8, 147 P. 1171; Stone v. Stone, 58 Cal. App. 415, 208 P. 993; Paduveris v. Paris, 213 Cal. 169, 172, 1 P.2d 986; Maxwell v. Maxwell, 66 Cal.App.2d 549, 552, 553, 152 P.2d 530.

In the case of Stone v. Stone, supra, 66 P.2d at page 419, 152 P.2d 530, it was held that the fact that the summons was served by publication rather than personally was not material.

[2] In Abbott v. Superior Court, 69 Cal. App. 660, 664, 232 P. 154, 156, it was held that while the status of the parties in a divorce action is determined by what is designated by the divorce statute as "the final judgment," that insofar as the property rights of the parties are concerned the judgment of the court thereon as embodied in the interlocutory decree becomes final when each and every period has expired within which an attack could have been made by motion or appeal.

[3] In the case now under consideration respondent is not seeking to have the judgment in the divorce case or any part thereof set aside, but she is asking for a decree in the probate proceeding establishing her alleged interest in property which, under authority of the Brown cases, supra, has been judicially determined in the divorce action not to be community property. This is a collateral attack upon the judgment in the divorce action and can not be maintained.

[4] If law and good morals should be one and inseparable, it does appear to us to be a harsh rule which provides that a defendant in a divorce action served by publication, and as in the case at bar, at all times unaware of the institution or pendency of the action should be held to be apprised of "the facts upon which he is required to act, and * * * is presumed to admit all the facts which are well pleaded in the complaint", Brown v. Brown, supra, 170 Cal. at page 5, 147 P.2d at page 1170, but we are bound by such rules and must apply them in the instant case until they are disapproved by the Supreme Court.

We have carefully examined the record in this case and have no hesitancy in saying that except for the aforesaid interlocutory decree of divorce, based on the legally proven facts and on such a deduction therefrom as is warranted by a consideration of the usual propensities of people and the course of business, the inference arrived at by the trial court that one half of the estate was the community property of decedent and respondent was fair, reasonable, and sufficient to support the judgment. Code Civ.Proc. §§ 1958, 1960.

For the reasons herein stated the judgment is reversed and the cause remanded with directions to the court below to make its order distributing the entire estate of decedent to J. P. Williams, as provided in the will of said decedent.

DORAN and DRAPEAU, JJ., concur.

34 Cal.2d 406

In re DUMAS' ESTATE.

MEHL et al. v. DUMAS et al.

L. A. 20642.

Supreme Court of California, in Bank.

Oct. 28, 1949.

Proceeding in the matter of the estate of Nellie Dumas, deceased, wherein Mrs. J. H. Mehl, Mrs. Walter J. Niederer and others filed a petition for probate of a purported last will of the deceased, opposed by Kenneth Dumas, and others.

The Superior Court, Los Angeles County, Frank C. Collier, J., entered an order admitting to probate the purported last will of deceased and Kenneth Dumas and other appealed. The appeal was opposed by petitioners and by the Bank of America National Trust and Savings Association, special administrator.

The Supreme Court, Carter, J., affirmed the order and held that a second sheet which was neither dated or signed, and a third sheet which was not dated but signed and folded with a first page which was a complete holographic will in itself were admissible to probate as valid holographic instruments.

Edmonds, J., dissented.

For prior opinion, see 203 P.2d 82.

1. Wills ⟹130, 133, 207

An undated, unsigned second page in deceased's handwriting and a signed undated third page in deceased's handwriting, both of which were written nine years after first page, which in itself was valid holographic will, which were all folded together were admissible to probate as valid holographic instruments under rule of "integration" on theory that testatrix adopted date on first page by her signature on third. Probate Code, § 53.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Integration".

2. Wills ⟹130, 133

Additions or alterations may be made in a holographic will if done in testator's handwriting without necessity of resigning and redating on theory that old signature and date are adopted. Probate Code, § 53.

3. Wills ⟹97, 98

"Integration," as distinguished from "incorporation by reference," occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Incorporation by Reference".

◆

Dunlap, Holmes, Ross & Woodson and Emrys J. Ross, Pasadena, for appellants.

E. L. Searle, Los Angeles, for respondents.

CARTER, Justice.

This is an appeal from an order in a probate proceeding admitting to probate certain papers as the holographic will of Nellie Dumas, deceased.

From the findings of fact (the appeal is on the judgment roll), the following facts appear: The deceased left neither spouse nor issue. The contestants are a nephew, niece, and brother of deceased's previously deceased spouse. The instruments admitted to probate consist of three papers upon which is writing all in the hand of the testatrix. The first page (the pages are not numbered, but we designate them by number for convenience), was written on January 20, 1935, in a "greenish-blue" colored ink. It is dated at the top and is headed "The Last Will and Testatment of Nellie Dumas." Then follows the customary recitals of soundness of mind and that she makes and publishes her will; that all her debts are to be paid; that "The following bequests are to be given my friends herein named"; that Mrs. H. J. Mehl and Mrs. Walter Niederer are to serve as "Executors". Thereafter it states: "In testimony I set my name this 20th day of January, 1935", signed Nellie Dumas, and her address. A blank space of several inches thereafter follows. The second and third pages were written nine years after the first page and are in black ink. Minute spots of greenish-blue ink appeared on the reverse side of the third sheet. The second page is completely filled with bequests of mentioned property to various named persons. There is an interlineation on one item that was made by the testatrix sometime after the second and third sheets were written. The second page is neither dated nor signed. The third sheet continues with the bequests and winds up about three-fourths of the way down the paper with "signed Nellie Dumas" and her address. No date appears thereon.

The court found that all papers remained in the possession of the testatrix at all times until April 3, 1947, when the deceased became seriously ill, dying on April 9, 1947. On the former date, Mrs. Mehl and Mrs. Niederer called upon deceased at her home, and to the inquiry of the former whether she had a will, the testatrix, being unable to speak, nodded her head in the affirmative. At the request of the testatrix, Mrs. Niederer, in the presence of Mr. Patton, a roomer in deceased's home, obtained a satchel from a closet and gave it to Mrs. Dumas. The latter removed a manila envelope therefrom containing the above mentioned papers and indicated that it contained her will. Although no papers were removed from the envelope by the testatrix, it follows that the three papers above mentioned were in it inasmuch as the subsequent events show little opportunity for a substitution. She placed that envelope in a white envelope, sealed the latter and had Mr. Patton, Mrs. Mehl and Mrs. Niederer sign their names thereon. It was handed to Patton with instructions to deliver it to Weiser who was to, and did, place it in deceased's safety deposit box where it remained until after her death. The three sheets in the envelope were not mechanically fastened together, but were folded in a unit in the order heretofore discussed.

There is no question of any fraud, forgery or undue influence, inasmuch as contestants offered no evidence on the subject.

Contestants urge that the first page was a complete will in itself and the second and third sheets were, in effect, codicils or new wills, but ineffective as such, for the second sheet is neither dated nor signed and the third is not dated, both requirements of an holographic will. Probate Code, sec. 53. Proponents counted with the proposition that all the papers were one integrated document—a will, and that the testatrix adopted the date on the first page by her signature on the third page, and the second sheet was only a part of a continuous testamentary document.

[1] Proponent's contention that the adoption of the date on the first paper by the signature on the third must prevail under the reasoning of the authorities. In re Estate of Finkler, 3 Cal. 2d 584, 46 P.2d 149, this court was considering an holographic will on the face of which interlineations had been made by the hand of the testator at some unknown time after the paper was dated and signed. The court, holding that the paper as altered by the interlineations, was the will of the testator, although he had not re-signed or redated it after making the alterations, stated 3 Cal.2d at page 599, 46 P.2d at page 156: "The final contention of appellants is that the wrong document was admitted to probate in that decedent, *after executing the will of April 21, 1930,* made thereon certain cancellations, changes, and interlineations, in his own handwriting, which altered the meaning of the instrument. Behind this contention is the claim that under the document as altered, the deceased died intestate as to his real property, which is the bulk of the estate. * * *

"The court admitted to probate the document as originally executed, acting unquestionably upon the conviction that the cancellations and interlineations were of no effect, because not accompanied by a redating, re-execution and republication of the instrument. In this assumption the court fell into error. As the changes were made in the handwriting of the testator, and the document as changed remained in his possession until his death, this raised the clear presumption that the changes were made animo cancellandi. The rule in this respect has been stated by Mr. Page in his work on Wills, vol. 1, 2d ed. § 500, p. 822, as follows:

"'If witnesses are not necessary to the validity of a will, as under the ecclesiastical law, interlineations made by a testator after he has executed his will, are a part thereof; *since by his act of making such interlineations, intending them to be a part of his testament, testator has re-executed his testament in such form as would have been sufficient for the original execution thereof.*

" 'Interlineations in a holographic will after execution are a part thereof; and if they are not in testator's handwriting the will is rendered invalid thereby.

" 'Since holographic wills do not need witnesses, testator's act in erasing words and interlining others may amount to a revocation and re-execution, although such conduct would not have this effect if the will were an attested will.

" 'Here again, we have an apparent, but not a real exception to the general rule with reference to the effect of interlineations, since the holographic will needs no witnesses; and its execution in testator's handwriting, including the interlineations is a sufficient compliance with the statute which regulates the original execution of the will; and hence it may be justified on the theory of a sufficient re-execution.'

"The doctrine is also supported by the following additional authorities, to wit: The case of Succession of Guiraud, 164 La. 620, 114 So. 489, 490, where the testator, after making a bequest to his clerk in a paragraph of his will, later interlined it with the following language: 'I revoke the donation to Lionel Larrieu my clerk.' The court said: 'Even if the clause was inserted after the will was signed, and on a day actually subsequent to its date, it was the act of the testator himself, and the date and the signature apply to all that precede them, and make the instrument in its entirety a valid holographic testament.' The applicable section of the Civil Code of Louisiana had the same meaning as our own former section 1292, subdivision 2, now section 74, subdivision 2 of the Probate Code. In re Estate of Fay, 145 Cal. 82, 85, 78 P. 340, 104 Am.St.Rep. 17.

"The case of LaRue v. Lee, 63 W.Va. 388, 60 S.E. 388, 390, 14 L.R.A.,N.S., 968, 129 Am.St.Rep. 978, is instructive for, speaking of a will in somewhat the same condition as the one before us, the court said: 'So we say that erasures in a holographic will, made by the hand of the testator himself, is legal revocation of such portions as are so erased, since it is in the manner required for a will of that kind to be executed; and new portions written into such will by the same hand, to take the place of erasures, or new portions otherwise written therein by the same hand, being thereby executed in the manner which justifies the validity of a holographic will originally, so long as the signature of the testator remains in such manner as to make it manifest that it is intended as a signature, do not in any sense invalidate the will or affect its finality, since it is then a complete new holographic will, and needs no re-execution or republication before witnesses, because it did not originally demand execution and publication before them. *To say that the whole must be rewritten and again signed by testator is simply to say that which is neither reasonable nor practicable.*'

[2] "In fact this rule was necessarily indorsed and followed by this court in the case of In re Estate of Wikman, 148 Cal. 642, 84 P. 212, where the question before the court was the effect upon a holographic will of a deletion of the name of the executrix named therein. The court sustained this act as a revocation of that provision of the will, and gave final effect to the instrument as changed. If such cancellations are to be sustained, then so must interlineations which have been made with testamentary intent." [Emphasis added.] The dissenting justice in that case expressly agreed with the rule and this court approved the holding in Re Estate of Towle, 14 Cal.2d 261, 270, 93 P.2d 555, 124 A.L.R. 624, stating: "It has been held that the making of any alteration or interlineation by a testator in his original holographic will in his own handwriting constitutes a reexecution and republication of such instrument and it is entitled to probate as altered. In re Estate of Finkler, 3 Cal.2d 584, 600, 46 P.2d 149." In re Estate of Swendsen, 43 Cal. App.2d 551, 111 P.2d 408 is very similar to the case at bar. There *two pieces of paper* were offered as a will. Both were in the

testator's handwriting. On one appeared a date and a statement that it was his last will and a devise of various properties to Mrs. Earnest. It was signed by the testator and two witnesses at the bottom. It was written in ink. The other paper, written in pencil by the testator, was neither dated nor signed, merely stating: "P.S. I appoint Mrs. Earnest as executor". The trial court found that the second document looked older than the first, was different paper, and had been torn from a larger sheet; that one of the witnesses to the will testified that the testator exhibited both documents to him and said they were his will and signed the first one. The two papers in an envelope were handed to Mrs. Earnest. The court held that the two papers were one valid will. See also In re Estate of Cazaurang, 42 Cal.App.2d 796, 110 P.2d 138; Triplett's Ex'r v. Triplett, 161 Va. 906, 172 S.E. 162; Moyers v. Gregory, 175 Va. 230, 7 S.E.2d 881; Thompson on Wills, 2nd Ed., sec. 160; Page on Wills, Lifetime Ed., sec. 393; 28 Cal.L. Rev. 274. The essence of the holdings in the foregoing authorities is that additions or alterations may be made in a holographic will if done in the testator's handwriting, without the necessity of resigning and redating. The old signature and date are adopted. In the case at bar we have the adoption of the old date alone, and the case is thus stronger than those discussed. There is no indication in Re Estate of Finkler, supra, or the other authorities, that the mere lapse of time between the execution of the several papers, additions or interlineations is crucial. On the contrary, the theory of those cases is contrary to such an assumption. It may be that the time element is a factor to be considered along with other things but it is not controlling where the papers remain in the possession of the testator at all times after their execution and the other circumstances here present exist. In re Estate of Hartley, 181 Cal. 469, 184 P. 950; In re Estate of Olssen, 42 Cal.App. 656, 184 P. 22, are not contrary to the rule in Re Estate of Finkler, supra. They did not have to decide the question inasmuch as they relied upon a presumption that the two writings were made at the same time.

[3] The rule of integration is applicable here, rather than the principle of incorporation by reference. As said in Re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874, 878: "* * * integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. [Cases cited.] Thus several writings, connected by sequence of thought * * * folded together * * * or physically forming one document * * * have been admitted to probate as constituting an holographic will.

* * * * * *

"In re Estate of Swendsen, supra, 43 Cal. App.2d 551, 111 P.2d 408, an holographic will was written on two separate pieces of paper, but only one of them was dated. Although the papers were not attached, and it was not apparent from looking at them that they were connected in any way, both were admitted to probate upon the testimony of two witnesses quoting the testator as declaring that the two pieces of paper constituted his will." It is to be noted that in Re Estate of Swendsen, supra, referred to with approval in Re Estate of Wunderle, supra, the facts of which have heretofore been stated, the two papers were admitted as the will of the testator because he declared it to be his will. The court discusses the authorities [43 Cal.App.2d 551, 111 P.2d 409]: "In that case [In re Estate of Olssen, 42 Cal.App. 656, 184 P. 22] the testator while in a hospital made a holographic will which he dated and signed. Below his signature he wrote another sentence and again attached his signature but did not write in the date. The reviewing court in construing the document as a single instrument held that the question 'must be determined by the circumstances under which the instrument was drawn, as revealed by the testimony in the case * * *'.

"In Re Estate of Merryfield, 167 Cal. 729, 141 P. 259, the testatrix wrote upon three separate sheets of paper but the last one only contained the elements necessary to constitute a holographic will. The three sheets of paper, which had been arranged and folded together in proper sequence, were found on the day before the death of the testatrix in a locked drawer with other papers. The court held that the three papers constituted one instrument, which was admitted as the last will of the decedent. In affirming the order of the probate court the reviewing court held that the fact that the will was made upon more than one sheet of paper was immaterial and that it was not necessary that the several detached pieces of paper be fastened together by mechanical or other device.

"In Re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149, the testator executed a holographic will and on a later date made certain interlineations therein. In holding that the interlineations should be given effect as part of the will the court at page 600 of 3 Cal.2d, at page 156 of 46 P.2d, quoted from Page on Wills, volume 1, 2d Ed., section 500, page 822: 'If witnesses are not necessary to the validity of a will, as under the ecclesiastical law, interlineations made by a testator after he has executed his will, are a part thereof; since by his act of making such interlineations, intending them to be a part of his testament, testator has re-executed his statement in such form as would have been sufficient for the original execution thereof'. * * *

"From the cases above referred to it is apparent that on the present appeal these rules are applicable; (a) The circumstances surrounding the execution of the will may be taken into consideration (In re Estate of Olssen, supra); (b) the will may be made on several pieces of paper which need not be fastened together (In re Estate of Merryfield, supra); (c) an addition to the will may be made on a date subsequent to the date on which it was signed (In re Estate of Finkler, supra); (d) the signature does not necessarily have to be at the end of the will (In re Estate of Morgan, [200 Cal. 400, 253 P. 702], supra). The application of these rules to the facts of the present case leads unerringly to the conclusion that the two pieces of paper together constitute one instrument, the last will of decedent. The writings on the two papers unquestionably are complementary to each other and together they constitute a rounded out will. When decedent wrote upon the paper bearing his signature he made a will giving all of his property to Mrs. Earnest, who was not a blood relation, and it was entirely reasonable for him to name her executrix without bond, a course usually followed by those making wills under similar circumstances. On the other hand it would have been very unreasonable for him to leave the administration of his small estate to a stranger, a public officer who would place in the public treasury the administration fees which ordinarily go to the sole beneficiary.

"In its finding that the second piece of paper was not a part of the will the probate court appears to have been influenced by the fact that the two pieces of paper were of different types and that the writing on one of the pieces was in ink while the other was in pencil. As against these physical facts we have the uncontradicted and clear cut testimony of two witnesses (found by the court to be true) that decedent at the time he requested them to act as witnesses stated that both pieces of paper constituted his will and the additional testimony of Mrs. Earnest that both pieces of paper were in the envelope which decedent gave to her with the statement that the contents of the envelope were for her and that he was giving her everything. If the two pieces of paper had been of the same kind and both had been written in ink it could not be successfully argued that they would not together constitute a single instrument and the court unquestionably would be required to receive them together as the will of decedent. The only evidence before the court establishes that decedent considered the two pieces of paper to be his will and desired that they be acted upon as such. The circumstances that the pieces of paper are of different kinds and that one of the papers bears writing in pencil are not of sufficient importance to support a ruling that the penciled paper is of no effect."

In the case at bar there are very pertinent indications that the three papers constituted the will of the testatrix and that she adopted the date of the first paper for the rest. She declared it to be her will. They were folded in proper and chronological sequence and placed in an envelope. They so remained in her possession until shortly prior to her death when, under special instructions, they were deposited elsewhere in a sealed envelope. While it may be true that, legally speaking, the first sheet constituted a complete will, yet from the standpoint of the intent of the testatrix, it was obviously not intended as her complete testatmentary act for she therein did not dispose of any of her property, the primary function of a will. On the contrary, she clearly indicated therein that such disposition was to follow and the other sheets carry out that intent. The continuity of the context is manifest. Thus we clearly have an intent that all the papers were to be considered together as one continuous and complete document. That continuity is not destroyed by the time interval between the execution of the first and second and third sheets.

In Re Estate of Wunderle, supra, and In re Estate of Keith, 173 Cal. 276, 159 P. 705, are clearly distinguishable from the case at bar. There the circumstances were not present which pointed clearly to the intent that the papers were one integrated instrument.

The order is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion reached in this case. "The authorities without exception hold that the privilege of making testamentary disposition of property is not an inherent or even a constitutional right; that it is wholly statutory; and that since the Legislature has seen fit to impose certain requirements looking to the execution of a will, compliance with these exactions is absolutely necessary to the validity of any instrument offered as a testament." In re Estate of Carpenter, 172 Cal. 268, 269, 156 P. 464, 465, L.R.A. 1916E, 498.

The rule has developed that an holographic will may be altered by an unsigned and undated interlineation in the handwriting of the decedent. In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149. There is a logical and recognized distinction between the provisions of a will made by interlineation and an addition by way of a subsequently written page or pages placed with the executed will. This distinction is not made by the majority opinion. In re Estate of Finkler, supra, there was a validly executed holographic will. Subsequently, interlineations in the hand of the testator were made *on the face of* this paper. The same situation was presented in Succession of Guiraud, 164 La. 620, 114 So. 489. The case of LaRue v. Lee, 63 W.Va. 388, 60 S.E. 388, 14 L.R.A.,N.S., 968, 129 Am.St. Rep. 978, concerned erasures and writing placed in the blank spaces of a testamentary document after it was signed. The essence of the holdings in these decisions is *not* that "additions or alterations may be made in a holographic will if done in the testator's handwriting, without the necessity of resigning and redating"; the decisions are authority upon the sole issue of interlineation and do not determine the questions presented in the Dumas case.

Logically, interlineations made after an holographic will has been executed justify a relaxation of the rules by which the validity of that kind of a will is determined. Under such circumstances, it is apparent from the *face of the instrument* that it is a complete will; the basic evidence of fraud or forgery, if any, usually is the interlineation. In the Dumas case the fact that pages two and three are in the hand of the testatrix and were placed in an envelope together does not indicate, in itself, either the absence of fraud or that the instrument is a complete one.

The majority opinion mentions that there were minute spots of greenish-blue ink on the reverse side of the third sheet. The only possible importance this fact could have is to allow an inference that this sheet was in the testatrix's presence at the time the first page was written, although the words on the third sheet were written some nine years later with black ink. But the majority opinion neglects to mention that the same spots appeared on the back of the first sheet, allowing an inference that still another page of the will was written at the same time as the first one, or later when green ink was still or again being used by the testatrix. The instrument itself gives no evidence that during the nine years after the first sheet was written and signed there was, at no time, a testamentary document of only three sheets. An essential basis for the application of the rule allowing the probate of a will with interlineations is therefore lacking, namely, an original document complete in itself to which additions thereafter were made in the hand of the testator. Under such circumstances, it is said, there is circumstantial evidence of the probability of trustworthiness.

The law requires that the court be able to determine from an examination of the instrument itself that it is the complete will of the decedent. Thus where the writing terminates with one of several dispository clauses, and there is nothing to indicate that the document was intended to be complete, probate properly is denied. In re Estate of Devlin, 198 Cal. 721, 247 P. 577, the document offered for probate ended with a dispository clause but no punctuation or signature to indicate the completion of the will. In denying probate, the court referred to In re Estate of Bernard, 197 Cal. 36, 239 P. 404, where it was held that the abrupt termination of the document near the middle of the last page was a strong indication that the decedent intended to do something more in order to make it a complete will and compelled the conclusion that decedent had no intention of adopting the name written in the opening clause as the executing signature.

The Dumas instrument is signed at the end and no problem is presented as to its termination. However, an examination of the instrument fails to indicate that the second sheet contains the first of the dispository clauses. The second sheet is merely a list of bequests. There may have been any number of others either before or after it. The only evidence that the three sheets comprise the complete will of the testatrix is that they were contained in a single envelope and the testatrix so indicated by nodding her head in reply to inquiries. In the Devlin case the document was found enclosed in an envelope upon the face of which the deceased had written: "This Envelope Contains the Late Joseph Devlin's Will * * *." Nevertheless, because the will itself did not evidence its completeness, probate was denied. In re Estate of Devlin, 198 Cal. 721, 723, 247 P. 577, 578.

The writing offered as the will of Mrs. Dumas does not negative the opportunity for fraudulent substitution or extraction. There are separate writings on separate pages with no physical guarantee against substitution or extraction. On the contrary, the presence of the ink spots on the reverse side of the first page would permit an inference that, at one time, there were other pages containing writing in green ink. It cannot be determined from the instrument itself whether, if there were such pages, they were destroyed by the testatrix or fraudulently extracted by another so that the three pages do not constitute a complete will.

The majority opinion refers to the testamentary writing considered in Re Estate of Swendsen, 43 Cal.App.2d 551, 111 P.2d 408, which was dated and signed. The second page bore neither date nor signature but the signature on the first page was affixed in the presence of two witnesses after the writing of the second page and both pages were exhibited to persons present at the time of signing. The facts do not show a completely executed will and a subsequently written addition to it. Both papers attained the status of a will at the same time, namely, on the act of signing the first of two and only two pages.

In re Estate of Hartley, 181 Cal. 469, 184 P. 950, an holographic will, dated and signed by the testator, followed by a residuary clause, likewise holographic, signed but not dated, was admitted to probate as a single instrument upon the presumption that both portions of the instrument were executed at the same time. The point made on contest was that the residuary clause was a codicil, and not being separately dated was void. The court quoted with approval from Lagrave v. Merle, 5 La.Ann. 278, 281, 52 Am.Dec. 589, the following language: "Where an olographic testament contains several dispositions, of which the first one, at the same time dated and signed, and the second are only signed by the testator, are the latter null for want of date? They are; provided that from the manner those clauses are conceived and placed, they cannot be considered to have been written immediately after the first, and on the same date that the first was written." In the Dumas case the second and third pages were written nine years after the first was dated and signed. Not only is Lagrave v. Merle directly in point, but it is significant to note that the holographic will, as a distinct type, originated at French law and was expressly provided for in the Code Napoleon. This provision, in substantially the same form, was carried over into the Louisiana Civil Code. See Page on Wills, vol. 1, Lifetime ed., sec. 384, p. 694.

The case of Estate of Skerrett, 67 Cal. 585, 8 P. 181, involved two papers. The first was a deed of gift and the second a letter referring to the first. There was no intimation that the two parts were not written at the same time. In re Estate of Merryfield, 167 Cal. 729, 141 P. 259, was concerned with three separate sheets, only the last of which was dated and signed. But in this case too, there is no basis for an inference that the instruments were not executed either at the same time or at least closely enough together in point of time to be considered a continuous act.

There was presented to the court in Re Estate of Olssen, 42 Cal.App. 656, 184 P. 22, one paper upon which were written what appeared to be two separate wills, one of which was not dated. Although it was construed as one continuous instrument, the court was careful to point out that the facts justified the conclusion of the trial court that the document was all written at one time and, therefore, was to be construed as a single instrument. In another case, In re Estate of Taylor, 126 Cal. 97, 58 P. 454, the contention of the appellant was that the closing clause of the document should be regarded as an undated codicil. The court determined that from a consideration of the facts the trial court was justified in concluding that the instrument was written all at one time and thus was to be construed as a single instrument. The will admitted to probate in Re Estate of Henderson, 196 Cal. 623, 238 P. 938, consisted of two parts on the same sheet. The court found that both parts were written on the same day.

Throughout the opinions in these cases is the conscious awareness of the importance to be attached to the relative times at which the various documents were written. Each decision shows that reliance was placed upon facts which indicated the combined writings represented a continuous testamentary act by way of time as well as content. In the Dumas writing, although there is no evidence of fraud, the three pages, taken together do not, in themselves, refute the possibility of fraud. Extrinsic evidence alone must be relied upon. This absence of a physical guarantee against fraud is the decisive factor requiring that the rule allowing interlineations in holographic wills should not be applied to the Dumas document.

For these reasons, I would reverse the order of the probate court admitting the writing to probate as the will of Mrs. Dumas.

94 Cal.App.2d 356

JOLIN et al. v. SPIRA et al.

Civ. 17103.

District Court of Appeal, Second District,
Division 1, California.

Oct. 31, 1949.

Hearing Denied Dec. 29, 1949.

Action by William J. Jolin and another against John Spira and others to recover damages for removal of termite infestation in property purchased by plaintiffs under escrow instructions providing for termite clearance.

Defendants recovered judgment in the Superior Court of the County of Los Angeles, David Coleman, J., and plaintiffs appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment, holding that plaintiffs waived right to strict compliance with the escrow instructions by accepting a document denominated "termite clearance".

Doran, J., dissented.

1. Appeal and error ⚷994(3), 1012(1)

Weight of evidence and credibility of witnesses are questions for trial court, and determination thereof is binding on an appellate court.

2. Escrows ⚷9

Nonperformance of conditions set up in escrow instructions may be waived by the party entitled to demand performance, and failure to perform within specified time may be waived.

3. Estoppel ⚷52

A "waiver" is the intentional relinquishment of a known right or such conduct as warrants an inference of relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Waiver".

4. Estoppel ⚷52

One may waive a right given by contract or advantage of law intended for his benefit. Civ.Code, § 3513.

5. Estoppel ⚷119

Whether there has been a waiver is ordinarily a question of fact.

6. Escrows ⚷9

Vendor and purchaser ⚷343(1)

Where escrow instruction conditioned sale of realty on termite clearance showing property free of infestation and escrow agents submitted and purchaser accepted a document denominated "termite clearance" but which was executed a year before, and purchaser failed to inspect the premises to determine termite infestation or to notify defendants thereof within time specified in the document, purchaser waived right to recover damages in removing termite infestation.

Henry C. Rohr, Los Angeles, for appellants.

Loris V. Cady, Los Angeles, for corporate respondent.

Jacob W. Silverman, Los Angeles, for individual respondents.

DRAPEAU, Justice.

On January 17, 1946, plaintiffs as buyers, the individual defendants as sellers and the corporate defendant as escrow agent, negotiated the sale of real estate by means of escrow instructions, one of the conditions made therein by the buyers being: "Hold for me termite clearance showing the property free and clear of infestation."

During the pendency of the escrow, the escrow agent submitted to plaintiff Wm. J. Jolin a document dated February 18, 1945, denominated "Termite Clearance," executed by Atlas Termite Service, addressed to Howard G. Golay Realty Company, the broker handling the instant transaction, which recited as follows: "This is to certify that we have treated the above property for the eradication of dry wood and subterranean termites. This control service is for a period of two years with a semi-annual inspection."

While this document specifies property at a different address, it was established by testimony given in behalf of said termite company that the clearance covered the property which is the subject of this litigation.

This certificate was handed to plaintiff Wm. J. Jolin by an officer of the escrow company, who testified: "I told him this was the report that was on the property and it was a year old at the time it was handed to him, and that it was a two-year guarantee and for him to approve it—or examine it and approve it. * * * It was in the old escrow file wherein Mr. Spira and Mr. Grimm had purchased the property." In explanation, this witness testified that in checking the file and getting ready to close the escrow, she found that no termite clearance had been filed; that Mr. Golay, the broker, told her to take the clearance filed in escrow at the time of the sale of the property to Messrs.

Spira and Grimm the year before. When asked why she cleared this document in connection with the instant transaction, this witness replied: "Because it was approved by the buyer as satisfactory."

Defendant Othmar Grimm testified that "I told Mr. Golay we should give any inspection Mr. Jolin wants, and Mr. Golay said, 'The termite inspection is not necessary because the certificate on hand is satisfactory to Mr. Jolin. He doesn't want a termite inspection, a new one, because the certificate and services are paid in advance for two years. Therefore, he wants to have this certificate transferred.'"

With respect to the document here under review, Mr. Jolin testified that Miss Vybiral, the escrow clerk, "showed me the certificate and I read it and I asked her to see if that certificate was all right and she said yes"; that he did not call for any further certificate "Because I depended on the Wilshire Escrow Department. I thought they were supposed to take care of that thing. I was paying them to take care of it, to clear the property for me"; that he read the document but did not see that it was dated the year before, or that it ran for two years with semiannual inspection; that he read the body of this and handed it to Miss Vybiral and asked her to see if this was a good clearance, and she said it was all right. In answer to the question by Mr. Silverman, "Did you ever avail yourself of the six-month inspection that is set out in that instrument?" this witness stated: "That was impossible, because when you called the Atlas Company there was never anybody there. They wouldn't come if you called them."

The escrow was closed and title passed to the buyers in February, 1946. In November of that year, evidence of infestation by termites became apparent and Mr. Jolin attempted to reach the Atlas Termite Company without success; he did nothing further about the termites, because "I was not prepared to do anything at the time and I just let it go for the time being to see what would develop"; that he did not notify or get in touch with the sellers or the escrow company at that time, although he talked to Mr. Golay, the real estate broker.

In February of 1947, termites were again observed in the buildings and plaintiffs again unsuccessfully tried to reach the Atlas Company. They then called upon the Terminex Company to make an inspection and report which showed the premises were heavily infested with fungus, dry wood and subterranean termites and that such condition had existed over a period of from four to ten years. Plaintiffs hired Terminex Company to eradicate the infestation and repair the buildings at a cost of $4402. Later it was necessary to paint part of the buildings at an additional cost of $500.

The court found among other things that the property was infested with termites at the time it was conveyed to plaintiffs; that it is not true that the sellers knew or had reason to know that that the premises were infested; that at the time of closing of escrow and at all times, excepting November, 1946, plaintiffs failed to make any investigation of the premises to determine whether there was any termite infestation; that because of plaintiffs' failure to notify defendants that there was infestation defendants' rights have been impaired and prejudiced; that plaintiffs read the document designated termite clearance, failed to object to it or to ask for a better document or certificate, and fully accepted the same; that plaintiffs expended the sum of $4902.60 "for extermination of later discovered infestation and for structural repairs incident thereto"; that plaintiffs have not been damaged by reason of any failure or breaches by any of the defendants.

Based thereon, the court concluded that plaintiffs by their acts had waived any right to recovery from defendants; were estopped from making any claims against defendants, and therefore were not entitled to recover.

From the judgment which followed in favor of defendants, plaintiffs have appealed.

The basic question presented on this appeal is whether the evidence is sufficient to sustain the trial court's finding that appellants waived their right to a strict compliance with the terms of the escrow agreement by their acceptance and approval of the document here under review.

As above pointed out, there is a direct conflict in the evidence regarding the circumstances under which appellants approved the document:

They claim they accepted it upon the advice of the escrow agent.

The escrow agent denies that any advice was given; that when she handed the so-called termite clearance to Mr. Jolin she told him that "it was a year old but there was a two-year guarantee on it, and for him to check it and, if it was satisfactory, to approve it and tell me it was approved, which he did." This witness also testified that when she handed him the report, she also handed him for his approval the bill of sale, inventory and insurance policies as provided in the escrow, and that Mr. Jolin approved these papers also; that he was anxious to get the escrow closed, as he said he was going East; told her that everything was satisfactory and to go ahead and close the escrow.

[1] It is elementary that the weight of the evidence and the credibility of witnesses are questions for the trial court, and its determination thereof is binding on an appellate court.

[2] Nonperformance of conditions set up in escrow instructions "may be waived by the party who is entitled to demand performance. Failure to perform within the specified time may be waived, and indeed a party may waive any condition * * *." 5 Cal.Jur.Supp. (1944 Rev.) pp. 576–7, Escrows, sec. 14; and see, also, 19 Am.Jur. 438, sec. 20, and 130 Am.St.Rep. 951.

[3] A waiver is defined in Bastanchury v. Times-Mirror Co., 68 Cal.App.2d 217, 240, 156 P.2d 488, 500, as "the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive. Davis v. Brinkhouse Hotel Co., 74 Colo. 199, 219 P. 1074; Johnson v. De Waard, 113 Cal.App. 417, 298 P. 92.

[4] "The rule is clearly stated in Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 349, 286 P. 165, 1071, that one may waive a right given by contract or advantage of law intended for his benefit. See, also, Civ. Code, sec. 3513."

[5] Whether there has been a waiver is ordinarily a question of fact. Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173, citing 25 Cal.Jur. 932.

[6] The circumstances disclosed by the record herein are amply sufficient to raise the inference that appellants waived their right to a strict compliance with the escrow instructions when they accepted the document here in question.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

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94 Cal.App.2d 334

FRYMIRE v. BROWN.

UPPER LAKE UNION HIGH SCHOOL DIST. v. FRYMIRE.

Civ. 7662.

District Court of Appeal, Third District, California.

Oct. 28, 1949.

Hearing Denied Dec. 22, 1949.

Goldsmith Frymire sued Leonard W. Brown for an accounting for certain personalty and moneys and to recover separate parcels of realty, and Upper Lake Union High School District intervened.

The Superior Court, Lake County, Ben R. Ragain, J., rendered judgment for the plaintiff, and defendant and intervenor appealed.

The District Court of Appeal, Adams, P. J., affirmed the judgment and held that the evidence sustained the finding that realty conveyed to defendant by plaintiff's wife prior to her death was community property and that defendant failed to rebut a presumption of fraud and undue influence.

1. **Husband and wife 🔑264**

Evidence that husband and wife used joint earnings to acquire realty for purpose of making a home for themselves in their old age established that property was community property notwithstanding realty stood in name of wife alone.

2. **Husband and wife 🔑259**

Property received by wife from her father's estate during marriage in payment for services rendered by her in caring for father during his illness pursuant to agreement made by her father that she should be so paid, constituted community property.

3. **Husband and wife 🔑264**

Fact that certain realty stood in name of wife alone was not conclusive as to whether property was separate property of wife or whether it was community property of spouses.

4. **Husband and wife 🔑264, 266**

That separate property of either or both spouses may be transmuted into community property without necessity of any written agreement and intention of parties that property held in name of one or other is to be considered as community property may be shown by circumstantial as well as direct evidence.

5. **Husband and wife 🔑273(1)**
Trusts 🔑101

Where agent of wife took title to realty purchased with community funds of husband and wife, agent held title to realty in trust for wife and on wife's death realty belonged to husband. Civ.Code, § 853.

6. **Husband and wife 🔑273(1)**
Principal and agent 🔑78(4)

Where trusted agent of wife who had entire management and control of farm property paid no consideration for realty conveyed to him which had previously been acquired by wife with community funds, presumption of fraud and undue influence arose, and husband on wife's death was entitled to land so conveyed on agent's failure to rebut presumption.

7. **Evidence 🔑77(1)**

Where defendant failed to call material witnesses to testify in his behalf, presumption arose that had he called them they would have given testimony unfavorable to him. Code Civ.Proc. § 1963, subd. 5.

8. **Partnership 🔑53**

Evidence sustained finding that partnership between agent and wife did not exist with respect to farming operations so that agent was not entitled to one-half of profits from such operation.

9. **Evidence 🔑591**
Witnesses 🔑323, 400(2)

Party has a right to rebut or impeach testimony of a witness called under statute providing for examination of an adverse witness but such testimony would be as binding on party as any other testimony. Code Civ.Proc. § 2055.

◆

Everett H. Roan, San Francisco, for appellant.

Nichols, Richard, Allard & Williams, Oakland, by Jesse E. Nichols and Joseph Landisman, Oakland, H. G. Crawford, Lakeport, for respondent.

ADAMS, Presiding Justice.

This is an appeal by Leonard W. Brown and Upper Lake Union High School District for a judgment in favor of plaintiff Frymire in three separate actions filed by him, and on the issues raised by the school district in a complaint in intervention which it filed, all of which were by stipulation consolidated for trial and tried together, but one set of findings and one judgment having been filed.

Plaintiff's actions were brought to recover from Brown four separate parcels of property in Lake County and for an accounting for certain personal property and moneys. The school district, in a complaint in intervention, claimed title to some of the parcels of real estate, which had been conveyed to it by Brown after the death of Mrs. Frymire.

The four parcels of real property were claimed by plaintiff, the surviving husband of Celia H. Frymire, deceased, as community property of the spouses, and are referred to as the Elmer Dewell tract of about 10 acres, deeded to Mrs. Frymire on November 10, 1930, the John Dewell tract of about 10 acres deeded to Mrs. Frymire on December 2, 1930, the "Town House," consisting of a dwelling and about one acre of ground at Upper Lake which had been distributed to Mrs. Frymire by the decree of distribution in her father's estate about September 7, 1945, and the Carter parcel of about 9 acres conveyed to Brown on October 23, 1942.

The evidence in the case shows that the Frymires were married March 15, 1923, and continued to be husband and wife until Mrs. Frymire's death April 1, 1947. At the time of their marriage neither had any substantial sum of money but both were employed. Their earnings were thereafter commingled and applied to their common support and acquisitions. Out of such community funds they purchased the two Dewell parcels of land. The so-called town house was devised to Mrs. Frymire by her father in execution of an agreement that it should go to Mr. and Mrs. Frymire in payment for services rendered by Mrs. Frymire to her father in caring for him during the last eight years of his life.

For some years after their marriage the Frymires lived in Westwood, Lassen County, where both were employed, he as a storekeeper and she as a graduate nurse. In February, 1930, Mr. Frymire went to work in Pittsburg, Contra Costa County, where he worked continuously until he reached retirement age in 1947. When the parties left Westwood Mrs. Frymire's father, who was old and ailing, asked his daughter to come to Upper Lake to take care of him in his home there, which she did, it being agreed that for her services she should have said home on her father's death.

The spouses continued to see one another and continued their relationship as husband and wife, and after the death of Mrs. Frymire's father the Frymires bought a home in Pittsburg, where they resided for a time. For convenience they maintained a bank account in Pittsburg called the house account, upon which Mrs. Frymire alone drew checks, Mr. Frymire maintaining another account in his own name. Mr. Frymire, out of his earnings and from sale of some bonds, kept the house account supplied, and therefrom his wife paid insurance premiums for both of them. Also, Mr. Frymire paid large doctor's bills for his wife, as she was in poor health.

Before leaving Westwood they had discussed the purchase of the Dewell tracts, which belonged to two of Mrs. Frymire's uncles, and some adjoining land for a home for them when Mr. Frymire retired. They did not have sufficient money for these purchases, so $1700 was borrowed from Mrs. Frymire's sister and brother-in-law. This loan was ultimately paid off by 1940 as Mr. Frymire turned into their common pool his earnings and the proceeds of bonds owned by him before his marriage, while Mrs. Frymire put in a service bonus received by her because of her services as an overseas nurse in World War I, the proceeds of her matured life insurance policy, and some of her earnings as a nurse. While the Dewell tracts were deeded to Mrs. Frymire alone, she always referred to them as "our property," and plans were drawn by her for a home for her and her husband which was to be built thereon, it being planned that the Pittsburg home and the town house should be sold.

From sometime in 1941 to the date of Mrs. Frymire's death in April, 1947, defendant Brown was employed to farm the lands in Lake County belonging to the Frymires, and while the latter maintained the home in Pittsburg, the supervision of the property in Lake County was left to Mrs. Frymire who made frequent trips there and improved the buildings thereon with community money. During the years that Brown was employed on the property he became the trusted agent of the Frymires and gradually took over the entire management and control of the properties, harvesting and selling the crops and keeping under his control the proceeds therefrom. Mrs. Frymire's health gradually declined, and on March 24, 1947, when her death seemed imminent, she signed three deeds purporting to convey to Brown the two Dewell tracts and the property which she had received from her father. She died in the Lake County home but one week later, whereupon Brown, without notifying Mr. Frymire of his wife's death, shipped her body to an undertaker in Ukiah who notified Mr. Frymire of her death. Brown also withdrew from the joint account the balance of $5,738.19 and redeposited it in his own name, without advising Mr. Frymire.

Regarding the Carter property the evidence shows that Brown acquired title to it on October 23, 1942, but he admitted that he paid for same with moneys advanced by Mrs. Frymire which he drew from the joint account maintained in his name and that of Mrs. Frymire to facilitate farming operations, and which had been opened with community funds belonging to Mr. and Mrs. Frymire and in which Mrs. Frymire had deposited money from an account she had in the Crocker National Bank in San Francisco. Brown admitted that this property was bought with Mrs. Frymire's money and that he did not earn any part of the $1600 paid for it.

Mr. Frymire testified that he and Mrs. Frymire had, in January and February, 1942, talked about buying the Carter tract which adjoined the Dewell tracts; that he had questioned their financial ability to buy it, but Mrs. Frymire had urged that they had almost enough money in the bank; and that later that year, when he was visiting with her at Upper Lake, he told her to go ahead and buy it.

In respect to the three deeds conveying the Dewell tracts and the town house to Brown, the latter testified that about ten days before her death Mrs. Frymire asked him to have a Mr. Glassgow (a notary public) and Doctor Beil, her physician, and one Jack Dodge come to her house as she wanted to fix up her business and wanted them to witness some deeds. The day after the deeds were executed they were recorded by Dodge who instructed the recorder to mail them to Mrs. Frymire, which was done. But she died before they reached her, and they were turned over to Mr. Frymire. They were never in Brown's possession, and he admitted that he had never seen them until they were produced at the trial. It is undisputed that he gave no consideration whatever for any of them.

The trial court found in favor of plaintiff on all issues and by its judgment declared void the three deeds executed by Mrs. Frymire to Brown, decreed that plaintiff was the owner of all four of the parcels of real property, and ordered their conveyance to him. It also decreed that Mr. Frymire was the owner and entitled to the possession of an automobile, a Ford truck, tools, farming equipment and machinery, which were on the Dewell tracts, and a balance of $2502.17 on deposit in the Bank of Upper Lake, and that he have judgment against Brown for the additional sum of $936.02. This judgment was based upon its findings that the properties involved were community property of plaintiff and his deceased wife.

[1, 2] On this appeal Brown's first contention is that the court erred in finding that the property was community property. However, we are satisfied that the record reveals ample evidence to sustain this finding. It shows that the Frymires were husband and wife during all of the time that the properties were being acquired, and that their joint earnings were the source of the funds with which the Dewell and Carter properties were purchased; that the purchases were made for the purpose of making a home for them in their old age, and were always referred to by Mrs. Frymire as "our property," and that she never referred to them or claimed them as her separate property. The evidence also supports the conclusion that the property which Mrs. Frymire received from her father's estate was left to her in payment for services rendered by her in caring for her father during his last eight years, and pursuant to the agreement made by her father that she should be so paid. This property, then, represented the earnings of Mrs. Frymire during the marriage, and was properly considered as community property. Mr. and Mrs. Frymire filed joint income tax returns in which they reported all income as community income. The marriage of the spouses was apparently a happy one, and while they did not, at all times, live in the same household, they visited one another, and to the very last maintained the relationship of husband

and wife, their failure to live together at all times being due to the necessities of their respective obligations which required that, for their common good, Mr. Frymire remain in Pittsburg where he was employed, and that Mrs. Frymire spend her time on the property which had been acquired for their future home; and also because her health was not good, and Lake County was better for her than Pittsburg.

[3,4] While the Dewell tracts and the former home of Mrs. Frymire's father stood in her name alone, it is well established that such a fact is not conclusive as to whether or not property is the separate property of the holder of the legal title, or is community property; that the separate property of either or both spouses may be transmuted into community property without the necessity of any written agreement; and that the intention of the parties that property held in the name of the one or the other is to be considered as community property, may be shown by circumstantial as well as direct evidence. In re Estate of Sill, 121 Cal.App. 202, 204, 9 P.2d 243; Williamson v. Kinney, 52 Cal.App.2d 98, 102, 125 P.2d 920; Opp v. Frye, 70 Cal. App.2d 478, 486, 161 P.2d 235.

[5] As for the finding that the Carter property was community property, Brown admitted that he did not pay for it with his own money, and that Mrs. Frymire deposited in their joint farming account the moneys with which it was purchased. He also admitted that he did not earn any part of the moneys paid for it. Mr. Frymire testified that he and his wife had conferred regarding acquisition of this parcel (which adjoined the Dewell property) when he was on a visit to her at Upper Lake, and they finally agreed that she should buy it and allow a debt which they owed to her father's estate to "ride" longer. Brown having admitted that he bought this property with Mrs. Frymire's money, became, perforce, her trustee of same, Kinert v. Wright, 81 Cal.App.2d 919, 924, 185 P.2d 364; Civ.Code, sec. 853, and cannot claim ownership in himself.

[6] Regarding the three deeds which Mrs. Frymire executed just prior to her death, the trial court found that during the five and one-half years that Brown was employed to farm the lands in controversy, he became and was the trusted agent and servant of Mr. and Mrs. Frymire; that he gradually took over the entire management and control of the properties, harvesting and seeding the crops and keeping under his control the proceeds therefrom; that as Mrs. Frymire's health declined she became weak in mind and body, and Brown frequently administered to her needs at Upper Lake; that he knew, at the time the deeds were signed, that her death was imminent; that because of his status as trusted agent of the Frymires and the admitted fact that he gave no consideration whatsoever for the lands described in the deeds, a presumption of fraud and undue influence arose; that Brown failed to rebut this presumption, and that to defraud Mr. Frymire of his right, title and interest, and his right of inheritance, he procured and induced Mrs. Frymire to sign the three deeds; that the deeds were never delivered to Brown; and that Mrs. Frymire acted without independent advice of any kind, and but for Brown's influence would not have signed the deeds. It was also found that Brown kept no books of account, or accounts of his receipts or disbursements, commingled all of the receipts from sale of crops with other funds held and used by him, in such manner that it was impossible to trace them.

[7] While Brown testified that Mrs. Frymire asked him to have a notary, and her doctor, Beil, and Jack Dodge come to her home and witness some deeds, and there is no direct evidence that he did so, the inference is that he did. Brown failed to call any of these parties to testify in his behalf, and the presumption arose that had he called them they would have given testimony unfavorable to him. Code Civ.Proc. sec. 1963(5).

[8] Brown testified that there was an agreement between him and Mrs. Frymire that the profits of the farming operations were to be divided between them equally, and that they, therefore, became partners. But his manner of handling the affairs

contradicts such a contention, and the trial court's finding to the contrary is fully sustained by the evidence. Even a partnership between them would not have justified his assumption of ownership of all of the property upon her death. Furthermore, no partnership income was ever reported by Brown or claimed to Mr. Hildebrand who made out his income tax returns for the years 1942–1947, inclusive. Appellant admitted that with money from the joint bank account he bought livestock which he later sold, and once bought a piece of real property for which he paid $900 out of the joint funds, and that he later sold it for $1600, but did not return either the $900 taken out or the profit to such bank account, or account to Mrs. Frymire for same. Such conduct negatives any claim of a partnership relation between the parties. He also admitted that he had paid his living expenses, dentist's bills, lodge dues, etc., from the joint account.

It is further argued by appellant that the trial court erroneously ruled that defendant would be bound by the testimony of plaintiff if said plaintiff were called by defendant under section 2055 of the Code of Civil Procedure. The record shows that at the conclusion of the direct examination of plaintiff on his testimony on his own behalf, there was a colloquy between the court and one of the defendant's attorneys regarding the extent to which plaintiff could then be cross-examined and defendant's rights, were the witness called as an adverse witness, during which defendant's counsel apparently took the position that his client would not be bound by testimony which was elicited from plaintiff called under section 2055. The court disagreed with this contention, stating that a party has a right to rebut or impeach the testimony of a witness called under that section, but that his testimony was binding upon the party as any other testimony in the case. The court then advised said counsel to proceed in the orderly way, and cross-examine plaintiff, saying that the court would follow the usual procedure; and that at the close of testimony for plaintiff defendant might call said witness under section 2055, if he so desired.

[9] Defendant's counsel then cross-examined plaintiff exhaustively and at length. Subsequently said counsel stated that he did not care to call Mr. Frymire as an adverse witness. We think that appellant, in construing the words of section 2055, that "The party calling such adverse witness shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence", as meaning that should such witness give testimony unfavorable to the party calling him, the trier of the facts, whether judge or jury, could not consider such testimony was in error. We do not so construe it. The section itself explains its meaning when it provides that the party calling such witness may rebut such testimony; but it does not provide that the testimony so given is not to be considered as testimony in the case. In Balasco v. Chick, 84 Cal.App.2d 802, 808, 192 P.2d 76, 79, hearing in Supreme Court denied, the court said: "Undoubtedly, it is true that any party to a lawsuit may call an adverse witness without being bound by the testimony of that witness, but 'this testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or if the case is before a jury, by the jury.' Smellie v. Southern Pacific Co., 212 Cal. 540, 559, 299 P. 529, 537. The jury in the instant case was therefore justified in considering the evidence of the defendant called under section 2055 of the Code of Civil Procedure, as merely creating a conflict with testimony in contradiction thereof, to pass upon the weight of such evidence, and if believed by them, to predicate a verdict thereon." Also see Joseph v. Vogt, 35 Cal.App.2d 439, 441, 95 P.2d 947, and cases there cited.

We find no reversible error, therefore the judgment is affirmed.

PEEK and THOMPSON, J., concur.

94 Cal.App.2d 373

DOWNEY v. BAY CITIES TRANSIT CO. et al.

Civ. 16992.

District Court of Appeal, Second District, Division 2, California.

Nov. 1, 1949.

Wayne Downey sued Bay Cities Transit Company, a corporation, and Don Zachary Brady, for injuries resulting from a collision between plaintiff's automobile and a bus driven by defendant Brady and owned by defendant corporation.

The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment for plaintiff and defendants appealed.

The District Court of Appeal, McCombs, J., affirmed the judgment, holding that whether trial court committed prejudicial error in adding a paragraph to an instruction requested by plaintiff would not be considered, and that rulings are of trial court on evidence were not prejudicial to defendants.

1. Appeal and error ⟹699(4)

Whether trial court committed prejudicial error in adding a paragraph to an instruction requested by plaintiff would not be considered on defendants' appeal where record failed to disclose at whose request the complained of addition was made, so as to give rise to presumption that it was made at defendants' request,

2. Appeal and error ⟹1170(7)

In action for injuries arising from collision at intersection between plaintiff's automobile and bus driven by one defendant and owned by another defendant, any error in permitting defendant bus driver to be interrogated by plaintiff relative to the manner in which he drove bus for several blocks prior to time bus entered intersection was cured where the questions were all answered favorably to defendants. Const. art. 6, § 4½.

3. Appeal and error ⟹1053(2)

In action for injuries arising from collision at intersection between plaintiff's automobile and bus driven by one defendant and owned by another defendant, testimony that conduct of driver of bus was reckless to witness because witness had been to the doctor, was not prejudicial to defendants where court on motion of defendants' counsel struck the testimony from the record and instructed jury to disregard it. Const. art. 6, § 4½.

Bauder, Veatch & W. I. Gilbert, Los Angeles, by W. I. Gilbert, Los Angeles, for appellants.

Elbert E. Hensley, Los Angeles, by P. T. Howe, Los Angeles, for respondent.

McCOMB, Justice.

From a Judgment in favor of plaintiff after trial before a jury in an action to recover damages for injuries resulting from a collision between a vehicle driven by plaintiff and a bus driven by defendant Brady and owned by defendant Bay Cities Transit Company, defendants appeal.

FACTS: On October 7, 1947, plaintiff was driving his car at about 15 miles per hour in a northerly direction on Fourth Street near its intersection with Broadway in the City of Santa Monica. At the same time defendants were operating a bus at about 7 miles per hour in a southerly direction on Fourth Street and made a quick turn in an easterly direction on Broadway, striking plaintiff's automobile with resulting injuries to plaintiff. At the time the driver of defendants' bus turned east onto Broadway the driver was talking to a passenger in the bus and looking to the west.

QUESTIONS: First: *Did the trial court commit prejudicial error in adding the last paragraph to the following instruction which had been requested by plaintiff?*

"If you should find from the evidence that the traffic controlling signal device, controlling north and south traffic at the intersection of 4th and Broadway Streets, changed from 'go' to 'stop' just as either vehicle involved in this accident was entering the intersection, or when it was so close that to stop immediately would be futile, then I instruct you under such circumstances no duty was imposed upon either driver to bring their vehicle to a stop in response to such signal, but they might, still exercising due care under all of the circumstances, proceed on into the intersection in an endeavor to cross the same.

"However, when danger is apparent to him or would be apparent to him, or would be apparent to a person of ordinary prudence in the same situation, he is not excused from exercising ordinary care to avoid a collision, even though the danger is created by one who enters or appears about to enter the intersection against a stop signal."

[1] This question will not be considered for the reason that the rule is established that in the absence of a contrary showing in the record it is presumed upon appeal that an instruction was given at the request of appellant (in this case defendants).* (Deevy v. Tassi, 21 Cal.2d 109, 124, 130 P.2d 389; Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 216, 89 P.2d 453.)

In the present case examination of the record fails to disclose at whose request the last paragraph in the foregoing instruction was given. Therefore the above stated rule is applicable. It will be presumed that the instruction was given at the request of defendants.

Second: *Did the trial court commit prejudicial error in permitting defendant Brady to be interrogated relative to the manner in which he was driving the bus for several blocks prior to the time it entered the intersection where the accident occurred?*

[2] An examination of the record shows that each question asked of said defendant was answered by him in a manner favorable to defendants. Therefore any error in the asking of the questions was cured since the answers were not prejudicial to defendants. (Scragg v. Sallee, 24 Cal.App. 133, 141, 140 P. 706; Art. VI, Sec. 4½, Constitution, State of Calif.)

[3] Third: *Was is prejudicial error for the witness Fournier to testify relative to the conduct of the driver of the bus: "To me it was reckless because I had been to the doctor"?*

This testimony, though erroneous, was not prejudicial to defendants since upon motion of defendants' counsel the court struck the answer from the record and instructed the jury to disregard it.

Fourth: *Did plaintiff's attorney commit prejudicial error in examining defendant Brady and the witness Fournier relative to the conduct of the driver prior to the time the bus entered the intersection where the accident occurred?*

This question must be answered in the negative in view of the discussion hereinabove set forth under questions 2 and 3.

Affirmed.

MOORE, P. J., concurs.

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94 Cal.App.2d 348

WILLIAMS et al. v. PALMER et al.

Civ. 16924.

District Court of Appeal, Second District,
Division 1, California.
Oct. 31, 1949.

Action by George Williams and Lucy G. Williams against Leroy O. Palmer and another, to quiet title and foreclose an installment contract for the sale of realty because of the alleged failure of defendant to make payment as required. Defendants by cross-complaint sought affirmative relief.

The Superior Court, Los Angeles County, Charles Newell Carns, J., entered judgment that plaintiffs take nothing, that they remove certain clouds existing on the title to the property, and that they convey the property to the defendants and cross-complainants together with a certificate of title on payment by the defendants of the balance remaining due and the plaintiffs appealed.

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* At the time of the oral argument plaintiff (respondent) stated in open court that the modification of the instruction in question was made at the request of defendants (appellants), which statement was not denied by defendants.

The District Court of Appeal, White, P. J., held that the plaintiffs were tendered the full amount of the purchase price and consented that the funds remain in escrow to be paid to them on their compliance with the agreement by delivery of a special sufficient deed and certificate of title to defendants and that under such circumstances there could be no forfeiture and affirmed the judgment.

1. Quieting title ⚷44(3)
Vendor and purchaser ⚷299(3)

In action by vendors to quiet title and foreclose realty instalment contract, evidence sustained finding that vendors waived any breach and that defendants tendered balance of purchase price with accrued interest but vendors failed to deliver a certificate of title or a deed.

2. Vendor and purchaser ⚷142

Where vendors were unable to deliver good title they could not put purchaser in default.

3. Quieting title ⚷44(3)
Vendor and purchaser ⚷299(3)

In action by vendors to quiet title and foreclose realty instalment contract, evidence supported trial court's finding that vendors waived purchaser's alleged breach of covenant against assignment by accepting payments after knowledge thereof for eight months and by advising purchaser that he need not make monthly payments after balance due on contract had been deposited in escrow.

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John F. Poole, George D. Higgins, Los Angeles, for appellants.

Zeutzius & Steffes, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs, vendors in an installment contract for the sale of real estate, brought an action to "quiet title and foreclose contract" because of the asserted failure of defendants to make the installment payments as required. Defendants by cross-complaint sought affirmative relief. After trial without a jury, judgment was entered that plaintiffs take nothing, that they remove certain clouds existing upon the title to the property in question, and that they convey the property to the defendants and cross-complainants, together with a certificate of title, upon payment by the defendants of the sum of $1,326.81. From such judgment plaintiffs appeal.

Appellants set forth as "points to be determined" the following:

"First: Is it in the power of the Courts to make a new contract for the plaintiff herein, Williams, with a Mr. and Mrs. Jensen, with whom plaintiffs had no contractual relations, or in fact any dealings of any kind or nature? * * * Second: Where under the terms of the contract of sale at the termination thereof the vendor is given time to clear up any bonds, liens, or any other encumbrances on the property, can the Court declare nonperformance on vendors' part until such time has been given to make said clearances especially if the purchaser is long delinquent in his payments and refuses to make further payments? * * * Third: Can a purchaser of real property, deliberately sell the same property to another at a large profit to himself, with much larger monthly payments received than he pays to his vendor, and sit back and deliberately refuse to make any further payments to his vendor, because his vendee refuses or neglects to make further payments to him? * * *."

Appellants further assert that the evidence does not support the findings, and that the court erred in holding that there had been no forfeiture.

None of appellants' contentions is well founded, as the following resume of the facts will show.

On October 30, 1941, plaintiffs entered into a written agreement for the sale to defendants of real property in Los Angeles for the sum of $1,900.00, payable at the rate of $20.00 or more per month. The agreement contained a provision against assignment by the buyers without written consent of the sellers. It further provided that "* * * the Seller, on receiving the full payments at the times and in the manner above mentioned, agrees to deliver a certificate of title showing the title to be vested in Buyer and to execute and deliver to the Buyer or his assigns, a good and sufficient deed of grant, bargain and sale." Payments were duly made under the contract to and including July 10, 1945, at which time there remained an unpaid balance of $1,325.83.

On June 1, 1943, defendants entered into a written agreement with Mr. and Mrs. Jensen to sell them the property on installment payments of $30 per month. In July, 1945, an escrow was opened by defendants and the Jensens at the Los Angeles Escrow Company. Before the escrow was opened, Mr. Palmer had a telephone conversation with Mr. Williams, in which he told Williams that Mrs. Jensen was going to borrow enough money to pay off Mr. and Mrs. Williams in full, and that she would deposit the funds with the escrow company to hold until such time as the Williams' could produce title and deed. Palmer further testified: "And I asked Mr. Williams if that would be all right and he says, 'Now, Lee, you do just as you like on that, it is immaterial to me'."

On July 24, 1945, the sum of $1,800.00 was deposited in the escrow with instructions to pay plaintiffs in full upon their conveying a free and clear title to the property. This sum was still on deposit at the time of trial. Two or three days after the deposit had been made, Palmer called Williams and told him that there was enough money deposited with the escrow company to pay off both of them. Palmer then asked Williams if he wanted him to make the monthly payments to him, or whether it would be all right to let the money stay in escrow until Williams could produce title and a deed, at which time all the money would come through. Williams replied, "It really doesn't make any difference, it is immaterial; you do as you like." This conversation was denied by Williams, but this conflict was resolved against him by the trier of fact. No notice of cancellation of the agreement or demand for monthly payments was made by plaintiffs from July, 1945, until April, 1946.

After the opening of the escrow, a preliminary title report showed several clouds upon the title to the property, some of which had not been removed up to the time of trial of the action. Palmer thereafter had several conversations with Williams asking him about the title to the property, and Williams told him, "* * * that it was to be on the agenda the latter part of the year." It appeared that there was pending an action to foreclose a street improvement bond, as well as an action by plaintiffs and others to set aside a tax sale.

On February 27, 1946, plaintiff Williams opened an escrow with a Bank of America branch in Arcadia. The first that Palmer knew of that escrow was when he received a letter from the bank. Plaintiffs placed a grant deed in this second escrow, but never placed therein a certificate of title. The instructions given by plaintiffs required that defendants deposit the balance of the purchase price in the second escrow, although they knew the funds had been placed in the escrow opened by defendants. Palmer was in the act of getting the money sent from the first escrow to the second escrow in the Bank of America when he was served with a notice of cancellation of the agreement on the one ground of default in payments subsequent to July 11, 1945.

[1, 2] Upon the foregoing facts, the trial court was fully justified in finding, as it did, that plaintiffs waived any breach which they now contend occurred by reason of defendants entering into the agreement of sale with third persons; that defendants never refused to pay any monthly installments demanded; that the failure to pay any monthly installments directly to plaintiffs after July 10, 1945, was fully excusable, and that plaintiffs expressly and impliedly consented thereto. The trial court further found, and correctly, that under the agreement plaintiffs agreed to deliver, upon payment of the full purchase price, a certificate of title and a good and sufficient deed; that shortly after July 10,

1945, defendants tendered the balance of the purchase price with accrued interest, but that plaintiffs failed to deliver a certificate of title or a deed. When plaintiffs finally tendered a deed and demanded performance, they demanded it at a place other than the place of performance provided in the agreement, and the court so found. When plaintiffs opened the second escrow and deposited a deed, they were unable to deliver a good title, and hence were unable to put defendants in default.

The facts, in summary, therefore, are that in July, 1945, plaintiffs were tendered the full amount of the purchase price and consented that the funds remain in escrow to be paid to them upon their compliance with the agreement by delivery of a sufficient deed and certificate of title. In such circumstances, there could be no forfeiture.

[3] Whether the agreement of sale by defendants to the Jensens constituted a breach of the covenant against assignment is immaterial, since the evidence is sufficient to support a finding that plaintiffs waived the alleged breach by accepting payments after knowledge thereof for eight months, and further advised Palmer he did not need to make the monthly payments after the $1,800.00 had been deposited in escrow. Moreover, the notice of cancellation did not specify this breach as a ground of forfeiture. That in such circumstances the asserted breach is waived is well settled. (See 12 Cal.Jur., "Forfeitures", pp. 641, 642.)

It is also obvious that defendants could not be declared in default for failure to make monthly payments after July, 1945. Under the provisions of the agreement they had the right to pay the balance of the purchase price at any time. Furthermore, plaintiffs acquiesced in the opening of the escrow and the deposit of the funds necessary to pay them in full. From then on, plaintiffs were in default, for it was their duty by the express provisions of the contract "to deliver a certificate of title showing the title to be vested in Buyer and to execute and deliver to the Buyer or his assigns, a good and sufficient deed of grant, bargain and sale."

The equities are entirely with respondents. The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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94 Cal.App.2d 180

CITY OF LOS ANGELES v. GEIGER et al.

Civ. 16932.

District Court of Appeal, Second District, Division 2, California.

Oct. 17, 1949.

Rehearing Denied Nov. 2, 1949.

Hearing Denied Dec. 15, 1949.

Proceeding by the City of Los Angeles against Hector Geiger and others to condemn land for a highway.

The Superior Court of Los Angeles County, William J. Palmer, J., rendered an interlocutory judgment for defendants, and plaintiffs appealed.

The District Court of Appeal, Wilson, J., modified the judgment and as modified affirmed it, and held that defendants were not entitled to severance damages since the fact that condemnation of land for the highway rendered more costly the construction of a possible overpass to connect defendants' uncondemned land with a public street deprived them of no right of property in absence of an easement of access or right to build the overpass.

1. Eminent domain ⇨203(1)

In action to condemn land for highway wherein owners claimed severance damages for alleged added cost of overpass over highway and railway from contiguous uncondemned land to city street, testimony as to amount that should be awarded, which was based upon loss of access although witnesses knew that claimants had no right of access across any lands intervening between their property and the street, was objectionable as irrelevant. Code Civ.Proc. § 1248; Const. art. 1, § 14.

2. Eminent domain ⚿91, 93

While recovery of damages in condemnation proceeding is not limited to instances of actual invasion of land itself, damages can be justified only by evidence of direct physical disturbance of an existing right, either public or private, which owner possesses in connection with his property and which gives additional value to it, and by evidence that through such disturbance he has sustained a special damage with respect to his property or right appurtenant thereto different from or in excess of that suffered by the public in general. Code Civ.Proc. § 1248; Const. art. 1, § 14.

3. Eminent domain ⚿90

To sustain recovery of damages for depression of market value of property in condemnation proceeding, depreciation must be caused by an actionable injury. Code Civ.Proc. § 1248; Const. art. 1, § 14.

4. Eminent domain ⚿93, 124

In condemnation proceeding, valuation of property and damages thereto must be determined in view of physical conditions actually existing on date value was required by law to be fixed and not with reference to a hoped for or conjectured prospective event or to conditions as they might be if changed thereafter nor with reference to what was then reasonably foreseeable in the future. Code Civ.Proc. § 1248; Const. art. 1, § 14.

5. Eminent domain ⚿95

In condemnation proceedings, severance damage must be based upon some real physical disturbance of a property right which tends to and actually does decrease the market value, and mere fears of remote or contingent possibilities will not justify a judgment. Code Civ.Proc. § 1248; Const. art. 1, § 14.

6. Eminent domain ⚿95

Merely rendering private property less desirable for certain purposes, or erection of improvement that may result in impairing of its salability is not an injury to the property itself compensable by damages in condemnation proceeding; but if something is interposed that affects enjoyment by the owner of some actual existing right in reference to the property thereby making it intrinsically less valuable, damages result for which compensation must be paid. Code Civ.Proc. § 1248; Const. art. 1, § 14.

7. Eminent domain ⚿95

In condemnation proceedings, severance damages are limited to contiguous lands not separated from condemned land by other property. Code Civ.Proc. § 1248; Const. art. 1, § 14.

8. Eminent domain ⚿85, 106

Taking or impairment of easement of access is a direct physical disturbance and an invasion of an existing property right for which compensation must be paid just as for land itself when taken for a public use. Code Civ.Proc. § 1248; Const. art. 1, § 14.

9. Eminent domain ⚿106

Where undeveloped land was contiguous to condemned land but separated from public street by existing railway and highway, and owners had neither easement over railway, approval of Public Utilities Commission for overpass, easement for roadway across intervening properties or approval of public authorities for connection with the street, owners were not entitled to severance damages for cost of possible overpass to the street in excess of cost of overpass over railway before construction of highway. Code Civ.Proc. § 1248; Const. art. 1, § 14.

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Ray L. Chesebro, City Attorney, Charles F. Reiche, Assistant City Attorney, Arthur Wm. Green, Deputy City Attorney, and Spencer L. Halverson, Deputy City Attorney, Los Angeles, for appellant.

C. R. Montgomery, Sacramento, George C. Hadley, San Francisco, R. B. Pegram, Thomas G. Baggot, amici curiæ on behalf of appellant.

Francis H. Lindley, Los Angeles, for respondents.

WILSON, Justice.

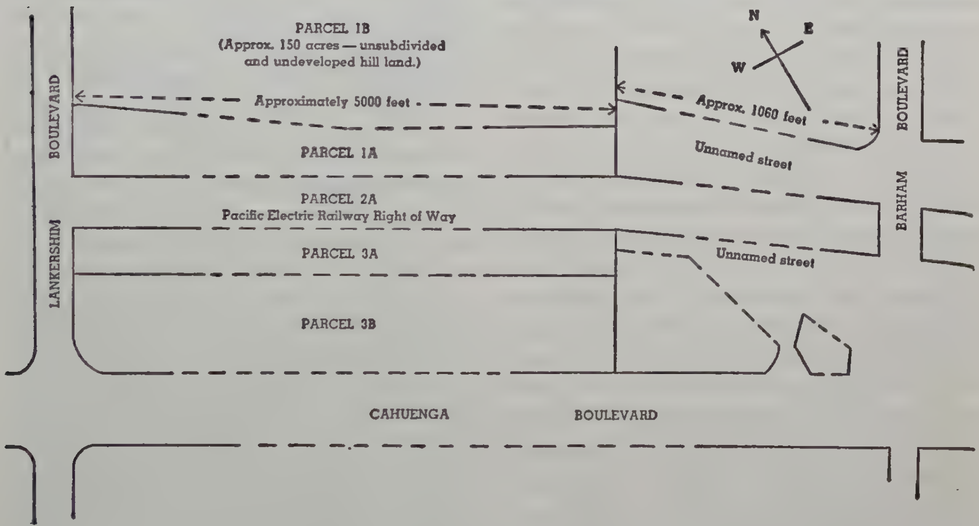
Plaintiff has appealed from that portion of an interlocutory judgment awarding severance damages to defendants in an action for the condemnation of a strip of land to be used for the opening and extension of a freeway (a limited access highway) from Hollywood into San Fernando Valley.

The accompanying sketch illustrates the relative locations of the several parcels of land that are to be discussed in the opinion. The diagram is not drawn to scale and does not indicate the various curves and angles in the boundaries of the lands involved or their dimensions.

City of Los Angeles v. Geiger

This sketch is not drawn to scale. It is used only for the purpose of illustrating the location in relation to each other of the various parcels of land and streets referred to in the opinion.

Each of the several parcels is irregular in width. Since their dimensions are not material to the decision the varying widths are not indicated.


PARCEL 1B
(Approx. 150 acres — unsubdivided and undeveloped hill land.)
Approximately 5000 feet
Approx. 1060 feet
N
E
W
PARCEL 1A
Unnamed street
PARCEL 2A
Pacific Electric Railway Right of Way
PARCEL 3A
Unnamed street
PARCEL 3B
LANKERSHIM BOULEVARD
BARHAM BOULEVARD
CAHUENGA BOULEVARD

At the date of filing the complaint defendants were the owners of Parcels 1A and 1B which at that time comprised one entire parcel consisting of approximately 150 acres of unsubdivided, undeveloped hill land. It was bounded on the south, a distance of approximately 5000 feet, by the Pacific Electric Railway right of way (Parcel 2A), on the west by Lankershim Boulevard, and on the north and east by privately owned property not involved in this action. Parcel 3A extends along the southerly boundary of the railway right of way, and Parcel 3B is between Parcel 3A and Cahuenga Boulevard.

At the time the action was commenced and at the time of trial Parcels 3A and 3B were owned by persons other than defendants. The latter had no right of access of any character from their property (Parcels 1A and 1B) directly to Cahuenga Boulevard; defendants' land was separated from Parcel 3A by the railway right of way. There was no street, bridge or overpass across the railway right of way or across Parcels 3A and 3B and defendants had no easement or right of passage over the same and no agreement under which they could acquire such right. The only access to public highways from defendants' land was to Lankershim Boulevard along the westerly boundary of the property and to an unnamed street extending from its easterly boundary to Barham Boulevard. Cahuenga Boulevard could be reached by traveling over Lankershim Boulevard or Barham Boulevard.

Parcels 1A, 2A and 3A have been condemned in the instant action, and the railway tracks have been removed from Parcel 2A and relocated on another portion of the condemned land. Parcel 3B is owned as before the condemnation by persons other than defendants. After the land in question had been condemned and the freeway constructed defendants still had no direct access by street, subway, overpass or otherwise across the freeway or the railway right of way to Cahuenga Boulevard, no provision having been made therefor in the condemnation proceedings, and they had no right or easement from the owners of Parcel 3B to cross such parcel.

The result of plaintiff's acquisition of the property by condemnation and the construction of the freeway is that the distance from the southerly boundary of defendants' remaining land (Parcel 1B) to Cahuenga Boulevard is much greater than from the former southerly line of their property (the southerly line of Parcel 1A) to the boulevard, and should an overpass be constructed to provide access to the boulevard it will be of greater length than would have been required for crossing the railway right of way by reason of the necessity of building also over Parcels 1A and 3A.

Defendants assume that had the condemnation proceedings not been brought and the freeway constructed they would have been able to obtain an easement from the Pacific Electric Railway to build an overpass across its right of way and they maintain that they are entitled to severance damages to their remaining property in a sum equal to the amount which they would be required to expend for an overpass from Parcel 1B to Parcel 3B in excess of the cost of an overpass across the railway right of way alone.

Adopting defendants' contention the court awarded them severance damages in the sum of $64,471 of which $40,000 was allowed for the reason, as stated in the findings, that the fair market value of the property "has been depressed by the fact that because of the construction of the improvement the building of a necessary or highly desirable access road into said Parcel 1B at a point fairly or nearly central in respect to the length of said parcel and by means of a possible and desirable overpass across the Pacific Electric Railroad right-of-way [Parcel 2A] * * * and a road across" a portion of Parcels 3A and 3B "will be much more costly than would otherwise have been the case," by reason whereof "the fair market value of said Parcel 1B has been reduced to the extent of not less than $40,000.00."

The court further found: "At the request of counsel for plaintiff, who believe that the taking of an appeal will be made more convenient and economical if their request is granted, the Court makes the findings set forth in this paragraph, although no issue has existed in respect to any of the matters set forth in this paragraph, and the Court has not made any finding or drawn any conclusion on any assumption or hypothecation (sic) or finding contrary to or inconsistent with any finding set forth in this paragraph:

"At the time of the filing of the complaint in this action and the issuance of summons thereon and the recording of the Lis Pendens in reference thereto, the said defendant owners of Parcel 1B did not own or possess a right of access over and across the Pacific Electric Railroad right-of-way designated in said complaint as Parcel 2A, or any other right, title or interest thereto, or over and across the land described in said complaint in Parcel 3, A-1, 3, B-1 and 3, C-I, and 3, A-II, 3, B-II and 3, C-II or any other right, title and interest thereto, except as beneficiaries under a deed of trust, covering Parcels 3, A-II, 3, B-II, 3, C-II and 3, D-11, hereinafter referred to." (The latter parcels are not involved in this appeal.)

Plaintiff contends that since defendants had neither an easement over the railway right of way or the property owned by others (Parcels 3A and 3B) nor any agreement whereby they could have procured the same there was no physical disturbance of their property right, hence the award of $40,000 for "a possible and desirable overpass" was for a noncompensable, remote and contingent possibility which the court was without power to allow.

Plaintiff's appeal is from that portion of the judgment awarding the sum of $40,000 as severance damages for the purposes mentioned.

In support of the appeal plaintiff assigns (1) the insufficiency of the evidence to sustain the finding and judgment awarding the sum of $40,000 for the construction of "a possible and desirable overpass," (2) error in awarding such sum to defendants when no right owned or possessed by them had been taken or invaded, and (3) error in considering evidence admitted over plaintiff's objection that there was a probability or possibility that in the future defendants could or might obtain a right to pass over some portion of the land between their property and Cahuenga Boulevard and evidence relative to the cost thereof. Plaintiff's contentions may be condensed into one question to wit, whether or not there has been some direct physical disturbance of a right enjoyed by defendants in connection with their property which gave additional value to it, and whether by reason of the severance and the construction of the improvement defendants have suffered a disturbance or invasion of such right whereby they have sustained a special damage to their remaining property.

Defendants' witnesses concerning severance damages testified that in their opinion the best method of developing Parcel 1B and to serve the persons who might reside thereon in the future would be to provide an overpass or bridge extending from such property over the railway right of way and an overpass or road across the intervening property to connect at grade with Cahuenga Boulevard, thereby providing a direct outlet to the boulevard and eliminating the circuity of travel to either Lankershim Boulevard or Barham Boulevard and thence south to Cahuenga Boulevard. The witnesses also testified concerning the difference between the cost of construction of an overpass across the 50-foot railway right of way and the cost of an overpass across the freeway 200 feet in width.

It was stipulated and the court found as above quoted that defendants never had a right of access over or easement to build a bridge across the railway right of way or an easement across or over the privately owned property (Parcels 3A and 3B) between the railway and Cahuenga Boulevard.

Witness Coffin testified that he knew defendants did not have an easement over the railway right of way or over the property between the railway and Cahuenga Boulevard for an overpass or roadway; nevertheless he secured cost estimates from bridge engineers for a traffic bridge crossing the railway right of way and the cost of roads extending from such possible bridge across privately owned property to Cahuenga Boulevard; he also secured the cost of a bridge across the 200 foot freeway "in the event that a permit could be secured from the city or the State Highway Department to secure similar direct access to Cahuenga Boulevard after the freeway was constructed * * *"; he "considered the attitude of Pacific Electric Railway officials in respect to a crossing by bridge or viaduct" above their right of way; he considered a conversation in which he was informed that the owners of Parcels 3A and 3B would give defendants permission to pass over the property if the need should ever arise; as a result of his studies he had formed an opinion as to whether or not the taking of Parcel 1A caused a severance damage to Parcel 1B and the amount thereof, stating his opinion as to such damage.

Witness Frisbie testified that in connection with considering the effect on defendants' land of the construction of the improvement he interviewed engineers and officials of the Pacific Electric Railway to determine whether an overpass could be obtained across the right of way; he took into consideration the effect of the freeway and the fact that it was a nonaccess highway as against the effect of an ordinary street at grade; he stated that the natural and best outlet from defendants' property was by an overpass across the railway to Cahuenga Boulevard; he conferred with the Pacific Electric officials and found that such an overpass was feasible and that any "prospective buyer could reasonably assume that he would be able to get such an overpass."

Witness Schmutz, in arriving at an opinion with respect to the severance damages, considered "the attitude of the Pacific Electric Railway officials as regards the probability of acquiring an overhead crossing over the right of way," and that the severance damage "is due to the loss of access directly to Cahuenga Boulevard, or rather the excess cost of gaining such access after the construction of the improvement."

Witness Spencer, an engineer in charge of the advance planning and development work for the Pacific Electric Railway Company and the sole representative of that company on the Los Angeles County Grade-Crossing Committee, testified as follows: "If an application were made for authority to construct an overhead bridge over the Pacific Electric Company's tracks at any point along the right-of-way as depicted on Plaintiff's Exhibit 20 and prior to the commencement of this action, which bridge conformed to the requirements of the public utilities commission of the State of California in the matter of design in overhead and side clearances, and there were no costs to the railway company, nor any change of grade involved, I could recommend that the authority be granted."

It must be noticed that the evidence (admitted over plaintiff's objections) given by defendants' witnesses concerning the overpass across the railway and with reference to the additional expense of spanning the freeway as against the cost of a bridge over the railway right of way is based on hearsay and on the conclusions of the witnesses without the support of facts. They *assumed* that an easement could be obtained from the railway company but no facts were stated upon which such assumption could be based. None of them made reference to the possibility of obtaining a right of way over Parcels 3A and 3B without which Cahuenga Boulevard could not be reached if the overpass should be constructed across the railway, except that Coffin "considered a conversation" (he did not say with whom) in which he was informed that permission to pass over such parcels could be obtained.

Coffin did not state the estimated cost of the 50-foot bridge over the right of way or of the 200-foot bridge across the freeway. He did not state how or from whom he had ascertained "the attitude of the Pacific Electric Railway officials," whether or not they were persons who were authorized to bind the company, or what attitude they had expressed. He did not state the names of the persons with whom he had conferred concerning the possibility of obtaining permission to pass over Parcels 3A and 3B, whether with the owners or some unauthorized third parties, nor did he state whether, if such permission should be granted, a charge would be made therefor and if so how much.

Frisbie did not state the names of the engineers and officials of the Pacific Electric Railway Company with whom he had conversed or what assurance, if any, they had given that an overpass would be permitted and he gave no reason for his assumption that such permission would be granted and no facts in support of his supposition

Schmutz also considered the "attitude" of the Pacific Electric officials without naming them or enlightening the court as to their "attitude."

Spencer, an engineer employed by the railway company, the only witness who might have given a ray of hope that an overpass would have been permitted by the company, said no more than that he "*could* recommend" that the company's consent be granted, provided the bridge conformed to the requirements of the Public Utilities Commission. He did not say he *would* have so recommended nor did he claim to have had authority to bind the company and there is no intimation that he or anyone else had conferred with his superior officers or that they would have acted favorably on defendants' application or on Spencer's recommendation if given.

Furthermore, the consent of the railway company would not have assured defendants the right to construct the overpass. The sanction of the Public Utilities Commission of the state is necessary before a structure may be erected over railway tracks and the design and clearance must have the approval of the commission. The record is destitute of any evidence that a design of the overpass had ever been prepared or that the commission had been approached for the purpose of ascertaining the possibility of its approval if and when presented.

[1] Every witness based his evidence as to the amount that should be awarded as severance damages upon the "loss of access," yet each well knew that defendants had no right of access across any of the lands intervening between defendants' property and Cahuenga Boulevard, therefore they had not lost it. It is manifest that all the evidence regarding the overpass and its cost and the "loss of access" is immaterial and irrelevant and the court erred in admitting it.

In view of the state of the evidence the court found (it could not have done otherwise) that defendants did not own or possess a right of access over the railway right of way or the property southerly therefrom, yet it also found that they were entitled to compensation for a "possible and desirable overpass" which was rendered more costly by the taking of the land condemned and that the market value of Parcel 1B had been reduced in the amount of the excess cost. The two findings are irreconcilable. The first is sustained by the evidence, the second is not.

The Constitution (Art. I, sec. 14) provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * *." Section 1248 of the Code of Civil Procedure reads: "The court * * * must ascertain and assess: * * * 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." It will become clear from the discussion to follow that the cost of the overpass is not the character of damage referred to in the Constitution nor is there any requirement or justification in the code provision that an allowance be made as severance damage since it is not a damage that is caused to the land not condemned by reason of the severance of Parcel 1A from the larger parcel.

[2] The award of $40,000 for the alleged excess cost of an overpass is indefensible even if the evidence admitted with reference thereto were unobjectionable. While the recovery of damages is not limited to instances of actual invasion of the land itself, yet damages can be justified only by evidence of direct physical disturbance of *an existing right,* either public or private, which the owner posesses in connection with his property and which gives an additional value to it and by evidence that through such disturbance he has sustained a special damage with respect to his property or to a right appurtenant thereto different from or in excess of that suffered by the public in general. Coast Counties Gas & Electric Co. v. Miller & Lux, Inc., 118 Cal.App. 140, 144, 5 P.2d 34; Rigney v. Chicago, 102 Ill. 64, 80–81; Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N.E. 338, 340, 52 L.R.A.,N.S., 192; Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N.E. 486, 489.

[3] Where a landowner asserted a claim to compensation for the value of wharf privileges although he had no wharf franchise, it was held he was entitled to the value of the land in its then condition and not what it would be worth if something should be annexed to it at some future time; the fact that he might at a later date obtain a franchise from the state, if he were permitted to remain the owner of the land, was too remote and speculative to be given consideration, and evidence relating to such future prospective improvement was inadmissible. Central Pac. R. Co. v. Pearson, 35 Cal. 247, 262. Depression of the market value of property may be and frequently is attributable to causes other tha

those for which the owner is entitled to be compensated. To sustain a recovery the depreciation must be caused by an actionable injury. Rose v. State, 19 Cal.2d 713, 739, 123 P.2d 505.

[4] Defendants' witnesses testified that the highest and best use for which Parcel 1B could be devoted was for multiple family garden-type housing projects, hotel sites, sports and amusement enterprises after grading, institutional use, and possibly future subdivision; that in the absence of a crossover to Cahuenga Boulevard "the property definitely could not be devoted to such use"; that an access road leading west to Lankershim Boulevard would not be adequate to serve the property; that in order to develop the land an access road leading "to the very heart of the property" would be necessary and that such a road "could best be provided by an overpass across the Pacific Electric Railway to Cahuenga." Such evidence cannot be considered in determining severance damages and should not have been admitted. If an overpass were the paramount necessity to the development of the property for its highest and best use such use could not have been attained since there was no overpass and no evidence that one could ever have been constructed had the condemnation not taken place. Moreover, the valuation of the property and the damages thereto should have been determined in view of the physical conditions actually existing on the date the value was required by law to be fixed and not with reference to a hoped for or conjectured prospective event or to conditions as they might be if changed thereafter, nor even with reference to what was then reasonably forseeable in the future.

[5, 6] There can be no detriment to a right which never existed and no compensation for a loss not sustained. The construction of the freeway improvement did not cause defendants to lose an easement for access to Cahuenga Boulevard since it had never been acquired. Manifestly plaintiff cannot be required to pay damages for injury to a non-existent right or for a mere hope, surmise, conjecture or expectancy that a right might possibly be obtained in the future, Colusa & Hamilton R. Co. v. Leonard, 176 Cal. 109, 125–127, 167 P. 878, or for "'remote,' 'speculative,' 'imaginary,' 'uncertain,' or 'conjectural' possibilities." Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 53–54, 186 P. 772, 775; Arnerich v. Almaden Vineyards Corp., 52 Cal.App.2d 265, 272, 126 P.2d 121. "[S]everance damage must be based upon some real physical disturbance of a property right which naturally tends to and actually does decrease the market value" and "mere fears of remote or contingent possibilities" will not justify a judgment for such damages. Coast Counties Gas & Electric Co. v. Miller & Lux, Inc., 118 Cal.App. 140, 144, 5 P.2d 34, 35. Merely rendering private property less desirable for certain purposes or the erection of an improvement that may result in impairing its salability is not an injury to the property itself; but if something is interposed that affects the enjoyment by the owner of some *actual, existing right* in reference to his property, thereby making the property itself intrinsically less valuable, damage has resulted for which compensation must be paid. Eachus v. Los Angeles Consol. Electric R. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149.

Not every cause of depreciation in the value of property is compensable. An injury is not peculiar to abutting property merely by reason of the fact that diminution in its value results. Only the value of the property itself and damage thereto may be considered. Injury to business is a detriment to its owner but it is not a damage to the property on which it is conducted, hence a property owner is not entitled to damages for loss of business caused by an improvement or by diversion of traffic. Rose v. State, 19 Cal.2d 713, 737, 123 P.2d 505; City of Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 399, 153 P. 705. In Bacich v. Board of Control, 23 Cal.2d 343, at page 349, 144 P.2d 818, at page 823, the plaintiff was held to be entitled to damages to "a property right known as the right of access" which extends in both directions to the next intersecting street, and the loss of access at one end of the street on which his property abutted was held to be a compensable injury. In the Bacich case a right of access to the intersecting street which he had possessed and used was destroyed by the public improvement. But he was denied compensation for depreciation in value of his property which followed (1) from the removal of residences from other property leaving it vacant and (2) from the discontinuance of a street railway, 23 Cal.2d at page 355, 144 P.2d 818 although a street railway is a convenience to property owners and its removal results in depreciating the value of adjacent land.

In People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799, upon which defendants here rely strongly, the defendants were not claiming damages by reason of a speculative or conjectural possibility but for an actually existing and long-used right. They owned property fronting on two intersecting boulevards and ingress and egress was afforded the entire property along both with driveways from each leading into the property. As abutting landowners they were held to be entitled to damages for the impairment of the direct access to their property which they had long enjoyed.

Counsel agree that there is no case in California in which a situation similar to that in the instant case has arisen. However there are analogous cases in other jurisdictions. Where the grade of a street was changed in order to eliminate a grade crossing, railway tracks were depressed and an overpass carried the street over the railway. Landowners whose property was separated from the railway by other property, although they never had had access to the railway tracks, claimed damages for the loss of "possible" access thereto by means of a private switch track across intervening property to the claimants' land. Their contention was held to be unsustainable because the deprivation "of the possibility of a private switch track, is too remote and speculative to be the basis of an award of damages." In re Grade Crossing Com'rs, 207 N.Y. 52, 100 N.E. 714, 715, Ann.Cas.1914C, 271. In a similar case damages were denied where the "possible" switch track, in order to reach the claimant's property, would have to cross a public street and private lands not owned by either the railroad company or the claimant. In re Grade Crossing Com'rs, 176 App.Div. 349, 162 N.Y.S. 1092, 1094, appeal dismissed 220 N.Y. 770, 116 N.E. 1048. In East Side Levee & Sanitary Dist. v. East St. Louis & C. Ry. Co., 279 Ill. 123, 116 N.E. 720, 725, the court held that the railway company was not entitled to damages for a doubletrack bridge and the elevation of its embankment for a double track since the track was not in operation when the condemnation proceeding was instituted, the court saying that "damages for future use, even though plans have been made by the railroad company, are too remote and speculative to be considered."

The case of Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N.E. 338, 52 L.R.A.,N.S., 192, is an example more cogent than the cases above cited of depreciation of the value of property by reason of the disturbance of access rights, existing and in actual use, for which compensation in damages was refused. Access to a railroad by means of a switch track used for the purpose of serving the business maintained by the plaintiff on its property was destroyed. There was no contract with the railroad company and no statute requiring the maintenance of the switch track for the plaintiff's business. No compensation for damages was allowed because there was "no physical invasion of the premises" or of a right of access to which the plaintiff was legally entitled, although it was conceded that the value of the premises had been depreciated by depriving the plaintiff of the benefits accruing to its property by reason of the switch connection.

If the owners of property that is actually damaged suffer real financial loss for which they cannot be compensated, how then in the instant case can the allowance of damages to defendants be justified for a "right of access" or increase of the cost of an access or easement that does not exist, never existed and is no nearer actuality than a conjecture or speculation with no basis of fact or even a promise? The question answers itself.

The fallacy of defendants' contention and of the finding that they are entitled to damages for the additional cost of a "desirable overpass" is illustrated by any one of several supposititious situations in no one of which could defendants have recovered damages:

(1) Had the freeway been constructed entirely along the southerly line of the railway right of way (on Parcels 3A and 3B) and defendants land had not been encroached upon the overpass would have been no less "desirable" but its construction would have been much more costly than over the railway alone, in fact just as costly as now, if indeed it had been possible to build it at all. If by such location of the freeway the market value of defendants' land had been depreciated they would not have had a valid claim against the city for damages.

(2) If the railway right of way had been widened to the south and no part of defendants' property had been taken their damage would have been as great as now but the railway company would not have been required to make recompense therefor.

(3) The abandonment of Cahuenga Boulevard as it presently exists and its relocation along a distant southerly route would have increased the cost of an easement across the intervening land but defendants would have had no recourse against the city or the state for such additional cost.

[7] (4) Had defendants owned Parcel 3A as well as the land on the northerly side of the railway right of way and only Parcel 3A had been condemned no severance damage could have been allowed for the property north of the railway since damages are limited to contiguous lands not separated from the condemned land by other property. County of San Mateo v. Christen, 22 Cal.App.2d 375, 380-381, 71 P.2d 88.

In each of the foregoing instances defendants' cost of reaching Cahuenga Boulevard by overpass (if they had obtained the right therefor) would have been greater than over the railway right of way as it formerly existed, but under the authorities cited such additional cost could not have been allowed as damages.

Defendants' contention is that they are entitled to recover the additional cost of the overpass because Parcel 1A has been taken but admit they could not have claimed such damage if the freeway had been located elsewhere and no part of their property had been condemned. They say their defense of the award of severance damages is not based on the loss or impairment of the right to establish an access road to Parcel 1B but the damage awarded is to compensate them for the depreciation in the value of that parcel resulting from the additional cost of establishing an access road by means of a longer overpass than would have been required had Parcel 1A not been taken. These assertions are self-contradictory since the alleged depreciation of the value of Parcel 1B is not claimed to have been caused by any other means than the condemnation of Parcel 1A which they have argued is an impairment of their access to Parcel 1B. If the additional length of the overpass were the same the cost of building it would be the same whether the freeway were north or south of the railway. If the overpass should be built such additional cost, which defendants refer to as severance damage, would be incurred in either case.

If with the taking of Parcel 1A plaintiff had also taken some other property of defendants accessory to the land condemned the law would have demanded that compensation be made therefor. But as we have already shown the cost of building an access road or overpass, either before or after the condemnation, does not enter into consideration for the reason that the right to construct it did not exist and defendants cannot be paid for a right or property they did not own. Their remaining property did not suffer depreciation in value by reason of the taking of an appurtenance since nothing appurtenant to it was taken or damaged and no property right was invaded.

Defendants maintain they are entitled to damages as awarded even though there has not been an "actual physical invasion" of their property, relying on cases in which no part of the land itself has been taken but the owner's right of access has been impaired, citing Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818 and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799.

In these cases, as we have already pointed out, the landowners did not have merely a possibility of access to the street or highway depending on whether a right to cross the lands of others could be obtained, but they each had a "property right known as a right of access" which they had actually used for many years in going to and from their respective properties. In the Ricciardi case the access was directly into two highways and in the Bacich case the plaintiff's access to a street at the end of the block in which his residence was located was cut off.

[8] An easement is property and the taking or impairing of the "easement of access" is a direct physical disturbance and an invasion of an existing property right for which compensation must be made just as for the land itself when taken for public use. Since defendants had no easement of access to Cahuenga Boulevard they had no property right; since no property right was taken in the condemnation proceedings they have no supportable claim for damages on that account.

[9] Granting that the overpass is "desirable" there is no evidence that its construction is "possible." Since defendants did not have an "easement of access" or right to build the overpass they were not deprived of any right of property by the condemnation proceedings and are therefore not entitled to that element of the severance damages awarded by the trial court for the cost of a longer "possible and desirable overpass." Such award is a gratuity since it rests upon a mere surmise that at some indefinite time in the future defendants might possibly have been able to obtain (1) the necessary easement from the railway company, (2) the approval of the Public Utilities Commission, (3) an easement for a roadway across the property lying between the railway right of way and Cahuenga Boulevard, and (4) the approval by the city or the state of the connection of such roadway with Cahuenga Boulevard.

It is ordered: (1) That the findings of fact be and are amended as follows: (a) In paragraph XVII strike from the first sentence "$64,471.00" and insert "$24,471.00"; (b) strike subparagraph 2 from paragraph XVII; (c) in paragraph XXIII strike "$97,595.17" and insert "$57,595.17"; (d) in paragraph XXV strike "$64,471.00" and insert "$24,471.00"; (e) in paragraph XXV strike "$112,525.00" and insert "$72,525.00"; (2) that the judgment be and is modified to conform to the findings as hereinabove amended and as so modified the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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94 Cal.App.2d 267

DOUGLAS v. BERGERE et al.

Civ. 16670.

District Court of Appeal, Second District,
Division 3, California.
Oct. 25, 1949.

Donald W. Douglas brought action against A. L. Bergere and William P. Andrews to recover damages for alleged breach of oral contract by defendants to deliver shares of stock to plaintiff.

The Superior Court of Los Angeles County, Joseph W. Vickers, J., rendered judgment for the defendants, and the plaintiff appealed.

The District Court of Appeal, Vallee, J., affirmed the judgment, holding that the contract of the defendants was several, rather than joint and several, and that therefore A. L. Bergere was not liable for the breach of William P. Andrews, and that William P. Andrews was not liable because of his discharge in bankruptcy.

1. Contracts 🔑175(1)

The presumption under statute providing that where all parties who unite in a promise receive some benefit of the consideration, whether past or present, their promise is presumed to be joint and several, is not conclusive and is rebuttable, but it controls in absence of evidence to the contrary. Civ.Code, § 1659; Code Civ.Proc. § 1962.

2. Contracts ⚷175(1)

Rebuttable presumption under statute providing that where all parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several, may be controverted by other evidence. Civ.Code, § 1659; Code Civ.Proc. §§ 1961, 1962.

3. Appeal and error ⚷1008(3)

Where rebuttable presumption under statute providing that where all parties who unite in a promise receive some benefit from consideration, whether past or present, their promise is presumed to be joint and several, is controverted by other evidence, an issue of fact is made for determination of the trial court, and its conclusion is conclusive on a reviewing court, unless it is clearly unsupported by substantial evidence. Civ.Code, §§ 1430, 1659; Code Civ.Proc. §§ 1961, 1962.

4. Contracts ⚷183

Where two or more parties to a contract promise separate performances to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, the obligation is "several" as distinguished from "joint". Civ.Code, § 1430.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Joint" and "Several".

5. Contracts ⚷181

In determining whether promises are several or joint and several, when uncertainty arises concerning the meaning of a contract, language used by parties is to be considered in light of surrounding circumstances and of the practical and mutual construction placed thereon as shown by their acts and conduct before any controversy has arisen between them. Civ.Code, § 1430.

6. Contracts ⚷175(1)

The rebuttable presumption under statute providing that where all parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several, is merely a species of evidence and is the weakest and least satisfactory character of evidence. Civ.Code, § 1659.

7. Corporations ⚷121(5)

In action for alleged breach of oral contract by two defendants to deliver a number of shares of stock in corporation to plaintiff if plaintiff would assist in raising additional funds for corporation, evidence sustained finding that statutory presumption that obligation of defendants was joint and several was rebutted, so that defendant who delivered half of agreed shares, was not liable for failure of other defendant to deliver other half. Civ.Code, §§ 1430, 1659: Code Civ.Proc. §§ 1961, 1962.

8. Contracts ⚷183

If two persons bind themselves severally in respect to the same subject matter, each obligor is liable only for his several promise and cannot be held for the other.

9. Bankruptcy ⚷421(1)

A discharge in bankruptcy releases a bankrupt from all of his provable debts existing on the day on which the petition was filed, except such debts as are, by express terms of the Bankruptcy Act, excepted from operation of a discharge. Bankr.Act, § 17, sub. a, 11 U.S.C.A. § 35, sub. a.

10. Bankruptcy ⚷421(1)

Obligation of defendant under alleged oral contract to deliver shares of stock to plaintiff if plaintiff assisted in raising additional funds for corporation, was not excepted from operation of defendant's discharge in bankruptcy. Bankr.Act, § 17, sub. a, 11 U.S.C.A. § 35, sub. a.

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Fleming, Robbins & Tineman, Los Angeles, for appellant.

Reynolds, Painter & Cherniss and Louis Miller, Los Angeles, for respondent A. L. Bergere.

No appearance for respondent Wm. P. Andrews.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants in an action for damages for the alleged breach of an oral contract to deliver shares of stock to plaintiff.

Douglas Oil & Refining Company is a corporation. Pursuant to a preorganization agreement between appellant Douglas, respondents and one Stratton, 110,000 of its common shares were issued to respondents Bergere and Andrews, 55,000 shares to each. The stock is called "nickel stock" as it was purchased at five cents a share. The corporation needed additional funds. About November 1, 1941, appellant and Stratton on the one hand, and Bergere and Andrews on the other, made an oral contract whereby Douglas and Stratton agreed to assist in raising the additional funds, and Bergere and Andrews agreed to transfer 55,000 shares of the nickel stock to them. Douglas claims Bergere and Andrews jointly and severally agreed to transfer 55,000 shares of nickel stock to himself and Stratton. Respondents claim the contract was several and that it was agreed Bergere was to transfer 27,500 shares of nickel stock to Stratton and Andrews was to transfer 27,500 shares of nickel stock to Douglas. Douglas and Stratton performed and the additional funds were secured. Thereafter Bergere transferred 27,500 shares of nickel stock to Stratton and Andrews transferred 13,252 shares of nickel stock and 14,248 shares standing in the name of Comet Oil Company, Ltd., to Douglas. Comet was a limited partnership, of which Andrews was sole general partner.

Comet was adjudicated bankrupt about one month after the transfers to Douglas. Andrews was adjudicated bankrupt about five months later. The bankruptcy proceedings were consolidated. The trustee instituted proceedings against Douglas to recover the stock delivered to Douglas by Andrews or its value. A compromise was effected between the trustee and Douglas, which was approved by the bankruptcy court, by which the 14,248 shares transferred by Andrews to Douglas were transferred by Douglas to the trustee and the proceedings instituted by the trustee dismissed with prejudice.

The complaint sought recovery of damages for the alleged refusal of Bergere and Andrews to transfer 14,248 shares of nickel stock to Douglas. The court found that: Stratton was agent for Douglas; the contract was several; Bergere agreed to and did transfer 27,500 shares of nickel stock to Stratton; Andrews agreed to transfer 27,500 shares of nickel stock to Douglas; Andrews, pursuant to instructions of Stratton as agent of Douglas, and pursuant to agreement between Douglas and Stratton, transferred to Douglas 13,252 shares of nickel stock and 14,248 shares standing in the name of others, but which had arisen out of the 55,000 nickel shares belonging to Andrews, and which were the subject of the original contract; Bergere and Andrews performed all covenants and conditions of the contract.

Appellant Douglas contends that (1) respondents are jointly and severally liable; (2) the findings are not supported by the evidence.

[1–5] Civil Code, section 1430 reads: "An obligation imposed upon several persons, or a right created in favor of several persons, may be: 1. Joint; 2. Several; or, 3. Joint and several." Civil Code, section 1659 reads: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." The presumption is not conclusive. Code Civ.Proc., sec. 1962. It is rebuttable but controls in the absence of evidence to the contrary. Gummer v. Mairs, 140 Cal. 535, 537, 74 P. 26. It may be controverted by other evidence. Code Civ.Proc., sec. 1961. When controverted by other evidence an issue of fact is made for the determination of the trial court and its conclusion is conclusive upon a reviewing court unless it is clearly unsupported by substantial evidence. Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 258, 270 P. 672; Siegell v. York, 84 Cal. App.2d 383, 388, 191 P.2d 50; In re Estate of Ades, 81 Cal.App.2d 334, 337, 184 P.2d 1; Leathers v. Leathers, 77 Cal.App.2d 134, 141, 174 P.2d 875. The Restatement defines a several promise as follows: "Where two or more parties to a contract promise separate performances, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance shall be rendered, each is severally bound for the performance which he promises and is not bound jointly with any of the others." Rest., Contracts, sec. 113; see, also, Spangenberg v. Spangenberg, 19 Cal.App. 439, 126 P. 379; Los Angeles National Bank v. Vance, 9 Cal. App. 57, 60, 98 P. 58; 17 C.J.S., Contracts, §§ 349, 352, pages 805, 807. In determining whether the promises were several or joint and several, when uncertainty arises concerning the meaning of a contract, the language used by the parties is to be considered in the light of the surrounding circumstances and of the practical and mutual construction placed thereon as shown by their acts and conduct before any controversy has arisen between them. Johnston v. Landucci, 21 Cal.2d 63, 70, 130 P. 2d 405, 148 A.L.R. 1355; Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 761, 128 P.2d 665; Eggert v. Pacific States Savings & Loan Co., 57 Cal. App.2d 239, 242, 136 P.2d 822; Weaver v. Grunbaum, 31 Cal.App.2d 42, 49, 87 P.2d 406.

Bergere agreed to give up one-half of his nickel stock and Andrews one-half of his. Stratton, who was agent for Douglas, knew that Andrews did not have 27,500 nickel shares. Stratton knew that Andrews had transferred nickel shares to purchase the interests of his partners in Comet. Stratton knew that the 14,248 shares were to come from, and that they did come from, shares of Comet. Stratton was president of the corporation. He directed Bergere, who was secretary-treasurer, to transfer 27,500 of the nickel stock to himself (Stratton), and 27,500 shares made up of 13,252 shares of nickel stock and 14,248 shares of Comet stock to Douglas. Stratton countersigned the certificates issued to Douglas. Before the transaction was consummated, an escrow holder handling the transaction notified Douglas in writing that the shares were held for him and that the 14,248 shares were transferred to him from Comet. Douglas, after receiving this notice, joined in an application to the Commissioner of Corporations for approval of the transfer of the 14,248 shares to himself. In this application it was stated that the transfer was "distinctly personal" between Comet and Douglas. Douglas appointed Stratton his proxy to vote the stock at a stockholders' meeting. Stratton exercised the power. In the bankruptcy proceedings Douglas at all times asserted that his title to the 14,248 shares was good. In effecting the compromise with the trustee he stated to the Commissioner of Corporations that he was the owner of the shares.

[6-8] The presumption created by Civil Code section 1659 is merely a species of evidence. It is the weakest and least satisfactory character of evidence. Simonton v. Los Angeles Trust & Sav. Bank, 205 Cal. 252, 258, 270 P. 672. The presumption was controverted by the evidence narrated and the reasonable inferences therefrom, thereby creating an issue of fact for the determination of the trial court. Its determination is conclusive here. The evidence was sufficient to justify the court in concluding that the contract was several and not joint and several. If two persons bind themselves severally in respect to the same subject matter each obligor is liable only for his several promise and cannot be held for the other. Failure of Andrews to perform could not enlarge the liability incurred by Bergere. The evidence supports the findings that the promises of Bergere and Andrews were several and not joint and several and that Bergere performed the contract when he transferred 27,500 nickel shares to Stratton.

[9, 10] Appellant's other points are predicated on the assumption that the promises of respondent were joint and several. They need not be considered as to respondent Bergere in view of our holding that the findings that the promises were several and that he performed the contract are supported by the evidence. The transfer in question was made in July, 1942. On December 31, 1942, Andrews was adjudicated bankrupt. Douglas had such knowledge of the bankruptcy proceedings as is contemplated by section 17, sub. a of the Bankruptcy Act within 30 days after the proceeding was commenced. 11 U.S.C.A. § 35, sub. a. Andrews was discharged in bankruptcy on March 3, 1944. A discharge in bankruptcy releases the bankrupt from

all of his provable debts which existed on the day on which the petition was filed, except such debts as are, by the express terms of the Bankruptcy Act, excepted from the operation of a discharge. 11 U.S.C.A. § 35; 6 Am.Jur. 800, sec. 481. The alleged obligation sued on in the present case is not excepted from the operation of a discharge. 11 U.S.C.A. § 35; 6 Am.Jur. 811, sec. 502 **et seq.** The judgment for respondent Andrews was therefore proper.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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94 Cal.App.2d 364

PEOPLE v. TORRANCE.

Cr. 4400.

District Court of Appeal, Second District,
Division 2, California.
Oct. 31, 1949.

William E. Torrance was convicted in the Superior Court of Los Angeles County, Frederick F. Houser, J., of receiving money wagered on a horse race and from the judgment and sentence and from an order denying a motion for new trial, he appealed.

The District Court of Appeal, McComb, J., held that the evidence sustained conviction and affirmed the judgment and order denying the motion for new trial, and dismissed the purported appeal from sentence.

1. Gaming ⚷98(1)

Evidence sustained conviction of offense of receiving money wagered on a horse race. Pen.Code § 337a, subd. 3.

2. Criminal law ⚷1023(10)

An appeal does not lie from a sentence.

John J. Bradley and Max M. Solomon, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Kent C. Rogers, Deputy Attorney General, for respondent.

McCOMB, Justice.

From a judgment of guilty of violating Section 337a, subdivision 3* of the Penal Code after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying a motion for a new trial and a purported appeal from the sentence.

FACTS: Los Angeles City police officer Scheidecker on March 23, 1949, at about noon went to Jefferson Boulevard and Grand Avenue in Los Angeles where he bought a scratch sheet. As he stood at this place he observed six people with scratch sheets walk up to one Kotowich, consult the scratch sheet and a yellow sheet of paper, look around and hand Kotowich something. In each instance as Kotowich walked over to the door of a nearby bar, defendant came out of the bar, conversed with Kotowich who handed defendant something and the latter returned into the bar. Officer Scheidecker opened his scratch sheet and with a pencil borrowed from Kotowich made marks thereon. He then told Kotowich that he had a good one going in the second race. Defendant came out of the bar, motioned to Kotowich who joined him and a whispered conversation resulted. Kotowich returned to Officer Scheidecker and told him that Adrieanna had won the second race and paid $9.40 to win. Officer Schiedecker then stated he was mad because he could not make a bet. Kotowich stated, "Well, I thought you were down on it." Schiedecker replied. "No, I had no way to make my bet," and asked Kotowich, "Well, can you get something for me in the third?" On receiving an affirmative reply, Officer Schiedecker then told Kotowich that he wished "two to win" in the third race and gave him two $1.00 bills.

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* Section 337a, subdivision 3 of the Penal Code reads: "Every person,

"3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever;

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

Defendant walked over to Kotowich who told defendant, "I got one for the third. I want $2.00 to win on Easter Ship in the third." He then gave defendant the two $1.00 bills which Officer Schiedecker had just given him. Defendant re-entered the bar and made some telephone calls, whereupon he was arrested, and upon demand of Officer Schiedecker he pulled the two $1.00 bills out of his pocket which the officer had formerly given to Kotowich .

Officer Schiedecker stated that he was familiar with the common means and methods used by bookmakers in Los Angeles county, and the expression "I want $2.00 to win on Easter Ship in the third" meant that he had placed a $2.00 bet for Easter Ship, a horse, to win in the third race at Golden Gate Park on March 23, 1949.

Question: Do the foregoing facts constitute sufficient evidence to sustain a judgment of conviction for violating the provisions of Section 337a, subdivision 3 of the Penal Code?

[1] This question must be answered in the affirmative under the decision in People v. Newland, 15 Cal.2d 678, 104 P.2d 778. In that case the evidence was not more cogent than in the present case, and the Supreme Court held that such evidence was sufficient to sustain a conviction under Section 337a, subdivision 2 of the Penal Code. Therefore it is obvious that the evidence set forth above in the present case supports the judgment.

[2] An appeal does not lie from a sentence. (People v. Munoz, 61 Cal.App.2d 646, 647, 143 P.2d 502.)

The judgment and order denying the motion for a new trial are affirmed. The purported appeal from the sentence is dismissed.

MOORE, P. J., and WILSON, J., concur.

94 Cal.App.2d 388

ARABIAN AMERICAN OIL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 17211.

District Court of Appeal, Second District, Division 3, California.

Nov. 2, 1949.

Hearing Denied Dec. 29, 1949.

Jean Frances Brown, employee, was awarded compensation for injuries by the Industrial Accident Commission when an automobile in which she was riding went off a sand dune, and the Arabian American Oil Company, a corporation, employer, petitioned for the review of the order.

The District Court of Appeal, Wood, J., annulled the award, holding that the injury did not arise out of or in course of employment and was not proximately caused by employment.

Workmen's compensation 🔑1559

An injury incurred when employer's automobile in which employee was riding on trip for pleasure over the desert from company town to beach dived off a sand dune which had a drop instead of being round was not under evidence compensable as an injury arising out of or in course of employment, and was not proximately caused by employment. Labor Code, § 3600.

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Lawler, Felix & Hall, Douglas Van Dyke, Los Angeles, for petitioner.

T. Groezinger, Robert Ball, San Francisco, for respondent Industrial Accident Commission.

Charles A. Son, Los Angeles, for respondent Jean Frances Brown.

WOOD, Justice.

Petition for a writ of review whereby it is sought to annul an award of the Industrial Accident Commission.

Petitioner and Jean Frances Brown entered into a contract of employment in California, the provisions of which were stated in a "Letter of Agreement," dated August 19, 1947. The letter was received in evidence, and it stated that Miss Brown was employed by petitioner for service in its "Zone of Operations" which zone "is understood to mean Saudi Arabia, and any other foreign locality to which employee may be transferred for service," for a minimum period of 2 years; her classification would be "Stenographer," but she might be assigned to other work at any time; upon her arrival in the zone of operations she would "be subject to the instructions of the Management"; during her service with petitioner she would be "required to abide by such rules and regulations as may be in effect in the Zone of Operations"; petitioner would designate the means and route of travel to be used and provide for reasonable expenses incurred while traveling for the account of petitioner; and that the petitioner might summarily dismiss her for conduct which would be detrimental to the best interests of petitioner, for wilful neglect of duties, or for noncompliance with regulations.

The zone of operations to which Miss Brown was sent was Dhahran, Saudi Arabia, which was referred to at the trial as a "company town." Dhahran consisted of administration buildings, oil installations, living quarters for the employees, a "messhall," and recreational facilities which included a library, a club house, a baseball diamond, motion pictures, and a swimming pool. Dhahran was inclosed by a wire fence about 6 feet high. The fence was to keep the natives out of the town. Apparently the fence inclosed a large area—Miss Brown having testified that she saw the fence when she was at or near the main gate; and that it took about 8 minutes for her to go by bus from the place where she lived to the place where she worked. Outside the fence there was an area known as "Old Dhahran," which consisted of other administration buildings. Miss Brown worked in one of those buildings. Also outside the fence was a golf course which petitioner maintained for the use of its employees. Petitioner furnished its employees with board and lodging and transportation to and from work. It also permitted the employees to use its automobiles for pleasure after working hours. It maintained a "car pool," which was made up of all the vehicles owned by it, including those used in petitioner's business during working hours. Upon request, the male employees were given written authorization to use vehicles from the "car pool" for a designated number of hours. They were not, however, permitted to use them for pleasure purposes inside the fenced area. There was one main gate in the fence inclosing Dhahran. Immediately outside this gate there was a checking station at which the driver of a vehicle which was being used for pleasure was required to stop, sign his name, and state his approximate destination. He was also required to check in upon his return. There were three roads from Dhahran to other towns. One of those roads was to the town of Abqaq, about 50 miles away, and the road apparently was built by petitioner.

On May 20, 1948, Miss Brown, who planned to go to a beach that evening with a co-employee, Mr. Reardon, returned to her living quarters after working hours and changed her clothing to beach apparel. About 6 p. m. Mr. Reardon, who was driving a pick-up truck which he had obtained from the "car pool," called for Miss Brown at her living quarters, and they went in the truck to the mess hall where they had dinner. They then reentered the truck and started to go to a beach, known as "Half-Moon Bay," on the Persian Gulf. Miss Brown testified that they went through the main gate, and at that time there was someone at the checking station; that it was the duty of the person at the station to check the truck out, but she did not remember whether Mr. Reardon stopped—that many times he "was not stopped going in and out of the gate because his job necessitated going in and out of the gate so they just waved him by." There was no road from Dhahran to Half Moon Bay. Miss Brown testified that they proceeded along the road toward Abqaq for approximately 15 miles and then they turned off that road, onto the sand, and proceeded toward Half Moon Bay; that there was no road extending from the Abqaq road to Half Moon Bay; that the bay was about one mile from the point where they turned off the road; that there were various trails "if they hadn't been covered over by the sand"; that it was open country; that an experienced driver could recognize solid sand from its color and texture; that they proceeded toward the bay, and "to stay on solid ground we were on these hills, sand hills or sand dunes"; that they tried to follow the path closest to the sign that indicated the direction of the bay; that while enroute to a particular spot on the beach Mr. Reardon drove onto a sand dune which "instead of being a round dune it had a direct drop on it" and the truck nose-dived off that hill and dropped about 12 feet; and that she sustained severe injuries. She testified further that Half Moon Bay was recognized as the best bathing beach on that coast, and it was used on holidays and non-working days by employees of petitioner; it was also used by employees of petitioner's subcontractors, and by the Army; she had been there at least 5 times; it was not maintained by petitioner, and there was no wharf, pier or other development there; petitioner had some restrictions as to where its employees went—they were not permitted to go into "the very interior of the desert"; there was no restriction against going to the towns of Abqaq and Rastanura; and there was no restriction against going to Half Moon Bay—it "was accepted like a public beach."

Section 3600 of the Labor Code provides that liability for compensation shall exist against an employer for any injury sustained by his employees arising out of and in the course of the employment in those cases where, among others, the following conditions of compensation concur: "(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment" and "(c) Where the injury is proximately caused by the employment, either with or without negligence."

Petitioner contends that the injury did not arise out of or in the course of the employment, and that the injury was not proximately caused by the employment. That contention is sustained. Miss Brown had finished her work for the day, had gone home and changed her clothing to beach apparel, had eaten dinner, left petitioner's premises and, at the time of the accident, was on a pleasure trip. While petitioner permitted employees, after working hours, to use its motor vehicles for pleasure, it did not require them to do so. Miss Brown had complete freedom in deciding whether she should go on a pleasure trip, in selecting an escort and driver, and in deciding where to go. The mere fact that she was riding in a vehicle owned by petitioner at the time of the accident is not sufficient to create liability under the Workmen's Compensation Act. In Graf v. Montecito County Water Dist. (and consolidated actions for damages), 1 Cal.2d 222, 34 P.2d 138, the trial court rendered a judgment of nonsuit on the ground that the Industrial Accident Commission had exclusive jurisdiction of the claims. The Supreme Court, in reversing that judgment, held that the Industrial Accident Commission did not have jurisdiction. The plaintiffs therein were employed by defendant to help construct a dam in Santa Barbara County, and as such employees they resided near the dam at a camp maintained by defendant. The defendant therein owned and operated a train of flat cars in connection with the construction of the dam. Each Saturday afternoon the defendant operated the train as the

"Saturday Special" to furnish transportation, without charge, to its employees who desired to go to Santa Barbara. At the time of the accident therein, the plaintiffs were going to Santa Barbara for the purpose of visiting friends and relatives or to attend a theater. In holding that the injuries were not compensable under the Workmen's Compensation Act the court therein stated, 1 Cal.2d at page 224, 34 P.2d at page 139: "The issue on this appeal is whether the transportation furnished appellants by respondent was so connected with the employment that injury received by appellants while riding on the train arose out of or was incidental to their employment. Respondent contends that the transportation was furnished appellants as a matter of right, and was an implied term of their contract of employment. The record does not disclose what the exact terms of their employment were; there was no testimony that such transportation was promised the employees as a part of their contract. Respondent cites many cases in support of its contention that an injury received while going to or coming from work by means of a conveyance furnished by the employer as an incident of the employment and in pursuance of the contract of hire arises out of and in the course of the employment, and is compensable under the Workmen's Compensation, Insurance and Safety Act. But we think the facts of the instant case remove it from any influence of such cases. The injured employees were neither going to nor returning from their work, they lived at the campsite, and had been to their abodes, changed their clothes, and boarded the train for an excursion of pleasure wholly aside from their duties as employees." It should be noted that in the Graf case the train was under the control of and was being operated by the employer, over a route designated and established by the employer. In the present case the truck was not under the control of the petitioner, but was being operated by an employee in his individual capacity, on a pleasure trip, over an undeveloped area in a desert. At the time of the accident Miss Brown was on a personal venture which was not in the course of, or incidental to, her employment, and her injury was not proximately caused by her employment.

The commission contends that Miss Brown's trip to Half Moon Bay was reasonably contemplated by her employment. It was stated in the case of Bethlehem Steel Co. v. Industrial Accident Comm., 70 Cal.App.2d 382, at page 387, 161 P.2d 59, at page 61: "'If the particular act is reasonably contemplated by the employment, injuries received while performing it arise out of the employment, and are compensable. In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. * * *'" The commission argues, in substance: (1) The nature of Miss Brown's employment, with all her activities taking place in a fenced area, was such as to require recreation outside the fenced area for reasons of morale and efficiency. (2) The customs and usages of the employment, relative to maintaining the car pool and permitting the employees to use the cars outside Dhahran, show that petitioner considered that recreation outside Dhahran was a part of the employment. (3) The terms of Miss Brown's contract of employment placed all her activities while in Arabia under petitioner's control.

As to the first argument just mentioned, relative to being fenced in, it appears that the "fenced area" was not a small area but extended over a large tract of land. The testimony of Miss Brown indicates that the fence was not visible from the main part of Dhahran. As above shown, there were many recreational facilities in the town, including a swimming pool. It cannot be said that her recreational activities were so restricted that a trip by truck, off the highway, over hazardous desert, and across sand dunes to the unimproved beach at Half Moon Bay, was an incident of her employment.

As to the second argument above mentioned, relative to the "car pool," the petitioner was not performing a contractual obligation in permitting the cars to be used.

It appears that Miss Brown could not have obtained a car from the pool, since the women employees were not permitted to drive the cars. As above shown, the car pool was made up of all the vehicles used by petitioner during business hours. The use of a car for pleasure was a permissive use only. The requirement that a driver sign his name and state his destination appears to have been for the purpose of keeping a record of the whereabouts of the vehicles and was not for the purpose of checking the activities of the employees. This is indicated by the fact that only the driver of a vehicle was required to sign his name. Furthermore, it seems that the rule was not strictly enforced. Miss Brown testified, as above shown, that on many occasions the driver was not stopped at the gate (checking station); and that she did not remember whether he stopped at the checking station on the day of the accident.

As to the third argument above mentioned, relative to the contract placing all her activities under petitioner's control, there was no provision in the contract of employment pertaining to recreation or to a car pool or to transportation of employees for pleasure purposes. The employment agreement did state that Miss Brown would be "subject to the instructions of the Management" and that she would be "required to abide by such rules and regulations as may be in effect in the Zone of Operations." Those provisions did not constitute an unusual subjection to authority, and they did not pertain to control over the personal activities of the employee while she was away from petitioner's premises on a pleasure trip. The provision in the agreement that petitioner reserved the right to summarily dismiss the employee for conduct "which would be detrimental to the best interests of the company, wilful neglect of duties, or for noncompliance with regulations" is not an unusual provision in employment contracts, but is a right that is usually reserved to the employer. It does not appear that the petitioner had given any instruction or had made any rule or regulation regarding recreation. The record does not show that petitioner directed or attempted to direct or control the recreation of its employees.

The award is annulled.

SHINN, P. J., and VALLEÉ, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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94 Cal.App.2d 458

BORCH et al. v. CITY OF LOS ANGELES et al.

Civ. 16913.

District Court of Appeal, Second District, Division 3, California.

Nov. 3, 1949.

Fred Louis Borch and others brought a proceeding against the City of Los Angeles, W. J. Escherich and others, as members of and constituting the city Board of Building and Safety Commissioners, and others, for a writ of mandate directing the members of the Board to reinstate petitioners as city Examiners of Motion Picture Projectionists. From a judgment of the Superior Court of Los Angeles County, Clarence M. Hanson, J., granting the writ, defendant board members appealed.

The District Court of Appeal, Vallée, J., affirmed the judgment, holding that it was not erroneous as based on pleadings not showing that the board discharged or otherwise removed petitioners, nor as indefinite, uncertain and meaningless.

1. Mandamus 🔑**178**

A judgment, directing city Board of Building and Safety Commissioners to reinstate mandamus petitioners as city Examiners of Motion Picture Projectionists and reciting that petitioners acted as such examiners until specified date, on which board adopted resolution purporting to dissolve committee of examiners, as alleged in petition, was not erroneous as based on pleadings not showing that board discharged or otherwise removed petitioners.

2. Mandamus ⚷178

A judgment directing city Board of Building and Safety Commissioners to reinstate mandamus petitioners in their civil service positions as city Examiners of Motion Picture Projectionists after their discharge by board's resolution was not erroneous as indefinite, uncertain and meaningless because of recital that board might examine applicants for motion picture projectionists' licenses either directly or through committee of examiners, as such fact did not warrant denial of petition.

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Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, George William Adams, Deputy City Attorney, and Alan G. Campbell, Deputy City Attorney, City of Los Angeles, for appellants.

Buron Fitts and A. Moresby White, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from a judgment ordering that a writ of mandate issue directing the members of the Board of Building and Safety Commissioners of the city of Los Angeles, referred to as the "Board", to reinstate petitioners below, respondents here, as Examiners of Motion Picture Projectionists, in the employ of the city.

The petition for the writ alleges these facts. In January, 1934, after a civil service examination for the position of Examiner of Motion Picture Projectionists, respondents were duly certified as having passed the examination and as eligible for permanent appointment by the Board. Thereafter the Board appointed respondents as such examiners and they acted as such and as permanent employees in the classified civil service of the city and were paid their salaries each month from March, 1934, until January, 1948. About January 5, 1948, the Board adopted the following resolution: "Whereas it is the adopted policy of this Board to cause all examining Boards under its jurisdiction to be composed of one representative of labor, one representative of management, one member of the Department of Building and Safety. And whereas it is necessary to reorganize the Examiners of Motion Picture Projectionists to conform to the adopted policy therefore be it resolved that the committee known as the Examiners of Motion Picture Projectionists be hereby dissolved effective January 6, 1948, and the members instructed to hold no more meetings, further pending reorganization of the committee examinations will be held by this Board with the Superintendent of Building delegated to conduct the required tests, and further that the Superintendent of Building prepare and submit rules and regulations for the conduct of the examinations." On January 6, 1948, each respondent received a notice from the Board, purporting to discharge each of them from their employment, which reads as follows: "Pursuant to the action taken at the meeting of January 5, 1948, the Board of Building and Safety Commissioners have dissolved the committee known as the 'Examiners of Projectionists.' Future examinations are to be conducted by the Board of Building and Safety Commissioners as specified in Section 96.08(L) of the Municipal Code. This action is to be effective January 6, 1948. This will serve as a notice to the members of the above committee that there will be no more meetings of said committee." No copy of this notice was filed with the Civil Service Commission. On January 12, 1948, the Board adopted the following resolution: "Report was received and filed from the examiners of Motion Picture Projectionists, File 2267-117, regarding meeting held January 12, 1948, finding that a Board consisting of Electrical Inspectors had been instructed to conduct the examinations for motion picture projectionists." On January 15, 1948, the Board adopted the following resolution: "Report was received and filed from the Chief of Mechanical Bureau with revised rules and regulations for the examinations of motion picture projectionists, these were adopted and previous rules and regulations were cancelled." Respondents were not served with a written notice of charges against them, and the Board did not at any time file with the Civil Service Commission a written statement of any charges "or of reasons for any discharge or removal or suspension or lay-off, or abolition of office concerning the petitioners." Thereafter the Board wrongfully refused to employ respondents or to utilize their services as such examiners or to pay them their salary, and wrongfully terminated their employment. Respondents are ready, willing and able to perform all of the services of the position. On January 12, 1948, the Board appointed certain electrical inspectors as Examiners of Motion Picture Projectionists and these appointees have since acted as such. About January 22, 1948, respondents made application to the Civil Service Commission for reinstatement and the Civil Service Commission informed them it had no jurisdiction. A request for reconsideration was denied by the Commission on May 5, 1948.

The answer admitted that respondents were certified, appointed and acted as Examiners of Motion Picture Projectionists as alleged in the petition; alleged that an ordinance of the City of Los Angeles provided for the employment of three motion picture projectionist examiners with a salary of $12.50 a meeting; admitted the adoption of the resolutions and the giving of the notice; denied that the Board had discharged the respondents; alleged that the Board had decided to conduct examinations itself and that it had done so since January 6, 1948.

On the hearing respondents moved for judgment on the pleadings. The motion was granted. The judgment directed the Board to reinstate the respondents in their positions as Examiners of Projectionists. The court in the judgment stated that, after hearing argument, it was of the opinion that the Board may, as provided by section 96.08 of the Municipal Code (Ord. 77,000) either conduct any examination of an applicant for a license as a motion picture projectionist directly, or conduct any such examination through a committee of three persons, known as Examiners of Projectionists, appointed by the Board under the provisions of the ordinances and charter of the city. The judgment recites "that the three petitioners were duly appointed and qualified from the classified Civil Service list of said city in March, 1934, to act as Examiners of Projectionists, that they acted in such capacities until January 5, 1948, and that the said Board of Building and Safety Commissioners then adopted a resolution purporting to dissolve said Committee of Examiners of Projectionists." The Board appeals.

Appellant claims that (1) the judgment was error; (2) the judgment is erroneous because it is indefinite, uncertain and meaningless.

[1] The claim that the judgment was error is predicated on the erroneous conclusion that it does not appear from the pleadings that the Board had discharged or otherwise removed respondents. Appellants concede that "the court might thereupon have entered a declaratory judgment that the board's action of January 5, 1948, did not operate to discharge the respondents or otherwise to remove them from their positions." We think it clear that the trial court's interpretation of the resolution adopted by the Board on January 5, 1948, was correct. We think a fair interpretation of this and the other resolutions and the notice from the Board to respondents is that the latter were discharged from their positions. We understand appellants concede that if the trial court's interpretation of the resolution of January 5, 1948, was correct, the action of the Board was improper and illegal. The judgment of reinstatement was therefore proper.

[2] The contention that the judgment is indefinite, uncertain and meaningless, is without foundation. This contention appears to be based upon the fact that the judgment recites that under section 96.08 of the Municipal Code the Board may conduct examinations of applicants for licenses as motion picture projectionists either directly or through a committee of three examiners. This fact did not warrant a denial of the petition. It is conceded that respondents are civil service employees and that they can only be discharged from their positions in the manner provided by the charter. Until they are so discharged, they are legally entitled to hold their positions. The fact, if it is a fact, that examinations may be

conducted by the Board or by respondents, is not material. The fact, if it is a fact, that respondents will not be given any services to perform and that they will not receive any compensation, is not material. They are entitled to hold their positions until they are legally discharged. There is nothing to prevent the Board from changing its policy as announced in its resolution of January 5, 1948, and to conduct examinations through respondents as was done from 1934 to 1948. The judgment is not indefinite or uncertain or meaningless. It is clear and unambiguous and requires the reinstatement of respondents.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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94 Cal.App.2d 353

O'BRYANT et al. v. BOSSERMAN.

Civ. 17067.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1949.

Hearing Denied Dec. 29, 1949.

Action by Verna V. O'Bryant and husband against Gordon Bosserman to partition realty, legal title to which was held by named plaintiff as trustee.

The Superior Court of Los Angeles County, Chris B. Fox, J., entered an interlocutory judgment of partition and defendant appealed.

The District Court of Appeal, Doran, J., held that plaintiffs, suing in their individual right as owners of an interest in the realty, could maintain such action, though named plaintiff held legal title as trustee, and that the evidence sustained judgment determining the respective interests of the parties and affirmed the judgment.

1. Trusts 🔑249

Holder of legal title to realty as trustee and her husband, suing in their individual right as owners of an interest in the realty, could maintain action against third person who also had an interest in the realty for a determination of their respective interests and partition of the realty. Code Civ.Proc. § 752.

2. Partition 🔑74

Where record disclosed that husband and wife and wife's brother had all contributed toward purchase, construction, improvement and preservation of realty, resulting in equitable interests in the realty, to which wife held legal title as trustee, interlocutory judgment of partition determining respective interest of the parties in the realty was proper.

3. Partition 🔑69

That trial court in action to partition realty determined the respective interests of the parties without referring the matter to a referee, though the evidence was in conflict, was not reversible error.

4. Partition 🔑63(3)

Where the evidence is conflicting in action to partition realty, trial court has considerable latitude in determining the interests of the parties.

5. Partition 🔑63(3)

Evidence sustained interlocutory judgment of partition determining the respective interests of the parties in realty toward the purchase, construction, improvement and preservation of which all the parties had contributed.

Ernest P. Morgan, Los Angeles, for appellant.

Arthur T. Stewart, Los Angeles, for respondents.

DORAN, Justice.

The complaint herein, as finally amended, alleges that since the year 1939 the parties "have had dealings together and as a result of which they have acquired and hold (real) property in which they cannot agree as to their respective interests"; that the record title thereto is held by the plaintiff, Verna V. O'Bryant, as trustee, but that "she recognizes that plaintiffs and defendant have interests as tenants in common", making it necessary that such interests be determined and a partition ordered. The defendant (appellant) claims to be the sole owner and denies that the plaintiffs have any interest whatsoever in the property.

It appears from evidence adduced at the trial, that the three parties involved, Mr. and Mrs. O'Bryant, plaintiffs herein, and Mrs. O'Bryant's brother, the defendant Gordon Bosserman, came to California from Texas in 1936 and for a time lived in a rented house. In 1938 the defendant purchased the two lots here involved, paying $120 on the purchase price of $300. Thereafter a loan of $1,700 was procured, a house was built on the property and occupied by the parties. Title was taken in the name of the defendant who executed the trust deed, but notes secured by the trust deed were signed by all parties. Later the defendant sold an automobile and applied $350 therefrom on the loan. In May, 1942 the defendant entered the army; after the latter's discharge in 1945 the balance of the loan, $749, was paid off in a lump sum by the plaintiffs. Appellant's brief affirms that "All of the parties testified that there was no conversation as to the interests of the other in the property at the time of the final pay off of the loan."

According to appellant's brief, "In late June, 1946, a difficulty arose among the parties, and the plaintiff Verna V. O'Bryant who had in her possession, unrecorded, a power of attorney from defendant given to her during the period of his service, executed a deed to herself as trustee of the premises" and recorded the power of attorney and deed. This was the condition of the title at the time the present action was brought.

The trial court found that all parties hereto had contributed a sum total of $3,237.67 for the purchase, construction, improvement and preservation of the property, of which the plaintiffs had jointly contributed $2,044.81 against which was chargeable the sum of $717.50 "for rent for the time they occupied the property to the exclusion of defendant", making plaintiffs' net contribution $1,327.31; that the defendant had contributed $1,192.86. Plaintiffs were therefore adjudged to be "the equitable owners of a 52.68% interest in said property and defendant of a 47.32% interest therein". An interlocutory judgment of partition was accordingly entered, and it is from this judgment that the defendant has appealed.

Appellant's brief presents the following points: (1) "The complaint does not state facts sufficient to state a cause of action"; (2) "The findings of fact, conclusions of law and interlocutory judgment are erroneous and not supported by the evidence"; (3) "The evidence offered in support of the complaint is so contradictory and uncertain that a judgment based thereon must be reversed".

In reference to appellant's first point, it is urged that the complaint fails to state a cause of action for the reason that one of the plaintiffs, Verna V. O'Bryant is alleged to and does hold the legal title as a trustee, and that a trustee is "not one of the persons enumerated in Section 752 of the California Code of Civil Procedure who could maintain an action for partition". In this connection is cited Varni v. DeVoto, 10 Cal.App. 304, 101 P. 934, 935, wherein it is said that "One cannot, of course, by a suit for partition, put an end to an express trust or defeat its lawful purposes, nor usurp the functions of the trustee."

[1, 2] The present situation does not, however, fall within the purview of the above rule, and as respondents' brief points out, the action was not instituted by the self-appointed Verna V. O'Bryant as a trustee, but was brought by Mr. and Mrs. O'Bryant "suing in their individual right as owners of an interest in the property sought to be partitioned". The appellant's answer denies that either plaintiff has any interest in the property or that Mrs. O'Bryant has any "interest, right or title * * * either as trustee or otherwise". And the record discloses that contribution has been made by all parties resulting in an equitable interest in the property requiring partition. Under these circumstances plaintiffs' complaint seeking a determination of the respective interests cannot be deemed insufficient nor the judgment uncalled for.

[3] Appellant's contention that the findings and judgment "are erroneous and not supported by the evidence", does not find support in the record. It is true that the

evidence was in conflict, that the appellant claimed to be the sole owner of the property, and that the trial court determined the respective interests of the parties without referring the matter to a referee. However, as stated in respondents' brief, "A great deal of time was taken, without objection, in getting at the facts as to the contributions of the respective parties * * *. The Court appeared to have reached the conclusion that, with conflicting testimony at many points, and endless detail involved, that the Court had as clear an idea * * * as a referee would probably be able to arrive at after an extensive and expensive investigation". In all this, there has been pointed out nothing which could in any way justify a reversal.

[4, 5] Nor can it be said, as appellant's brief avers, that the evidence "is so contradictory and uncertain that a judgment based thereon must be reversed". As hereinbefore indicated, the evidence was in conflict, but as appellant's brief admits, "considerable latitude must be given to a trial court in deciding such a question of fact". The authorities submitted by appellant deal with factual situations dissimilar to those here involved and present nothing requiring a reversal herein.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

94 Cal.App.2d 361

WILSON v. FREDERICKSEN et al.

Civ. 17146.

District Court of Appeal, Second District, Division 1, California.

Oct. 31, 1949.

J. R. Wilson brought action against P. C. Fredericksen and C. E. Kasler, co-partners, doing business as Fredericksen and Kasler, and Fred S. Jones and others, to recover for injuries sustained by the plaintiff when his truck collided with automobile and house trailer of Fred S. Jones on a detour constructed by the co-partners.

The Superior Court of San Luis Obispo County, Ray B. Lyon, J., rendered a judgment for the plaintiff and the defendants appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment, holding that evidence supported findings of the Superior Court, and that a reference to insurance was not harmful error.

1. Appeal and error 🔑1010(1)

Trial court's findings which were supported by the evidence were conclusive.

2. Automobiles 🔑244(15)

In action by truck driver for injuries sustained when his truck collided with an automobile and a house trailer coming from opposite direction on dusty detour in the evening, evidence sustained finding that driver of automobile was negligent in driving partially on wrong side of the detour.

3. Automobiles 🔑306(4)

In action by truck driver for injuries sustained in collision with automobile and house trailer on dusty detour, against contractors who under contract with the state were required to wet down dusty roadways during course of construction so as to make them reasonably safe for travel, evidence sustained findings that detour was very dusty because of contractors' failure to wet it down, authorizing recovery against contractors.

4. Appeal and error 🔑1054(1)

Where trial of injury action was before a judge, no harm was done by fact that plaintiff's attorney put before the court evidence that an insurance company was interested in the case.

5. Trial 🔑127

If a representative of an insurance company talks with witnesses who are to testify at a trial in which the company is interested, that fact, if relevant, becomes admissible on the trial.

6. Trial 🔑127

In action for injuries sustained in automobile collision, plaintiff's attorney properly inquired as to whether witness had discussed his testimony with any representative of a certain insurance company, for purpose of testing the credibility of the witness.

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A. H. Brazil, San Luis Obispo, for appellants.

Walch & Griswold, Sidney J. W. Sharp, Herbert M. Braden, Hanford, for respondent.

DRAPEAU, Justice.

October 2, 1947, a modern four-lane highway was being constructed on state highway 101 in San Luis Obispo county. At a point a mile or two north of the city of San Luis Obispo, the construction contractors had placed barricades across the old pavement and provided a detour or bypass in the dirt alongside the old pavement. Kerosene flares were closely placed along the barricades across the pavement.

The detour was about five hundred feet in length, and from thirty-two feet minimum to fifty feet maximum in width. Kerosene flares were also placed at short intervals along each side of the detour. The detour was sprinkled with water several times a day by the contractors.

About 6:30 in the evening, the plaintiff, driving a Chevrolet pickup truck was going south toward San Luis Obispo. At that time vehicles using the highway had their lights on, and the kerosene flares were burning. Reaching the detour, the plaintiff drove off the pavement and onto the dirt roadway between the lighted flares.

At approximately the same time, the defendant Jones was going north, driving a Willys sedan, hauling a house trailer. There is no evidence of undue speed of any of the parties. Jones was following a big, box-car truck, equipped with twelve or fourteen wheels. As the truck went through the detour, it caused a thick, whirling cloud of dust to rise. The dust was so pervading that it obscured the vision of the plaintiff. He first stuck his head and shoulders out of the pickup the better to see where he was going, and, then, to avoid the dust, he elevated the glass window of his pickup on the driver's side. About 100 feet after the plaintiff passed the big truck, his pickup, the Willys, and the house trailer collided.

The pickup was damaged extensively, and the plaintiff suffered severe personal injuries. His left arm was fractured at the elbow, and it is doubtful if he will ever have much use of the arm any more.

The plaintiff, and his wife, who was riding with him, testified about the dust; also that he was driving as close as possible to the flares on his right side of the detour, and that the defendant Jones ran into him.

The defendant Jones, and his wife, who was riding with him, testified that their car was traveling close to the flares on their right-hand side of the detour; that there was no dust; and that the plaintiff ran into their car and trailer.

A traffic officer who went to the scene shortly after the accident testified that the dust was bad, and that he telephoned the office of the Highway Patrol in San Luis Obispo to have the barricades changed to a different angle across the pavement, and to have the detour sprinkled. This was done later that evening.

Other witnesses testified to the condition of the detour: those for the plaintiff as to its dangerous and dusty condition; those for the defendants that the dust wasn't so bad, and, anyhow, that there was no driving danger caused by the dust.

The trial judge found for the plaintiff and against the defendants Jones and the contractors; judgment followed; and all of the defendants appeal.

The work was being done by the contractors under a contract with the state of California which imposed upon them the duty to maintain the highway being improved in a reasonably safe condition. The contract also required the wetting down of dusty roadways during the course of construction so as to make them reasonably safe for travel.

[1-3] The evidence supports the findings of the trial court. Therefore, under

the substantial evidence rule, these findings must be upheld by this court.

Appellants complain of a ruling of the trial court relative to a question of insurance. The situation may be stated by quoting from appellants' brief as follows:

"'Mr. Braden. Q. Is it your testimony that you have not discussed your testimony here with any representative of the United Pacific Insurance Company?

"'Mr. Brazil. Just a moment. If Your Honor please, I think that is a highly improper question on the theory that it doesn't make any difference whether he did or not, and that the only basis of a question of that kind is to impeach, and he should relate the specific conversation that he is dealing with, and not ask him the general question of that kind.

"'Mr. Braden. I think, if the Court please, it would only go to test the credibility of this witness.

"'The Court. Well, let him answer. Read the question to him. (Question read.)

"'A. I did discuss it to a certain extent.'

"The Court finally sustained our objection—but plaintiff's counsel had successfully put before this Court that an insurance company was interested in the case."

[4-6] As stated in appellants' brief, defendants' objection was sustained. So, in any event, the trial being before a judge, no harm was done. Moreover, if a representative of an insurance company talks with witnesses who are to testify in a trial in which that insurance company is interested, that fact, if relevant, competent and material, becomes admissible in evidence upon the trial. The law does not give anyone the privilege of talking with witnesses in a case in which he is interested, upon the assumption that opposing parties may not inquire into the fact or details of such a conversation, when such inquiry is pertinent and proper for the purpose of testing the credibility of witnesses, weighing their testimony, or for any other lawful reason. Even if defendants' objection had not been sustained, the testimony was presented to the trial court in a legitimate manner and for a legitimate purpose. Moffitt v. Ford Motor Company, 135 Cal.App. 7, 26 P.2d 661.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

GARDNER v. JONATHAN CLUB.

Civ. 16841.

District Court of Appeal, Second District,
Division 3, California.

Oct. 25, 1949.

Hearing Granted Dec. 22, 1949.*

Beverly Gardner brought action against the Jonathan Club, a corporation, to recover $5,500 allegedly deposited with defendant for safe-keeping in defendant's safe, and the defendant contended that its liability under the Innkeepers Act was limited to $250.

The Superior Court of Los Angeles County, Harold B. Landreth, J., rendered summary judgment for only $250 and the plaintiff appealed.

The District Court of Appeal, Wood, J., reversed the judgment, holding with Shinn, P. J., and Vallée, J., specially concurring, that defendant was not entitled to summary judgment.

1. Innkeepers 🔑11(11)

Check which was detached from sealed envelope containing $5,500 when guest handed it to desk clerk to place in safe, and which was given by clerk to guest, and which provided that it was to be signed by guest when envelope was called for, was a "receipt" within statute limiting innkeeper's liability to not more than $250, unless he gives a "receipt" in writing to guest, for money placed in hotel safe. Civ.Code, § 1860.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Receipt".

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* Subsequent opinion 217 P.2d 961.

2. Innkeepers ⟹11(11)

The limitation of statute providing that liability of an innkeeper-depositary for negligence cannot exceed amount which he is informed by depositor, or has reason to suppose, thing deposited is worth, applies to simple negligence. Civ.Code, § 1840.

3. Innkeepers ⟹11(11)

Where a receipt has been given pursuant to statute for money placed in hotel safe, there is no limitation of liability except general limitation under statute providing that liability of a depositary for negligence cannot exceed amount which he is informed by depositor, or has reason to suppose, thing deposited is worth. Civ. Code, §§ 1840, 1860.

4. Innkeepers ⟹11(1)

Except as limited by statute, the liability of an innkeeper-depositary for lost article deposited by guest is the value of the article deposited. Civ.Code, §§ 1840, 1860.

5. Innkeepers ⟹11(11)

Where guest deposited a sealed envelope containing money with desk clerk of club for deposit in safe, and received a receipt therefor, and envelope was lost, club might be liable for full amount of money if club was negligent and had knowledge or reason to suppose envelope contained amount claimed by guest, or if failure of club to return envelope was due to conduct on its part amounting to more than simple negligence. Civ.Code, §§ 1840, 1860.

6. Innkeepers ⟹11(11)

Where guest deposited a sealed envelope with desk clerk at club for safekeeping in club's safe, without informing clerk of amount of money contained in envelope, and clerk gave guest a receipt for envelope, and envelope disappeared, club was not liable for the $5,500 allegedly contained in envelope, in absence of showing that loss of envelope resulted from conduct amounting to more than simple negligence. Civ.Code, §§ 1838, 1840, 1860.

7. Innkeepers ⟹11(12)

Where guest deposited a sealed envelope with desk clerk at club for safekeeping in club's safe, without informing clerk of amount of money contained in envelope, and clerk gave guest a receipt for the envelope, and envelope disappeared, club had burden to prove that loss was occasioned through no fault of its own or was due solely to its negligence. Civ. Code, §§ 1838, 1840, 1860.

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Murchison & Myers, Bruce Murchison, John B. Myers, Claude B. Cumming, Los Angeles, for appellant.

Fulcher & Wynn, Gibson, Dunn & Crutcher, Los Angeles, for respondent.

WOOD, Justice.

Action to recover $5500 which allegedly was "deposited" with defendant for safekeeping, and which was not returned after demand therefor had been made. Defendant made a motion for a summary judgment in favor of plaintiff for $250, on the ground that defendant's liability was limited to that amount by the statute relating to innkeepers' liability. Defendant filed two affidavits in support of its motion. Plaintiff did not file any affidavit in opposition thereto. The court granted the motion, and plaintiff appeals from the judgment.

The defendant club furnished lodging for hire to its members. Plaintiff's assignor, Mr. Polderman, was a member of the defendant club at the time the alleged deposit was made. He also resided at the club. The club maintained a safe for the safe-keeping of property of its members and lodgers.

On June 18, 1947, Mr. Polderman delivered a sealed envelope (which allegedly contained $5500) to a desk clerk at the defendant club and requested that he place it in the safe. The envelope, which had been furnished to Mr. Polderman by the defendant, had the following printing on it:

"A check

1781 This check to be signed when package is deposited.

"In accepting this envelope and contents for safekeeping, we assume no liability other than that provided for in the Inn Keeper's Act of this state, which has limited our liability so that in no event can we be liable for more than the amount specified in said Act.

"The employee accepting this envelope has no authority to accept same if the contents are valued at more than the amount specified in said Act.

"The contents of this envelope do not exceed a value of $———

"Signature of Depositor ————

"Received by ———— Date ——— 19—

"Do Not Detach Until Package
Is Called For

"Delivery only to owner after signature on Duplicate check 'B' is witnessed and compared."

"Depositor's
B Check

1781 This check to be signed only when package is called for in the presence of the Clerk on duty.

"Signature of Depositor ————

"Delivered by ———— Date ——— 19—

"Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package."

Mr. Polderman signed his name on the "A check" in the blank space provided for the signature of the depositor, but he did not fill in the space provided thereon for declaring the value of the contents of the envelope. The clerk then removed the "B check," which was detachable from the envelope, and delivered it to Mr. Polderman.

About September 4, 1947, Mr. Polderman presented the "B check" to defendant and demanded a return of the envelope, but defendant failed to return it to him.

[1] Appellant contends, in substance, that an innkeeper's liability, for money deposited with him, is not limited by statute to $250 if he gives a receipt to the depositor. Section 1860 of the Civil Code, in effect at the time the deposit was made, provides as follows: "If an innkeeper * * * or lodginghouse keeper, keeps a fire-proof safe and gives notice to a guest * * * or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest * * * or lodger, that he keeps such a safe and will not be liable for money, jewelry, documents * * * or other articles of unusual value and small compass, unless placed therein, he is not liable * * * for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case for more than the sum of two hundred and fifty dollars * * * unless he shall have given a receipt in writing therefor to such guest * * * or lodger." The B check was a receipt. See Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 258 P. 155. The liability of defendant, therefore, was not limited by statute to $250. Since there was a triable issue herein, a summary judgment was not proper. See U.S. Fidelity & Guaranty Co. v. Sullivan, 93 Cal.App.2d 559, 209 P.2d 429.

The judgment is reversed.

SHINN, Presiding Justice, and VALLÉE, Justice.

We concur. For convenience we shall refer to Mr. Polderman as plaintiff. In our opinion the facts before the court on the motion for summary judgment did not warrant a limitation of defendant's liability to $250.

With certain exceptions stated in sections 1859 and 1860 of the Civil Code, the former section places upon innkeepers the liability of depositaries. Baxter v. Shanley-Furness Co., 193 Cal. 558, 561, 226 P. 391; Providence Washington Insurance Co. v. Hotel Marysville, 60 Cal.App.2d 338, 343, 140 P.2d 698. So far as simple negligence is concerned, that liability is limited by section 1840, which reads as follows: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."

The exceptions stated in section 1859 relate to the deposit of specific articles, such as trunks, etc., and consist generally of limitations to stated amounts in the absence of a written agreement by the depositary for the assumption of a greater liability. We mention this section only because the type of receipt issued by defendant is broad enough to cover the subject matter of section 1859. Under the facts of the present case, section 1860 and not 1859 has application.

[2-5] There is no statutory limitation of the liability of a depositary, generally, except for negligence, and we understand that the limitation of section 1840 applies to simple negligence. There is no limitation of liability of innkeepers where a receipt has been given pursuant to section 1860 other than the general limitation of section 1840. Except as limited by statute, the liability of a depositary is for the value of the goods deposited. Muehlebach v. Paso Robles Springs Hotel, 65 Cal.App. 634, 640, 225 P. 19. There are therefore two situations in which defendant might be held liable for the full amount of money deposited as established by the evidence. (1) For negligence, if defendant issued a receipt for the deposit and also had knowledge or reason to suppose that the envelope contained the amount claimed by plaintiff, and (2) if defendant issued a receipt for the deposit and it was shown that its failure to return it was due to misappropriation or other conduct on its part amounting to more than simple negligence.

[6] With reference to the first situation it is our opinion that the receipt issued by defendant was in form and substance sufficient to remove the limitation of liability prescribed by section 1860 which applies when deposits are accepted and not receipted for in writing. On this point the decision in Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 258 P. 155, is controlling. The instrument signed by plaintiff here, and issued in two parts by defendant, seems to be just as clearly a receipt as the one considered in the Greer case, although the word "receipt" did not appear thereon. But the uncontradicted evidence on the motion for summary judgment was that defendant did not know or have any information as to the contents of the envelope or their value. Therefore, if the loss of the money had been shown to have resulted from defendant's negligence, judgment should have gone for defendant, had it not admitted its liability to the extent of $250. But there was no showing whatever that the loss was due to defendant's negligence, nor was the court enlightened in any manner as to what happened to the money. We think the court should have taken a broad view of the case as it was presented on the motion for summary judgment. Prima facie, the facts are that plaintiff deposited with defendant $5,500 to be placed in defendant's safe; defendant issued a receipt for the envelope without making inquiry as to the nature or value of the contents; plaintiff demanded a return of the money and defendant failed to return it; plaintiff brought suit and defendant, without offering any explanation as to what became of the money, admitted liability in the sum of $250 and moved for and had entered a judgment in that amount. Plaintiff does not know, and has been denied the right and opportunity to ever find out, what happened to the money or what defendant did with it. It does not seem to us that a depositary may thus shrug off his duty to account for the property of his depositor, and we are sure that the law does not permit it.

[7] Plaintiff pleaded breach of contract consisting of the deposit, the issuance of a receipt by defendant, a demand for the return of the money and a refusal of the demand. Upon proof of these facts, or their admission by defendant, plaintiff was entitled to a judgment. The only question would be as to the amount of his recovery. It is true that the receipt limited the amount of defendant's liability to the statutory liability of an innkeeper, and that plaintiff appears to have consented to the limitation, but there is no statutory limitation of the liability of an innkeeper for breach of contract to redeliver articles which have been deposited with him to be kept in a safe, for which articles he has issued a receipt, unless his failure to redeliver the articles is due to his negligence alone. Upon proof that defendant was guilty of breach of contract it would have been incumbent upon it to prove that the loss was occasioned through no fault of its own and to thus escape liability, or to prove that the loss was due solely to its

negligence and thus gain the benefit of section 1840. It is well settled that in similar situations, upon proof of breach of the contract, the duty rests upon the depositary to account for his failure to return the goods. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 837-838, 205 P.2d 1037, and cases there cited; Greer v. Los Angeles Athletic Club, supra, 84 Cal. App. 272, 281, 258 P. 155; Cussen v. Southern California Sav. Bank, 133 Cal. 534, 537, 65 P. 1099, 85 Am.St.Rep. 221; see also note 13 So.Calif.L.Rev. 164. It is a just and reasonable rule because the bailee has, or should have, knowledge of the facts which would ordinarily be denied the bailor. It seems to us that in a case of this sort the procedure for summary judgment is not appropriate. A full inquiry should be made into the facts in order to determine the extent of the plaintiff's rights and the extent of the defendant's liability. The principles that require an agent to account for the property of his principal which he has handled, also require a depositary to make a full disclosure to the owner insofar as he is able to do so. It was incumbent upon defendant to show that it had fulfilled this duty. Section 1838 of the Civil Code reads as follows: "If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or injury to occur." It may be that defendant can give no satisfactory account of the loss of the money. It will be necessary to a just decision for the court to know whether it can do so. Important inferences might be drawn from defendant's failure or inability to explain the loss.

Plaintiff was entitled to go to trial upon the complaint and was entitled to recover the full value of the deposit as established by the evidence, in the absence of proof by defendant sufficient to establish a want of liability or a lesser liability.

Hearing granted; SHENK, J., not participating.

PEOPLE v. GIBSON.

Cr. 4376.

District Court of Appeal, Second District,
Division 2, California.
Nov. 4, 1949.

Percy H. Gibson was convicted in Superior Court, Los Angeles County, Charles W. Fricke, J., of attempted burglary of the second degree, and he appealed.

The District Court of Appeal, Moore, P. J., held that admissions of defendant made to police officer after his arrest were competent proof of his intent to commit a burglary and that with admissions in evidence, defendant's attempt to commit burglary was positively established and affirmed the judgment.

1. Criminal law 🔑406(1)

Statement made to police officers by accused, after his arrest for attempted burglary, that he was fixing to commit a burglary, was admissible after prima facie proof of the corpus delicti.

2. Criminal law 🔑409, 680(2)

There is no necessity that the corpus delicti be proved beyond a reasonable doubt before other evidence corroborates it, and if admissions of participation in crime are voluntarily made, they are competent proof of the corpus delicti.

3. Criminal law 🔑44

A specific intent and an ineffectual overt act directed at its consummation are the only two elements essential to an attempted crime.

4. Criminal law 🔑44

The overt act proved need not have been the ultimate step toward the consummation of the design to commit the attempted crime, but it is sufficient if it was the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

5. Criminal law 🔑568, 738

The intent of any person at the time of his attempt to offend the state is a question of fact, and may be inferred from the circumstances in evidence.

6. Burglary ⚿41(10)

Evidence sustained conviction of attempted burglary in the second degree.

7. Criminal law ⚿44

Slight acts in furtherance of a criminal purpose are sufficient proof of one's attempt to accomplish his design, and acts are sufficient when they constitute a direct movement towards the consummation which was prevented by agency inhibitive of the offense.

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Fred N. Howser, Attorney General, Dan Kaufman, Deputy Attorney General, for respondent.

Francis D. Thornton, Los Angeles, for appellant.

MOORE, Presiding Justice.

Convicted by the court of attempted burglary of the second degree, appellant now seeks a reversal of the judgment on the ground of the insufficiency of the evidence. In the course of his argument he contends that the court erroneously admitted evidence of his admissions without proof of the corpus delicti.

About 12:30 o'clock of a January morning appellant crossed an alley extending easterly from San Fernando Road, the principal thoroughfare of Burbank. He carried a 14-foot wooden ladder which he placed horizontally by the fence in the rear of a department store. The darkness of the night was marred only by the street lights which were reflected into the alley. Having deposited his burden he stood erect, looked upward and walked along the edge of the building. Having reconnoitered the premises back to the point from which police officer Wooten had witnessed the prowler's movements he then proceeded easterly for 120 feet when commanded to halt. As he stood in the beam of the officer's flashlight he stated that he was considering whether he could use the ladder at his home and that he might steal it. Wooten then observing that this denizen of darkness wore brown cotton gloves, placed him under arrest and directed him to the police station where, having left the man in the custody of a fellow officer, he returned to the scene of his capture where he found a burlap sack which contained various tools and burglars' equipment, including an eight pound sledge hammer, bits, braces, flashlights, gloves and 30 feet of quarter-inch, white rope ladder of about 15 steps. In addition to the contents of the sack appellant had in his pockets two flashlights, wire cutters and a coil of small brown copper wire. Wooten took also from the man's possession the keys to his automobile which was found two blocks east of the department store. It was registered in the name of appellant's wife.

At the station appellant talked freely; said that he was fixing to commit a burglary. While he had not yet selected a building, "he said after I got on top I was going to see which was the most likely looking spot * * * He was coming to find the most likely looking spot with the rope to go down." Appellant told the officers that he had been in and out of several penal institutions for attempted burglary. Regarding the crippled condition of his left hand he answered that when he had refused to halt on the command of a Sacramento officer he was cut down with a shotgun. He had possessed the rope ladder ten days and had been picking up his tools here and there.

[1-6] There was no error in admitting in evidence the statements made to the officers after prima facie proof of the corpus delicti. People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745; People v. Davis, 24 Cal.App.2d 408, 410, 75 P.2d 80. There is no necessity that it be proved beyond a reasonable doubt before other evidence corroborates it, and if admissions of participation in the crime were voluntarily made they are competent proof also of the corpus delicti. Two elements only are essential to an attempted crime, namely, a specific intent and an ineffectual overt act directed at its consummation. People v. Fiegelman, 33 Cal.App.2d 100, 104, 91 P.2d 156; People v. Lombard, 131 Cal.App. 525, 530, 21 P.2d 955. It is not necessary that the overt act proved should have been the ultimate step toward the consummation of the design. It is sufficient if it was "the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." People v. Fiegelman, supra, 33 Cal.App.2d 105, 91 P.2d 158. Of course, the intent of any person at the time of his attempt to offend the state is a question of fact. It may be inferred from the circumstances in evidence. People v. Martone, 38 Cal.App.2d 392, 394, 101 P.2d 537; People v. Davis, 24 Cal.App.2d 408, 410, 75 P.2d 80; People v. Gilbert, 86 Cal.App. 8, 9, 260 P. 558. In view of the midnight appearance of appellant carrying a 14-foot ladder in an alley of a business section, his placing it beside a department store 20 feet high, his possession of a burlap bag containing divers tools adapted to the burglar's art, and wearing gloves to avoid leaving traces of his identity, it required no strain upon the conscience or the logic of the court to deduce that the purpose of this midnight tour was to enter an inclosure for the purpose of theft. In the Davis case, supra, the accused was seen with hands merely upraised towards a window. He fled when asked his purpose. His admissions to the police were admitted as evidence of his intent. His acts went much further than mere preparation and would have resulted in burglary had he not been frightened. In the Gilbert case the defendant was observed at 11 p. m. climbing over a balcony near the doors to a bedroom. Frightened by the aroused occupants he dropped to the ground. In each of the last cited cases the acts of the accused would have culminated in a burglarious entry but for the interference of other agencies outside the will of the actor. The trial court in the instant action was warranted in finding that appellant's midnightly, solitary drive from Santa Monica to Burbank and his appearance at the rear of a department store would have resulted in a burglary but for the rude gun, the flashlight, and "halt" command of officer Wooten.

[7] Since the admissions of appellant were competent proof of his intent to commit a burglary, his guilt of an attempt to do so was established beyond a reasonable doubt. People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745. Slight acts in furtherance of a criminal purpose are sufficient proof of one's attempt to accomplish his design. People v. Lanzit, 70 Cal.App. 498, 507, 233 P. 816; People v. Fiegelman, 33 Cal.App.2d 100, 105, 91 P.2d 156; People v. Miller, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913. They are sufficient when they constitute a direct movement towards the consummation which was prevented by an agency inhibitive of the offense. (Ibid.)

It is not practicable to prescribe guiding rules for determining what constitutes overt acts done in furtherance of a criminal scheme, plan or purpose. Whether one or more acts of the offender constituted an attempt to achieve his unsocial design is a fact to be determined by the exercise of common sense and with a fair knowledge of the behavior of people of average intelligence and honesty. When a man threatens to kill his neighbor then (1) buys a gun and (2) conceals himself on the neighbor's premises, his two acts are clearly done in furtherance of his declared purpose. If a man traveled 25 miles from his home by the seashore to Burbank north of the Hollywood hills to find a store to burglarize and thereafter was detected by an officer at midnight bearing a ladder down a dark alley and placing it at the rear of a department store and if he is equipped with all the tools commonly used by burglars, there could be no doubt that he was attempting to commit a burglary. His guilt is not less because after having committed such overt acts, he admits that they were done for a burglarious purpose. There was nothing equivocal about his tools, the ladder, the gloves he wore, the hour he chose or the store he approached. It could not reasonably be said that he was out to improve his health or the condition of the merchant on San Fernando Road. Even without his admissions, his criminal purpose was clearly evident. With such admissions in evidence his attempt to commit burglary was positively established.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 293

HAMILTON v. HAMILTON et al.

Civ. 16865.

District Court of Appeal, Second District, Division 3, California.

Oct. 26, 1949.

Proceeding by Harriet Hamilton on a creditor's claim against the estate of Walter A. Hamilton, deceased, predicated on an award made in an interlocutory decree of divorce.

From a judgment of the Superior Court of Los Angeles County, Charles S. Burnell, J., decreeing that the claim was valid, Martha Hamilton, administratrix of the estate, appealed.

Judgment was affirmed by the District Court of Appeal, Vallée, J. The court held that monthly payments to wife were a part of a division of property and not alimony, and that wife's right to monthly payments did not terminate with husband's death.

1. Divorce 🔑245(2)

Award of alimony is subject to modification by court to meet changed conditions. Civ.Code, § 139.

2. Divorce 🔑247

Right to unaccrued alimony stops with death of party directed to pay.

3. Divorce 🔑254

Divorce decree adjusting property rights of parties is not subject to modification though it is based upon agreement of the parties.

4. Executors and administrators 🔑202(1)

Where as part of property division in a property settlement agreement husband contracts to pay wife monthly payments during her lifetime, and agreement is approved by court in divorce action and incorporated in interlocutory decree, wife upon the husband's death has a claim against husband's estate for payments due after his death, the claim resting not upon obligation of husband to support wife but upon decree.

5. Divorce 🔑253, 254

Where party settlement agreement is presented for approval in divorce action and it is not clear whether payments therein provided for are part of division of property or are in the nature of alimony, court should receive evidence, and clearly make its determination in decree of divorce.

6. Divorce 🔑254

Where divorce decree approves property settlement agreement and incorporates it as a part of decree, and orders payment of money as provided in agreement but does not clearly determine whether such payments are part of division of property or are in nature of alimony, question if raised in subsequent proceedings is to be determined from decree, including agreement as a part thereof, and intention of parties as expressed therein.

7. Divorce 🔑245(1)

Where property settlement agreement is approved by divorce decree and incorporated in it as a part of the decree, and decree orders payment of support money as provided in agreement, if it appears that it was intention of the parties to permanently settle their property rights, and provision for support constitutes an integral element in amicable adjustment of property rights of parties, court cannot thereafter modify decree.

8. Divorce 🔑247, 255

Where property settlement agreement divided property and provided for payment by husband to wife of $150 per month for wife's support for the remainder of her life, and subsequent interlocutory decree of divorce incorporated agreement by reference and ordered husband to pay wife $150 a month for her support, agreement was merged in decree and monthly payments were part of division of property rather than alimony, and wife's right to monthly payments did not terminate with husband's death.

9. Divorce ⚷255

Interlocutory decree of divorce is res judicata on all issues determined thereby, including property rights of the parties.

◆

Nathan Newby, Jr. and Newby, Holder & Newby, Los Angeles, for appellant.

Gordon M. Snyder, Los Angeles, for respondent.

VALLÉE, Justice.

Appellant, administratrix of the estate of her son, Walter A. Hamilton, deceased, appeals from a judgment decreeing that a creditor's claim filed by respondent, the surviving widow, in the estate of her deceased husband, predicated on an award made in an interlocutory decree of divorce, is valid, and ordering appellant to pay respondent the sum of $3,750, being accrued monthly payments of $150 for the period from April 1st, 1946, to and including April 1st, 1948, and the further sum of $150 a month thereafter accruing under the terms of the interlocutory decree.

Respondent and decedent were married on June 20, 1927. They separated in September of 1941. On August 31, 1945, they entered into a property settlement agreement. The agreement provided:

"* * * in settlement, adjustment and compromise of all property questions and rights it is agreed by and between said parties that the community property of said parties shall be divided as follows, to-wit:

"1. The wife shall receive and retain as her sole and separate property all * * * [description of real and personal property].

"2. The husband shall receive and retain as his sole and separate property all * * * [description of real and personal property].

"3. The husband agrees to pay to his said wife, Harriet Hamilton, for her support and maintenance, the sum of One Hundred and Fifty Dollars * * * ($150.00) per month for the remainder of her life, beginning the first day of Sept., 1945, and on the first day of each month thereafter until the death of the said Harriet Hamilton; provided however, that if the said parties should be legally divorced and the said Harriet Hamilton should marry some other person the obligation to pay to her the said sum of $150.00 per month shall immediately terminate.

"4. * * * [Provides for execution of documents necessary to transfer title.]

"5. This agreement is a full and complete settlement of all property rights between the parties hereto as husband and wife, both now and after the death of either party to this agreement. From the time of the execution of this agreement neither party shall have any interest of any kind or nature whatsoever in or to any property of the other party to this agreement, whether now owned by such party, or hereafter acquired, except to enforce the terms of this agreement. All salaries or wages earned, or any other property acquired by either party after the execution of this agreement shall be and remain the sole and separate property of the party earning said salary, or wages, or acquiring said property. Each party waives the right to inherit from each other, or to receive from the estate of the other after death, any property or rights or privileges of any kind whatsoever, from the estate of the deceased spouse, unless granted by the will of such deceased spouse, duly admitted to probate, but this covenant shall not be construed to deprive either party of the right to enforce the terms of this agreement against the estate of either party.

"6. In the event either party applies for a divorce against the other this agreement shall constitute a full and complete settlement of all property rights in such divorce action, and neither party in any divorce action that may be prosecuted shall have the right to obtain any part of the property of the other or to require the husband to pay any sum to his said wife for alimony in excess of said sum of $150.00 per month, as herein provided.

"7. After the execution of this agreement neither party shall be under obligation to support the other, except to the extent and under the conditions named in this agreement."

On September 19, 1945, respondent filed an action for divorce against the decedent on the ground of extreme cruelty, the complaint alleging there was "no community property" but that the parties had theretofore executed a property settlement agreement and praying that it be approved. The complaint contained no allegation with respect to or prayer for alimony. Decedent appeared in the action through his attorneys but did not file an answer and the action was tried as a default.

An interlocutory decree of divorce was granted respondent on October 29, 1945, which decreed, in part, that the property settlement agreement "dated the 31st day of August, 1945, and filed herein, true and correct copy of which is hereto attached, by reference incorporated herein, and made a part hereof, be and the same is hereby in all things approved", and ordered the defendant husband to pay the plaintiff for her support and maintenance the sum of $150 a month. The interlocutory decree became final.

The husband made the monthly payments of $150 to and including March 1, 1946, in which month he died intestate. Respondent has not remarried. On October 21, 1946, she filed a claim against her husband's estate for support and maintenance in the total amount of $36,150, being $1,050 accrued monthly installments, and for monthly installments of $150 to accrue, commencing November 1, 1946, and thereafter so long as plaintiff should live and remain unmarried.

After her creditor's claim was rejected by the administratrix, respondent filed the present action predicated upon the property settlement agreement and the interlocutory decree. At the trial the judgment roll in the divorce action and the entire file in the estate matter were introduced in evidence. Judgment was rendered for plaintiff, from which the administratrix appeals.

Appellant contends principally that (a) the court erred in sustaining respondent's objection to her offer of proof that the support money provided in the agreement was alimony and not made in lieu of a division of the property, (b) the interlocutory decree of divorce was not res judicata as to the support payments, and (c) the trial court was without jurisdiction in the default divorce action to order payment of "alimony" since there was neither a specific prayer for "alimony" nor for a division of "community property." The decisive question, therefore, is whether the support money provided for in the interlocutory decree, following the provisions of a property settlement agreement approved and incorporated in the decree, is, as appellant contends, in the nature of alimony which ceases upon the death of either spouse, or is, as respondent claims, a part of the division of property, and, therefore, res judicata.

[1-4] An award of alimony is subject to modification by the court to meet changed conditions. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868; Civ. Code, § 139. The right to unaccrued alimony stops with the death of the party directed to pay. Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868; Parker v. Parker, 193 Cal. 478, 225 P. 447; Roberts v. Higgins, 122 Cal.App. 170, 9 P.2d 517. A divorce decree adjusting the property rights of the parties is not subject to modification regardless of whether or not it is based upon the agreement of the parties. Puckett v. Puckett, 21 Cal.2d 833, 840, 136 P.2d 1; Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677. Where, as part of the property division in a property settlement agreement, the husband contracts to pay the wife monthly payments during her lifetime, and the agreement is approved by the court in a divorce action and incorporated in the interlocutory decree, upon the husband's death the wife has a claim against her husband's estate for payments due after his death. The claim rests not upon the obligation of the husband to support his wife but upon the decree. Parker v. Parker, 193

Cal. 478, 225 P. 447; In re Estate of Mesmer, 94 Cal.App. 97, 270 P. 732; Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868; 1 Cal.Jur. Ten-Yr. Supp. 245, sec. 89a; 14 So.Cal.L.Rev. 373, 382; International Trust Co. v. Liebhardt, 111 Colo. 208, 39 P.2d 264, 147 A.L.R. 700; Annotation 147 A.L.R. 708.

[5–7] When a property settlement agreement is presented for approval in a divorce action and it is not clear whether payments therein provided are part of the division of property or are in the nature of alimony, the court should receive evidence and clearly and concisely make its determination in the decree of divorce. When the decree of divorce approves the agreement and incorporates it as a part of the decree and orders the payment of money as provided in the agreement but does not clearly determine whether such payments are part of the division of property or in the nature of alimony then in any subsequent proceeding the question is to be determined from the decree, including the agreement as a part thereof, and the intention of the parties as expressed therein. Of course, if the agreement is ambiguous the court should receive extrinsic evidence in aid of its interpretation as in other cases, but the agreement here considered is not ambiguous. If it appears that it was the intention of the parties to definitely, fully and permanently adjust and settle their property rights, and the provision for support and maintenance constitutes an integral and important element in the amicable adjustment of the property rights of the parties, the court is without power to thereafter modify the decree. Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540; Holloway v. Holloway, 79 Cal.App.2d 44, 46, 179 P.2d 22; Kohl v. Kohl, 66 Cal.App.2d 535, 541, 152 P.2d 494; Rich v. Rich, 44 Cal.App.2d 526, 112 P.2d 780; Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314; 3 Cal.Jur. Ten-Yr.Supp., Community Property, 677, sec. 155; Annotations 166 A.L.R. 675; 109 A.L.R. 1068; 58 A.L.R. 639.

[8, 9] There is no essential difference between the agreement in the case at bar and those considered in Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Holloway v. Holloway, 79 Cal.App.2d 44, 179 P.2d 22, Kohl v. Kohl, 66 Cal.App.2d 535, 152 P.2d 494; and Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314, in which it was held that payments for the support of the wife in the property settlement agreements there considered were a part of a division of the property and not alimony. The reasons given by the courts in those cases for holding that the provisions for support and maintenance constituted a phase of the division of property are equally applicable here. No purpose would be served in repeating them. The fact that here, as in Wallace v. Wallace, 136 Cal.App. 488, 492, 29 P.2d 314, the prayer of the complaint did not ask for alimony but merely that the property settlement agreement be approved and the further fact that the award was not designated as alimony but followed the agreement as to amount and time of payment is indicative that the award in the decree was not by way of alimony but was part of the division of property. The decree approved the agreement and actually ordered the payment of $150 a month as provided by the agreement. The agreement was, therefore, merged in the decree. Shogren v. Superior Court, 93 Cal.App.2d 356, 209 P.2d 108.

We think it unequivocally appears from the agreement in the case at bar that the monthly payments to the wife were a part of the division of property and not alimony. After the interlocutory decree became final the court was without power to vacate or modify its provisions. An interlocutory decree of divorce is res judicata on all issues determined thereby, including the property rights of the parties. Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697; Borg v. Borg, 25 Cal.App.2d 25, 29, 76 P.2d 218; Overell v. Superior Court, 29 Cal.App.2d 418, 420, 84 P.2d 789; Parnham v. Parnham, 32 Cal.App.2d 93, 96, 89 P.2d 189; 14 So.Cal.L.Rev. 373, 386.

In view of what has been said, the court properly sustained objections to the introduction of evidence for the purpose of showing that the payments were alimony and not in lieu of a division of property. Holloway v. Holloway, 79 Cal.App.2d 44, 47, 179 P.2d 22.

Since the award of $150 a month to the wife in the interlocutory decree was a part of a division of property and not an award of alimony, it constitutes a valid claim against the estate of the deceased husband.

Our conclusion renders unnecessary a discussion of other points made by appellant.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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94 Cal.App.2d 343

SARMENTO v. BAY CITY LAND & CATTLE CO. et al.
Civ. 7708.
Sac. 6035.

District Court of Appeal, Third District, California.
Oct. 28, 1949.

Frank Sarmento sued the Bay City Land and Cattle Company, a corporation, and nine directors and managing agents thereof to compel the directors to account to the corporation for the reasonable rental value of premises owned thereby, enjoined them from leasing the corporation's land, improvements and equipment except for their reasonable rental value, and declare all leases executed by them for less than such value void as ultra vires.

From a judgment of the Superior Court of Merced County, R. R. Sischo, J., for defendants, plaintiff appealed.

The District Court of Appeal, Adams, P. J., affirmed the judgment, holding that the evidence did not warrant plaintiff's contentions that the corporation leased its land for less rent than the cost to the corporation of water furnished the tenant and that the lease was ultra vires.

1. Corporations 🔑186

A corporation's lease of its pasture land to gun club, formed by majority of its shareholders, was not constructively fraudulent as costing corporation more than rent received, in view of evidence that cost to corporation of water to produce pasture was not increased by gun club's operation and that water furnished club was equally beneficial to land for pasture purposes. Proclamation No. 2616, Regulation 4(d), 16 U.S.C.A. § 704 note.

2. Corporations 🔑459

A minority stockholder's contention that corporation's articles of incorporation contained nothing allowing corporation to lease its land at a loss for another organization's sole benefit, so that its lease thereof to gun club, formed by majority of its shareholders, was ultra vires, was unwarranted, where evidence showed that corporation suffered no loss from such lease and articles, as well as statutes, expressly authorized corporation to make leases. Corporations Code, §§ 802, 803.

Mazzera, Snyder & DeMartini, Stockton, for appellant.

W. Coburn Cook, H. E. Gleason, Turlock, Otto A. Hoecker, San Francisco, for respondents.

ADAMS, Presiding Justice.

Plaintiff, appellant here, brought this action against Bay City Land and Cattle Co., a California corporation, and nine individual directors and managing agents of the corporation, to compel the directors to account to the corporation for the reasonable rental value of premises owned by the corporation during the period of time they are alleged to have leased such premises for a rental less than its reasonable rental value, which it is alleged constituted a fraud on the corporation, and to restrain and enjoin the directors from leasing land, improvements and equipment of the corporation except for the reasonable rental value thereof, and to have any and all leases theretofore executed by the directors for less than the reasonable rental value declared null and void, on the alleged ground that their execution was beyond the powers granted the directors by the articles of incorporation, and, therefore, ultra vires.

The trial court found against plaintiff and from an adverse judgment he has taken this appeal.

Appellant is the owner and holder of 160 of the 2,400 issued and outstanding shares of the corporation, which shares he acquired in the following manner. One Pete Ramponi originally owned the 160 shares and upon his death his widow succeeded thereto. Appellant married the widow and she transferred the shares to appellant who acquired them on October 22, 1945.

The corporation was formed about December 12, 1927. It owns approximately 960 acres of pasture land in Merced County. The primary purpose of the corporation was to acquire and use the land to pasture its own cattle and to rent pasture when there was enough pasture available. The land had to have water to produce pasture, which water was obtained from Grasslands Water Association. That association is made up of landowners in the area, each landowner being given one share in Grasslands for each acre of land owned. Grasslands obtains water from the Reclamation Bureau and delivers it to its shareholders, when water is available, for a price equal to the cost of the water and its delivery. Before 1948 the Reclamation Bureau charged 50¢ an acre foot for the water, but in 1948 raised the cost to $1.50 an acre foot. Water was not always available. Grasslands had a limit of $2.50 a year assessment on its shareholders. The respondent corporation and all other shareholders in Grasslands paid $2.00 a share per annum for water, and the cost of water to this respondent on 960 acres was $1,920.00 a year.

A majority of the shareholders of respondent corporation formed an unincorporated association known as Bay City Gun Club, for the purpose of using the corporation's land for duck shooting during the open season. The officers and directors of the corporation are also the officers and directors of the Gun Club. To be eligible to membership in the Gun Club the applicant must be the owner and holder of 80 shares of the corporation's stock, must make written application for membership, and must receive an affirmative vote of 65% of the members. Appellant made application for membership in the Gun Club about August 10, 1947, and was rejected. The by-laws of the Gun Club provide that if the first application fails another may be filed within a year. Appellant did not make a second application. The apparent reasons why appellant was rejected as a memer of the Gun Club were that he had demonstrated hostility toward the directors previously by commencing two separate actions against them, one in Merced County and another in the City and County of San Francisco, both of which were dismissed. Further evidence of his hostility was furnished by Mr. Parks, the ranch manager for the corporation, who testified that appellant and his wife had called at the Gun Club, and as to what occurred he said:

"Well, as I recall, he came down and was asking me about the prospects of raising barley on the place, or something, I think he was going to level the whole ranch and raise barley, and asked me if I thought it could be done and I told him no, and said, 'Why, are you taking over the place,' and he said, 'I am going to show these sons-of-bitches something around here,' as well as I recall, that is his statement."

Mr. Parks, who is employed on an annual basis, also testified that in 1941 and 1942 barley was planted but the venture was a failure because the land was not farm land; that the hardpan was only eight inches from the surface and when the land was plowed he got alkali.

We have examined the record and find substantial evidence to support the trial court's findings that the directors had not managed or operated the corporation solely for the benefit or gain of the Gun Club nor had they leased to the Gun Club any property of the corporation at a rental less than the reasonable value thereof; that the hunting privileges and use of the hunting preserves, club house and bunk house were granted to the Gun Club for a reasonable rental; that the lease to the Gun Club was not a detriment to the corporation; that there was adequate consideration for the lease; that no greater annual rental could be obtained if the land were used as a commercial gun club; that the lease is not a fraud on the corporation and that its execution was not beyond the powers of the directors nor was it ultra vires; that though the corporation has been unable to meet its financial obligations and the directors had levied assessments against the shareholders, it was not true that appellant had been required to pay assessments for the use of the Gun Club; that the assessments were not the result of any wrongful, unlawful, illegal or ultra vires action of the directors as alleged in appellant's complaint; that the lease to the Gun Club for $500.00 per annum, plus a sum equal to one-half the salary and allowances for the keeper of the whole premises, was the full and reasonable market value of the leased premises; that the officers and directors of the corporation at all times acted in good faith and for the best interests of the corporation in its dealings with the Gun Club, and that there had been no fraud, either actual or constructive; that the lease to the Gun Club had not resulted in damage or injury to the corporation or its shareholders, or any of them, and that each and all of the acts of the officers and directors had been confirmed, ratified and approved by the shareholders of the corporation.

There is uncontradicted evidence that it is a custom of the shareholders of corporations owning lands in the San Joaquin Valley to form a gun club for the purpose of duck shooting on the land, such clubs paying a reasonable rental to the corporation for the privilege, the corporation furnishing the water. There is also evidence that the water used for the Gun Club in the instant case was equally beneficial to all the land, and that the Gun Club members were assessed for Gun Club purposes in addition to the assessments levied on them by the corporation. The Gun Club paid the corporation an annual rental of $500 plus a share of the keeper's salary in the approximate sum of $500 a year, or a total of about $1,000 per annum for the shooting privilege that lasted only about thirty-two days, Proclamation No. 2616, Regulation 4(d), 16 U.S.C.A. § 704 note, out of a year.

[1] Appellant's first contention is: 'The leasing of land under circumstances wherein it cost the corporation more than the income received as rent * * * is constructively fraudulent," etc. This contention assumes facts not borne out by the evidence and the findings. The evidence does not support or warrant such contention for the reason that it shows that the cost of water to the corporation was not increased by the operation of the Gun Club and that the water used for the Gun Club was equally beneficial to the land as a whole for pasture purposes.

[2] Appellant's second contention follows the trend of the first in that he argues: "The Articles of Incorporation * * * contain nothing allowing or permitting the corporation to lease land at a loss for the sole benefit of another organization. Therefore, the wrong complained of is also ultra vires." Again appellant ignores the evidence and the finding that the corporation suffered no loss from the lease to the Gun Club. The Articles as well as the statutes expressly authorize the corporation to make leases, hence the execution of the lease to the Gun Club, under the evidence, was not ultra vires. Corporations Code, secs. 802, 803; Wagg v. Toler, 80 Cal.App. 501, 510, 251 P. 973; 6a Cal.Jur., sec. 730, p. 1270.

The third contention of appellant is that: "The act being both constructively fraudulent and ultra vires so far as the corporate entity is concerned, the wrong may be redressed, under the circumstances of this case, by a minority stockholder suing in a derivative action to recover on behalf of the corporation." Respondent argues that plaintiff's complaint is insufficient to show that the action was brought on behalf of the corporation or other stockholders similarly situated. The evidence and the findings, and the conclusion we have reached on this appeal, that the acts of the corporation were neither fraudulent nor ultra vires, rendered this question unimportant and it need not be considered.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

94 Cal.App.2d 367

OVERTON v. VITA-FOOD CORPORATION et al.

Civ. 16951.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1949.

Rehearing Denied Nov. 15, 1949.

Hearing Denied Dec. 29, 1949.

Paul Overton sued the Vita-Food Corporation, a corporation, and M. H. Lewis, to recover compensation for services rendered by the plaintiff for the corporation as president under the terms of a written contract.

The Superior Court of Los Angeles County, Alfred E. Paonessa, J., rendered a judgment for the plaintiff, and defendants appealed.

The District Court of Appeal, Vallée, J., affirmed the judgment, holding that it was bound by Superior Court's construction of the contract, and that the corporation, by voluntarily placing itself out of power to meet provisions of production clause because of sale of trade-mark, was not excused from paying plaintiff's salary.

1. Appeal and error ⇨989

Where findings are attacked for insufficiency of evidence, power of District Court of Appeal begins and ends with a determination as to whether there is any substantial evidence to support them, and Court has no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence, or in the reasonable inferences that may be drawn therefrom.

2. Appeal and error ⇨1008(3)

Rule that District Court of Appeal is not bound by trial court's construction of contract and is called on to determine its meaning as a matter of law, applies only where decision is based solely on terms of written instrument, and rule is otherwise where parol evidence is introduced in aid of interpretation of contract, and where evidence is such that conflicting inferences may be drawn therefrom, and in such a case, a reviewing court will accept or adhere to interpretation of contract adopted by trial court and will not substitute another of its own.

3. Appeal and error ⇨1008(3)

Where, in action by president of corporation against corporation to recover compensation for services rendered under written contract, evidence was introduced in aid of interpretation of contract and conflicting inferences that could be drawn therefrom, District Court of Appeal was bound by trial court's construction of the contract.

4. Corporations ⇨308(3)

Where corporation, by selling its trade-mark, voluntarily placed itself out of the power to meet provisions of production clause of contract whereby it agreed to pay president of corporation certain salary if certain production was met, corporation would not be permitted to deny liability to president for salary.

5. Contracts ⇨303(4)

A party to a contract cannot take advantage of his own act or omission to escape liability thereon.

6. Contracts ⇨278(1)

Where a party to a contract prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability.

7. Corporations ⇨308(3)

If president of corporation was ready and willing to perform his services if work had been offered, but no work was offered, and he was not discharged pursuant to the contract, contract was in full effect and he was entitled to his salary, even though services performed by him were not great.

Charles I. Schottland, Los Angeles, for appellant.

Neil G. Locke, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by defendant, The Vita-Food Corporation, from a judgment for plaintiff in an action to recover compensation for services rendered under the terms of a written contract. The action was tried by the court without a jury.

On February 5, 1942, appellant and respondent entered into a written contract by which appellant employed respondent to serve as its president from January 1, 1942, to December 31, 1946. The contract provided that it was understood that respondent would be engaged primarily in the practice of law but that he should devote as much time as might be necessary or proper in the interests of the corporation and perform all duties and services as the Managing Director or the Board of Directors might direct from time to time and that he should receive as compensation for his services a salary of $250 a month. It contained the following proviso: "provided, however, that the said employment shall be totally suspended and no services shall be rendered by or required of Overton and the salary of Overton shall not accrue, become owing or due for the period or periods during which any or all of the following occur: The plant or plants of the Corporation are out of production from causes incident to or resulting from the present and prospective emergent conditions, or other causes beyond the reasonable control of the Corporation, such as, but without limitation to, transportation delays or interruptions, strikes, and acts of God. The plant or plants of the Corporation shall be deemed out of production during any month if the production in such month does not exceed forty per cent (40%) of one-third (⅓) of the actual production during the last three (3) months of 1941; laboratory and research work are not and shall not be considered as contributing to or being a part of production."

The complaint alleged the contract; that respondent performed the services required by the contract to the end of 1946; that he had not been paid for 1945 or 1946, except $500 paid in 1946, and that $5500 was unpaid. The answer alleged that the plants of appellant were out of production within the meaning of the contract in 1945 and 1946, and that, therefore, no salary was due respondent.

The court found the allegations of the complaint true except it found that $125 was paid in 1945. It also found: 1. "That at no time during the term of such written agreement was or were any plant or plants of Vita-Food 'out of production' within the meaning or effect of said written agreement; nor at any time during such term was any plant or plants of Vita-Food 'out of production' by reason of 'emergent conditions', or otherwise, within the meaning or effect of said written agreement (Clause 2)." 2. "That on or about November 30, 1942, Vita-Food sold to another entity a certain trade-mark, and right to manufacture products offered to the market under such trade-mark, for a consideration of Two Hundred Thousand ($200,000.00) Dollars; that all of such consideration has been paid; that such sale was not a forced or involuntary sale; that by so selling Vita-Food voluntarily placed it out of its power to meet the provisions of the so-called 'production clause' (Clause 2) set forth in said written agreement; and that at all times during the years 1945 and 1946 Vita-Food was financially able to pay plaintiff the salary or compensation agreed to be paid him under said written agreement." 3. "* * * that Vita-Food requested of, and accepted from, plaintiff the services rendered by plaintiff during such years 1945 and 1946, and accepted the benefits thereof; and that Vita-Food is estopped and precluded, by and as a result of its conduct, from denying or refusing to plaintiff payments of the salary or compensation otherwise due to him under the terms of said written agreement." Judgment was rendered for respondent in the sum of $5-375, with interest.

Appellant concedes the making of the contract, the payments made in 1945 and 1946, and nonpayment of the balance for those years. It claims that the other findings are entirely unsupported by the evidence.

[1] André Gide once observed: "Everything has been said already; but as no one listens, we must always begin again." With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen. We are satisfied from an examination of the voluminous transcript that the findings are amply supported by the evidence.

[2, 3] Appellant first says that we are not bound by the trial court's construction of the contract and are called upon to determine its meaning as a matter of law. Counsel cite Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, and Texas Company v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180. This rule applies only where the trial court's decision was based solely on the terms of the written instrument. Union Nat. Bank of Pasadena v. Hunter, 93 Cal.App.2d 669, 209 P.2d 621. This was the situation in the cases cited by counsel. The rule is otherwise where parol evidence is introduced in aid of interpretation of the contract and where the evidence is such that conflicting inferences may be drawn therefrom. In such case the rule is that a reviewing court will accept or adhere to the interpretation of a contract adopted by the trial court and not substitute another of its own. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. In the case at bar evidence was introduced in aid of interpretation of the contract and conflicting inferences may be drawn therefrom.

[4-6] Appellant argues that we must determine as a matter of law that respondent's employment was suspended in 1945 and 1946 because the evidence is without conflict to the effect that the "plant or plants" were out of production as the term is defined in the contract. Assuming the evidence to be without conflict in this respect, that fact does not settle the question. The contract says that the employment shall be suspended if the plant or plants are out of production "from causes incident to or resulting from the present and prospective emergent conditions, or other causes beyond the reasonable control of the Corporation, such as, but without limitation to, transportation delays or interruptions, strikes, and acts of God." The court, in the light of the evidence, interpreted "emergent conditions" to mean war conditions. No contention is made here that the evidence in aid of interpretation of the contract was inadmissible. The court found on substantial evidence that the fact that appellant was out of production in 1945 and 1946 was not due to "emergent conditions" but was due to the fact that appellant by selling a trade-mark for $200,000 "voluntarily placed it out of its power to meet the provisions of the so-called 'production clause.'" Having voluntarily placed itself out of production so as to prevent its performance of the contract, appellant will not be permitted to deny liability. A party to a contract cannot take advantage of his own act or omission to escape liability thereon. 17 C.J.S., Contracts, §§ 468, 966; 12 Am.Jur. 957, sec. 381. Where a party to a contract prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability. Bewick v. Mecham, 26 Cal.2d 92, 99, 156 P.2d 757, 157 A.L.R. 1277; Pacific Venture Corporation v. Huey, 15 Cal.2d 711, 717, 104 P.2d 641; Crane v. East Side Canal & Irrigation Co., 6 Cal.App.2d 361, 367, 44 P.2d 455; Carl v. Eade, 81 Cal.App. 356, 358, 253 P. 750. Whether appellant voluntarily placed it out

of its power to meet the production clause of the contract, and whether respondent waived the breach, were questions of fact for the determination of the trial court and not questions of law for this court, as appellant appears to contend. Since appellant was not out of production from one of the causes specified in the contract, respondent's employment was not suspended.

Appellant claims the finding that it was financially able to pay respondent's salary is not supported by the evidence. While making the contention, appellant says that since the contract was not based on ability to pay, the finding is immaterial. It obviously is immaterial and surplusage. It may be noted, however, that one of defendant's exhibits shows that during the year ending October 30, 1945, it received from the sale of the trade-mark $53,367.81. Respondent's annual salary was $3000.

[7] Appellant next claims that the finding that it requested of, and accepted from, respondent the services rendered by him in 1945 and 1946 and accepted the benefits thereof and that appellant is estopped by its conduct from denying to respondent payment of his salary, is contrary to the evidence. Appellant argues that the services actually performed by respondent in 1945 and 1946 were not great and that he was paid therefor by the $625 which he received. There is substantial evidence that respondent performed all of the services he was asked to perform in 1945 and 1946. He so testified. He also testified that at all times in 1945 and 1946 he held himself out to appellant "to perform such services as might be required" of him. Even if it can be said that the services performed by respondent in 1945 and 1946 were not great, yet if he was ready and willing to perform at all times if work had been offered, and no work was offered, and he was not discharged pursuant to the contract, then the contract was in full force and effect and he is entitled to his salary. Downs v. Atkinson, 207 Cal. 259, 262, 277 P. 723; Payne v. Pathe Studios, Inc., 6 Cal.App.2d 136, 141, 44 P.2d 598. As said by the learned trial judge, respondent "held himself out as ready, willing and able to perform any duties, to-wit, legal or in his capacity as an officer, and that is the only obligation he had."

The appeal is wholly devoid of merit.

Affirmed.

SHINN, P. J., WOOD, J., concur.

94 Cal.App.2d 320

B. C. TURF & COUNTRY CLUB, Limited, v. DAUGHERTY, Commissioner of Corporations.

Civ. 14013.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1949.

Rehearing Denied Nov. 26, 1949.

Hearing Denied Dec. 22, 1949.

Proceeding by the B. C. Turf and Country Club, Limited, to compel Edwin M. Daugherty, as Commissioner of Corporations, to rescind an order directing petitioner to cease from further sale of stock within the state and to rescind a letter advising California brokers not to trade in petitioner's stock without the Commissioner's consent.

The Superior Court for the City and County of San Francisco, Stanley Murray, J., denied the requested relief, and petitioner appealed.

The District Court of Appeal, Peters, P. J., reversed the judgment, and held that the Corporate Securities Act, requiring procurement of permits before negotiating for sale of securities, was constitutional as to foreign corporations, but that preliminary negotiations affecting the organization of petitioner required no permit under the statute.

1. Licenses 🔑39.5

Where shares of Canadian corporation were issued, and title passed to California subscribers in Canada, and contracts of purchase were executed there, and there was no bad faith, even if negotiations in California violated the California Corporate Securities Act, securities issued and delivered in Canada to California subscribers were valid. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

2. Licenses ⚷18½(1)

Under the Corporate Securities Act, requiring corporation to disclose complete financial picture and to secure permit before selling or negotiating for sale of its securities, a foreign corporation must secure a permit to solicit sale of stock within the state or to engage in preliminary negotiations looking towards such sale, even though issuance of securities and transfer of their title will, in good faith, be completed in a foreign state. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

3. Licenses ⚷18½(2)

The Corporate Securities Act, requiring domestic and foreign corporations to disclose financial picture and secure permit before selling or negotiating for sale of securities, is a valid exercise of the state's police power. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

4. Licenses ⚷18½(38)

Under the Corporate Securities Act, requiring domestic and foreign corporations to disclose financial picture and secure permit before selling or negotiating for sale of securities, even if it is apparent or reasonably inferable that there is fraud or exploitation present or that preliminary negotiations during period promoters are trying to decide whether to organize are a sham, or that there is an intent to evade the statute, Commissioner of Corporations has power to interfere. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

5. Licenses ⚷18½(30)

Where articles of Canadian corporation had been filed but it had no assets and no plan of operation, and option for purchase of race track considered as potential asset was in promoter's name when he conducted preliminary negotiations in California to secure aid of interested people desirable as directors, and majority of sales of shares to Californians resulted from conversations in Canada or were unsolicited, preliminary discussions did not amount to "solicitation" for sale of shares in California, requiring a permit under the Corporate Securities Act. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Solicitation".

6. Licenses ⚷18½(30)

Where, during organization of Canadian corporation whose articles were filed, subscribers deposited money with Canadian bank which was instructed to hold money until stated amount had been subscribed and then to buy stock for California purchasers, acts of representatives of California subscribers in securing bank forms for other California subscribers and distributing them among their friends did not amount to "solicitation" for sale of shares in California requiring corporation to secure California permit, in absence of showing that representatives were acting as agents of the corporation. Gen.Laws, Act 3814, § 2(a), subds. 3, 8; § 3.

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Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, Orville R. Vaughn, San Francisco, Wm. L. Holloway, San Francisco, J. Barton Phelps, San Francisco, for appellant.

Fred N. Howser, Attorney General, T. A. Westphal, Jr., Deputy Attorney General, William M. Bennett, Deputy Attorney General, for respondent.

PETERS, Presiding Justice.

By writ of mandate filed in the Superior Court the B. C. Turf and County Club, Ltd., a corporation organized and existing under the laws of British Columbia, sought to compel the California Corporation Commissioner to rescind an order issued by him on April 24, 1946, directing the Turf Club to cease and refrain from the further sale of its stock in California, and to rescind a letter sent by the Commissioner on April 26, 1946, to all California brokers advising them not to trade in the stock of the Turf Club without the Commissioner's consent. The trial court denied the requested relief, and from the adverse judgment the Turf Club appeals.

The facts are as follows: George L. Fraser is a barrister practicing law in Vancouver, British Columbia. Prior to 1944, he had represented the owners of two race tracks—Lansdowne Park and Brighouse Park—located in a suburb of Vancouver. Because of their mutual interest in racing, he had long been friends with Charles S. Howard, junior and senior, Bing Crosby and Pat O'Brien. These persons are all residents of California. Late in 1944, Howard, Jr. visited Vancouver and met Fraser. At that time Howard, Jr. suggested that he and Fraser buy the two tracks, and generally discussed this possibility. Thereafter, Fraser talked to a Mr. Randall, who owned Lansdowne Park and operated Brighouse Park, and ascertained that the tracks were not for sale.

In the spring of 1945, Randall approached Fraser and asked him if he was still interested in buying the two tracks. Fraser promised to get in touch with his principals. He thereupon telephoned Howard, Jr., who was then in California, and ascertained from him that he and his father were still interested in the two tracks. Fraser, thereupon, in his own name, and with $25,000 of his own money, secured an option to purchase Brighouse Park, and a letter indicating the probability that he could purchase Lansdowne Park. Fraser testified that, by this time, he had determined that if the Howards were not interested in the transaction, he and his friends in Vancouver would finance the purchase.

Pursuant to an invitation from Howard, Jr. to come to California to talk over the purchase with him and his father, Fraser arrived in Beverly Hills on September 19, 1945. Before leaving for California he had started to incorporate the Turf Club under British Columbia law, and, in fact, while Fraser was in California, on September 21, 1945, articles of incorporation of the Turf Club were filed authorizing a capital of one million shares, par value of $1 per share. Of course, the Turf Club then had no assets, no permit to engage in business, and no plan of financing.

Fraser stayed in California for four or five days. While here, he talked to the two Howards and to Crosby and O'Brien. He testified that he was anxious to interest these men in the deal, because all of them had strings of good race horses, were very influential with other owners and with jockeys, and he was anxious to get good horses and good jockeys to race at the two tracks. He felt that with them as owners of the track, the success of the venture was assured. On one of the days he was in California, Fraser met Howard, Sr., Crosby and O'Brien in Howard's box at Hollywood Park Race Track. Howard, Sr. told Fraser that he did not think it wise for him and his friends to purchase the two Vancouver tracks; that it was advisable that Vancouver people should be financially interested; that otherwise there would be antipathy to out of state control. He clearly indicated, however, that he would be interested in coming in with others on the deal. In a subsequent conversation with O'Brien, O'Brien told him that he might be "interested in the undertaking to the extent of $25,000.00." Crosby told Fraser that he might be interested "to the extent of Mr. Howard," and told Fraser that, on the assumption a corporation would be formed, he would be glad to serve on the Board of Directors. Fraser testified that when he left California he had determined to go ahead with the deal whether or not his California friends came in, and that when he left California he did not know whether any of the California residents involved would buy stock in the Company. At that time he was not sure whether the deal could be financed, and he was by no means certain he could buy Lansdowne Park. That, substantially, is a summary of what occurred in California at that time.

Fraser returned to Vancouver and discovered that, while he could get an option on Lansdowne Park, Randall had raised the proposed purchase price, and also insisted that any sale of the track would also have to include the sale of an office building in Vancouver owned by Randall. Fraser, in his own name, and with his own money, on October 1, 1945, secured an option to buy Lansdowne Park.

By this time Fraser had determined to proceed with the organization of the Turf

Club, and to finance the project by the sale of stock. During October, and up to November 24, 1945, Fraser had conversations with several Californians, who were his friends, concerning the enterprise. These conversations all took place in Vancouver. As a result of these activities, about 26 Californians subscribed to about 121,100 shares out of the 750,000 shares of the initial stock issue.

Howard, Jr. visited Vancouver shortly after the first of October to further discuss the proposition, and to accompany Fraser on a hunting trip. At this time, although the articles of incorporation of the Turf Club had been filed, the company had no certificate to do business, had not filed a prospectus, and had no fixed plan of financing. Fraser decided to ask permission of the British Columbia authorities to sell 750,000 shares as the initial stock issue. He entered into an agreement with five Vancouver brokerage firms to underwrite the issue, it being agreed that the shares should sell for $1 per share, the brokers to receive 10 cents per share commission, but it being also agreed that on the shares sold to the Canadian promoters, and to the California residents, but 90 cents should be charged, the brokers receiving no commission on these sales. The brokers were certain that they could sell the entire issue in Vancouver, and were by no means anxious to sell to California residents, because on such sales no commission would be earned. Fraser was not sure that the entire issue could be sold, and he wanted to protect Howard, et al., in the event the financing plan fell through. To settle these conflicting interests, the brokers, Howard, Jr. and Fraser held several conferences in Vancouver. Out of these conferences developed the plan that was used by most of the California subscribers. Fraser prepared a form to be deposited with the Dominion Bank in Vancouver, together with the subscriber's check. By this form agreement the subscriber deposited his money with the bank, and the bank was instructed to hold the subscriber's money until $750,000, including the California subscriptions, had been subscribed. When this amount had been raised and it was thus assured that the capital needed had been raised, the Dominion Bank was instructed to buy the stock for the California group. If the total amount was not subscribed, the Bank was directed to return the money deposited by the California subscribers.

Some of the California group received these forms from Fraser or the Dominion Bank while they were visiting in Vancouver. Howard, Jr., when he left Vancouver, took some of these forms with him to California, and he turned them over to his father and a few of their friends. A Mr. John Meyer, business representative and associate of Howard Hughes, visited Fraser in Vancouver, and asked to be let in on the deal. He received some of the forms from the Dominion Bank and brought them back to California, where they were distributed by Meyer to the Hugheses and some of their associates. A Mr. Gilmore, a client of Fraser's telephoned Fraser from San Francisco and asked about the deal, and was told by Fraser about the procedure to be followed.

The brokers were very successful in selling the balance of the stock, and the issue was oversubscribed the day the stock was offered for sale. About 550,000 shares were sold to British Columbia residents at $1 per share, and about 200,000 shares were sold to California residents or directors of the company at 90 cents per share. Fraser purchased 55,000 shares.

When the issue was oversubscribed, the Dominion Bank, pursuant to instructions, purchased the stock in the names of the California residents who had deposited money with it, received the shares, and sent them on to the owners in California.

The investment has been a sound and profitable one, and no shareholder has ever complained. No subscriptions were ever taken in California, and every share sold was sold in British Columbia. Some of the California purchasers have, however, resold their stock in California. Fraser testified, and the evidence shows, that he acted in good faith and without the slightest intent to evade the California law.

In the early spring of 1946, during some negotiations with the Securities and Exchange Commission, Fraser heard that there was a possibility that the corporation had violated the California Corporate Securities Act. Gen.Laws, Act 3814. He immediately wrote to the California Commissioner of Corporations and made a full disclosure of all that had been done, and stated that he had no intent of violating California law and was perfectly willing to comply with all California regulations. An exchange of correspondence led the California authorities to the belief that a violation of California law had occurred. On April 24, 1946, the Commissioner issued a cease and refrain order directing the Turf Club "not to sell or offer for sale, negotiate for the sale of, or deal in any of the capital stock or other securities" of the Turf Club "for the reason that, in the opinion of the Commissioner * * * the sale thereof is and would be unfair, unjust and inequitable to the purchaser thereof." Two days later the Commissioner sent a letter to all California brokers notifying them of the issuance of the cease and refrain order, and informing them that "no transactions in shares of this company should be had until first obtaining a clearance from the Commissioner of Corporations."

The Turf Club requested a hearing before the Commissioner, and such a hearing was had in April of 1947. Appellant claims that the hearing was on the cease and refrain order and on the letter to the brokers, while the respondent claims that the hearing was on the order alone. Although the request for a hearing refers only to the cease and refrain order, appellant, at the hearing, requested that the broker's letter also be considered, and it would appear that the letter was considered at the hearing, although the discussion is ambiguous and no definite ruling was made. It is obvious, however, that the letter was the main object of appellant's attack. The cease and refrain order did no direct harm to the corporation, because it had no legal right to sell its stock in California without a permit. The cease and refrain order, therefore, prohibited nothing more than what the law itself prohibits. Such order, however, if not based upon a violation of the act, indirectly did the company immeasurable harm throughout United States and Canada, because it publicly implied that the company was a violator of the California law. The letter to the brokers, however, directly affected the company and its stockholders. It means that no California stockholder, who admittedly owns lawfully issued stock, can sell his stock in California through a broker without first securing permission of the Commissioner. The letter was directly predicated upon the prior order. This being so, any attack on the order is necessarily an attack on the letter. If the order falls, the letter, being based on the order, falls with it.

The Commissioner found "That B. C. Turf and Country Club Limited, through its agent George Lovat Fraser, solicited subscriptions for stock of B. C. Turf and Country Club Limited in California and from California residents without first, or ever, having applied for or obtained a permit from the Commissioner of Corporations of the State of California authorizing said B. C. Turf and Country Club Limited so to do."

He also reached the conclusion "* * * that B. C. Turf and Country Club Limited violated the Corporate Securities Act of the State of California, and took subscriptions and issued shares in violation thereof, and that the par value of said shares of only $1.00 per share violated subdivision (b) of Section 663 of Article 25 of Title 10 of the California Administrative Code, which provided as follows:

"'663. The race track company shall covenant on behalf of itself, its successors or its assigns with the Corporation Commissioner for the benefit of its security holders, as a condition precedent to obtaining a permit to issue securities, and prior to said Corporation Commissioner granting or denying said permit, that: * * *

"'(b) The nominal or par value of each security sold and issued shall be $1,000 or full multiples thereof, except as provided in (c) following:

"'(c) The Company shall issue securities of more than one class only when the Commissioner has determined an emergency makes such issuance necessary; * * *.'"

Based on these conclusions, the Commissioner directed that the cease and refrain order remain in full force and effect.

Pursuant to § 1094.5 of the Code of Civil Procedure, the appellant applied to the Superior Court for a writ of mandate directing the Commissioner to set aside both the order and the stop letter. The Commissioner moved to strike those portions of the petition referring to the stop letter, but this motion was denied. The case was tried by the lower court on the transcript and exhibits introduced before the Commissioner. The trial court, exercising an independent judgment on the facts, denied the petition. The trial court found that Fraser solicited California residents to purchase stock in the Company during his California visit without a permit required by law; that all that was before the Commissioner and the court was the cease and refrain order; that the corporation also violated the California law in issuing shares with a $1 par value in violation of § 663 of Art. 25 of Title 10 of the California Administrative Code; that a further sale of appellant's stock in California would be unjust and inequitable to the purchasers. Based on these findings, judgment was entered in favor of the Commissioner. From this judgment the Turf Club appeals.

[1] Before directly discussing the contentions of appellant, there is one matter that should be mentioned. The shares of the Turf Club were issued, and title passed, to the California subscribers in British Columbia. The contract of purchase was executed there. There was no bad faith. Therefore, even though the negotiations had in California violated the California statute, a point later to be discussed, the securities issued and delivered in the foreign state to California stockholders are valid securities. Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42; Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 119 P.2d 219. The Commissioner concedes that this is the law.

Although the parties discuss many points in their briefs, there is one question that is of primary and decisive importance, and that is whether the acts of Fraser constituted a solicitation of a sale in violation of the California statute.

The Corporate Securities Act clearly applies to foreign corporations. Section 2(a), subd. 3, expressly so provides. The term "sale" as used in the act has a much broader meaning than that term normally has. Section 2(a), subd. 8, defines "sale" as including "an attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise." Section 3 of the act provides in part: "No company shall sell any security * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." The balance of the section sets forth what the application for such a permit must set forth, requiring the applicant to give a full and complete disclosure of the entire plan of operation of the company, a full disclosure of its financial set up, and other matters.

[2, 3] From a standpoint of interpretation, there can be no reasonable doubt but that these provisions of the statute require a foreign corporation to secure a permit to solicit a sale of its stock in this state, or to engage in preliminary negotiations looking towards such sale, even though the issuance of the securities and the transfer of their title will, in good faith, be completed in a foreign state. The sections quoted clearly prohibit a foreign corporation from soliciting in this state a sale of stock of its own issue without first securing a permit, even though in good faith the issuance of the stock and transfer of title are to take place in the foreign state. We also have no doubt that, although such a regulation may impose some restraint on interstate commerce and place some restriction on free speech, it is a valid exercise of the state's police power, and is not unconstitutional. It is true that in the Robbins case, supra, these problems were expressly left open and not decided, and that no other California case seems to have expressly determined these questions, but the suggested construction is so clear

that reasonable minds cannot differ thereon, and the question of constitutionality has been so long settled that citation of authority would be superfluous.

[4] The determination that the statute constitutionally requires a foreign issuer to secure a permit before soliciting sales of stock in this state, even though there is no fraud, exploitation, sham or intent to evade, and even though the issuance of the securities and transfer of their title will take place in the foreign state, does not settle the problem presented in the instant case. There still remains the question as to what type of solicitation and what type of preliminary negotiations fall within the intent of the statute. In one sense, any talk that ultimately leads a prospect to invest in the enterprise is solicitation. But it is quite obvious that the term was not used in that sense in the statute. If the statute purported to prohibit all talk about organizing a corporation without first securing a permit, it is quite likely that the statute, so construed, would be unreasonable and unconstitutional. No corporation is ever organized unless there is some preliminary discussion among the promoters and prospective investors about the proposed company. The statute—§ 3—requires the applicant for a permit to set forth, among other things, the names and addresses of the officers of the company, the location of its principal office, an itemized account of its financial condition, a detailed statement of its proposed plan of operation, a copy of its proposed securities, a copy of any contract proposed in relation to its securities, a copy of its prospectus, a copy of its articles, the date it proposes to sell its securities, the number, kind and amount of securities it proposes to sell, the par or face value, if any, and the price of its securities; the commission to be paid on the sale of its securities; if a foreign corporation, a copy of the certificate authorizing it to do business in the foreign state, and other matters. It is quite clear that during the preliminary phases of organization, during the period the promoters are trying to decide whether to organize, how to organize, and whether there is any prospect of financial assistance from possible investors, there must be some talk among those interested before the above information could be presented to the corporation commissioner. No one has ever suggested that if a foreign promoter, or even a local promoter, asked the Commissioner for a permit to talk to local persons about the possibility of forming a corporation, that such a permit would or could be granted. There is no machinery set up by the act for the issuance of such a permit. When it is remembered that a violation of the act constitutes a criminal offense, if the statute were ever interpreted so as to prevent such preliminary talk, every promoter of every corporation ever organized in this state would be a criminal violator. While regulation is necessary in this field, and honest, legitimate businessmen must, under the police power, submit to reasonable controls in order to effectuate the purpose of the statute, the controls, by strained construction, should not be extended to wholly unnecessary, unreasonable or absurd lengths. The courts must approach this problem with some degree of realism. If all preliminary talk in this state about organizing or financing or reorganizing a proposed foreign corporation requires a permit, then no such "talk" can ever lawfully take place in this state, because no permit can be secured to permit such talk. If the foreign promoter cannot talk about organization or proposed plan of financing to California residents without first securing a permit, and if a plan of organization and financing cannot be worked out until it is talked about, and if a permit cannot be secured until the plan of organization and financing is fully disclosed to the Commissioner, then we have reached a complete impasse. The statute should not be so construed. If it is apparent or reasonably inferable that there is fraud or exploitation present, or that the so-called preliminary negotiations are a sham, or that there is an intent to evade the California statute, there can be no doubt that the Commissioner has the power to interfere and that the statute is applicable. But where, as here, these elements are not present, it is clear that the statute does not and constitutionally could not prohibit an exchange

of views or a general discussion of a plan of organization. A business conversation preliminary to any fixed plan is not prohibited.

Now how do these rules apply to the present case? There is no fraud or exploitation here present. The form of the transaction was not a sham, and there was no intent to evade our statute. The discussions had by Fraser in California with the Howards, Crosby and O'Brien did not amount to solicitation. Fraser came to California to see if these persons desired to buy the two tracks. He required no permit, under any theory, to discuss that problem. When Howard indicated the reasons why he was not interested in the complete ownership, Fraser, at most, discussed the possibility of these people becoming financially interested. At that time, although the articles of incorporation had been filed, Fraser had no stock to sell. The foreign corporation had no permit to engage in business. It had no permit to sell stock, and at that time had no assets. No plan of operation then existed. The Brighouse option was in Fraser's name, and he was by no means certain he could purchase Lansdowne. His primary purpose in coming to California was not to secure financing. It was to secure the aid of the Howards, Crosby and O'Brien in supplying the two Vancouver tracks with a high quality of horses, good jockeys and the benefit of their experience in horse racing. He wanted them for directors, if he could get them, but before he could get them to act in that capacity, he had to ask them to serve. Fraser was not, during his visit to California, soliciting the sale of shares in the corporation. As already pointed out, when Fraser came to California the enterprise was in a most nebulous state of formation. The only thing he had to sell was the personally owned option on Brighouse Park and the general idea of operating race tracks in Vancouver. With or without the financial help of the people he interviewed, he intended to proceed with the project and operate the track or tracks. The actual plan of operation was not worked out until Fraser returned to Vancouver. Then, with Howard, Jr. in Vancouver, a plan was worked out whereby the California purchasers made the Dominion Bank their agent and deposited their money with that bank. Until the last part of November, 1945, when the brokers had sold the full 750,000 shares, including those purchased by the Californians, any of the Californians could have withdrawn their money from the bank. The great majority of the shares sold to Californians was sold as a result of conversations had by Fraser with the prospective purchasers in Vancouver, or as a result of a Californian talking to Fraser in Vancouver, and then voluntarily, and without solicitation by Fraser, returning to California and interesting his friends in the deal.

[5] It is quite apparent that, under the rules already set forth, the discussions had in California by Fraser during his short visit in September, did not amount to solicitation or the type of preliminary negotiation requiring a permit under California law.

[6] The Commissioner next argues that Howard, Jr. and John Meyer, who visited Fraser in Vancouver and talked the deal over with him there, when they secured from the Dominion Bank the forms for California subscribers, and returned with them to California and distributed them among their friends, were not acting on their own account, but were acting as agents of the corporation. Their acts, according to the Commissioner, as such agents, in California, amounted to solicitation within the meaning of the statute. Of course, if in fact Howard, Jr. and Meyer were agents of the corporation, their acts in California in distributing the forms, would have amounted to unlawful solicitation. In such event, both Howard, Jr. and Meyer would be subject to the criminal provisions of the act, and the corporation would be subject to the cease and refrain order. But the difficulty with this theory is that there is a total lack of any evidence of agency. The evidence on this issue is subject to but one reasonable inference, and that is, that Howard, Jr. and Meyer were acting on their own behalf and not on behalf of the corporation. The corporation at that

time had no need of further California money. The brokers were confident that they could sell the full issue in Vancouver and did not want to sell shares to California residents, because they made no commission on California sales. The entire issue was oversubscribed the first day of the sale. The evidence quite clearly demonstrates that Howard, Jr. and Meyer were acting on their own initiative in taking some of the forms back to California for the use of their friends and associates. There is no basis at all for the argument based on agency.

The holding already made disposes of the major issues on this appeal. It likewise disposes of the arguments about the letter to the brokers. While the Superior Court found that the hearing before the Commissioner did not include a hearing on the letter, it is quite clear that the letter was considered by both the Commissioner and the Court. The letter was introduced before the Commissioner and was the subject of Finding VII of the trial court, the Court finding the letter was sent to all California brokers and that the sending of it was not an abuse of the Commissioner's discretion. This finding was obviously based on the finding that there was an unauthorized sale without permit in California, and falls with that finding. It is too apparent to require extended comment that the letter was predicated on the cease and refrain order and falls with it.

This conclusion also disposes of the contention that the sale of race track stock with a par value of $1 violated the rule adopted by the Commissioner that race track shares must have a par value of $1,000. Even if this rule, and the subsequently adopted statute, applied to a foreign issuer who sells his stock in this state (a point strongly opposed by appellant), they could only apply when such foreign issuer "sells" his stock within this state within the broad meaning of the term as used in the statute. If no "sale" took place in this state, giving the rule and subsequently adopted statute their broadest application, they could not apply to the stock here involved, because no "sale" took place in this state.

The judgment appealed from is reversed.

WARD and BRAY, JJ., concur.

Hearing denied; SHENK, J., dissenting; GIBSON, C. J., not participating.

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RHODE v. BARTHOLOMEW et al.

Civ. 16926.

District Court of Appeal, Second District, Division 3, California.

Oct. 25, 1949.

Rehearing Denied Nov. 15, 1949.

Hearing Denied Dec. 22, 1949.

Lewis W. Rhode sued Guy Bartholomew and Andrew H. Neubauer to recover compensation for services rendered in securing a buyer of capital stock of defendants.

From a judgment of the Superior Court of Los Angeles County, Caryl H. Sheldon, J., rendering a judgment for the plaintiff, the defendants appealed.

The District Court of Appeal, Vallée, J., reversed the judgment, holding that plaintiff, in rendering services for defendants, acted as a broker under the Corporate Securities Act, and, not having a license, was not entitled to recover.

1. Brokers 🔑**2**

Whether a person acted as a broker in a given transaction depends on the nature of the services performed.

2. Brokers 🔑**2**

A person whose business it is to bring a buyer and seller together, is a "broker".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Broker".

3. Brokers 🔑**3**

Fact that plaintiff had no authority to effect a sale of corporate stock owned by defendants, was immaterial in action to recover compensation for services rendered in securing a buyer of the stock, in determining whether he was a broker who was required under the Corporate Securities Act to have a license to act as a broker. Gen. Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

4. Brokers 🔑3

Fact that defendants may also have negotiated with various prospective purchasers of stock who had been procured by plaintiff, was immaterial in an action for compensation for services in securing a purchaser, in determining whether plaintiff was a broker who was required under the Corporate Securities Act to be a licensed broker. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

5. Brokers 🔑3

Employment as a broker required to have a license under the Corporate Securities Act, is clearly established where an owner of property lists with another and the other acts in pursuance of such request to find a buyer willing to purchase on owner's terms. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

6. Brokers 🔑3

Where a property owner, in response to an inquiry by person with reference to corporate stock and the price thereof, gives the price, the terms of sale, and commission allowable, and the latter immediately seeks to find a purchaser, he is the "broker" of the owner and required to be licensed under the Corporate Securities Act. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

7. Brokers 🔑6

The relation between a broker and his customer ordinarily is that of principal and agent, the broker being a "special agent."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Agent".

8. Brokers 🔑6

The duty of a broker, in absence of an agreement enlarging his duties, is merely to bring the principals together to negotiate with each other for the purpose of making the contract.

9. Pleading 🔑238(1)

Generally, a party will not be allowed to amend a pleading to contradict an admission made in his original pleading.

10. Pleading 🔑36(1)

A party may not make a contention based on a statement of fact contrary to the admissions and allegations in his own pleading.

11. Pleading 🔑48, 246(2)

In action to recover for services rendered in securing a buyer of capital stock owned by defendants, wherein defendants set up defense that plaintiff was acting as a broker in corporate securities, though not licensed, allegations in original complaint that defendants agreed to pay plaintiff for securing a purchaser "and assisting in any such sale" were allegations of "ultimate facts" and plaintiff should not have been permitted to strike them from amended complaint, since they were admissions of facts alleged. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ultimate Fact".

12. Pleading 🔑48

"Ultimate facts" in a pleading are the logical conclusions deduced from certain primary facts evidentiary in character.

13. Pleading 🔑36(1)

A party will not be permitted to disprove admissions in his pleadings.

14. Brokers 🔑3, 42

Where plaintiff in action to recover compensation for services rendered in securing a purchaser of capital stock of defendants, made admissions in his pleadings and by his testimony that he assisted defendants in the sale of the stock, and that he negotiated with buyers with respect to the sale, he was a "broker" within meaning of the Corporate Securities Act, and, not being licensed, was not entitled to recover. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

15. Brokers 🔑3

If a broker takes any part in negotiations for sale of corporate stock, he is not a "middleman," no matter how slight a part he took, and he must be licensed under the Corporate Securities Act. Gen.Laws Act 3814, § 2(a), subds. 8, 10; §§ 6, 18.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Middleman".

16. Brokers ⟹3

Provision of the Corporate Securities Act requiring a broker of stock first to secure a license, was designed to protect the public against unscrupulous operators. Gen.Laws Act 3814, § 6.

17. Brokers ⟹42

A contract employing a broker to sell corporate stock is void where the broker is not licensed to sell the stock under the Corporate Securities Act, and broker may not recover a commission. Gen.Laws Act 3814, § 6.

◆

Harry W. Elliott and Robert E. Moore, Jr., Los Angeles, for appellants.

J. Q. Gilchrist, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff entered on a verdict of a jury in an action to recover compensation for services rendered in securing a purchaser of all of the capital stock of a corporation.

The complaint alleged these facts. About May 1, 1943, defendants entered into an oral agreement with plaintiff whereby they agreed to sell and transfer all of the capital stock of Neu-Bart Stamping and Manufacturing Company, a corporation, to any purchaser procured by plaintiff for a consideration of $225,000, and agreed to pay plaintiff for his services "in securing such purchaser and assisting in any such sale" all sums in excess of $225,000 that might be obtained from such sale. During July or August, 1943, plaintiff procured P. Seymour Heath and George W. Talbott as prospective purchasers of said stock; "that thereafter for a period of six or seven months plaintiff negotiated with defendants and said P. Seymour Heath and George W. Talbott and with agents and employees of said Heath and Talbott, in respect to the sale and purchase of said stock." About April 8, 1944, as a result of the work, efforts and services of the plaintiff, as aforesaid, defendants sold said capital stock to P. Seymour Heath and George W. Talbott, or one of them, and received therefor $250,000.

The answer denied the allegations of the complaint; and, as a special defense, pleaded that the services alleged to have been performed were performed by plaintiff as a broker in corporate securities, if performed at all, and that he was not licensed to act as such broker.

The cause was tried by a jury in 1947, resulting in a verdict for plaintiff. A motion by defendants for a new trial was granted. The cause was reset for trial. Thereafter plaintiff moved for leave to file an amended complaint. The motion was denied without prejudice. At the hearing of the motion the words "that thereafter for a period of six or seven months plaintiff negotiated with defendants and said P. Seymour Heath and George W. Talbott and with agents and employees of said Heath and Talbott, in respect to the sale and purchase of said stock" were stricken. At the commencement of the second trial plaintiff moved to amend the complaint by striking therefrom the words "and assisting in any such sale." The motion was denied without prejudice. At the conclusion of the trial and before argument to the jury, plaintiff again moved to amend the complaint by striking the quoted words. The motion was granted. The jury rendered a verdict for plaintiff for $25,000. Defendants appeal from the judgment which followed.

Appellants contend that the services performed by respondent were those of a broker as the term is defined by the Corporate Securities Act; that he did not have a broker's license; that therefore he may not recover. The fact that respondent did not have a broker's license at any time during the transaction in question is not disputed.

In 1943, Neu-Bart Stamping and Manufacturing Company, a corporation, was engaged in the business of manufacturing stamps. Appellants Neubauer and Bartholomew owned all of its capital stock; each owned one-half. In May, 1943, respondent called Bartholomew on the telephone and asked him "if they would be interested in selling." Bartholomew told him to "come out and see me." The next day respondent called on Bartholomew and told him he had a man who was interested in buying the stock. Bartholomew told him that he wanted him to talk to Neubauer. Thereafter, several conversations took place between respondent and Neubauer. In one Neubauer said the price would run from $210,000 to $225,000. Respondent said, "Well, give me something definite, please." In a few days Neubauer told him that the price was $225,000 "net", and that he would get his money "by adding to that price." At that time respondent asked Neubauer for a financial statement and suggested that he prepare one and not put the name of the company on it. Respondent had a prospective buyer for the stock at the time he first called Bartholomew, a Mr. Talbott. He had known for about a month before he spoke to Bartholomew that Talbott was interested in buying the stock. After he had obtained the price from Neubauer, respondent showed Talbott the financial statement, told him about the plant and that the price of the stock was $250,000. Neubauer, Talbott and respondent then met at respondent's office and respondent introduced Neubauer to Talbott. Talbott told respondent that he did not have enough money to purchase the stock, and said that a Mr. Borden might be interested in purchasing it. A short time later a meeting took place in Borden's office, at which respondent, Neubauer, Bartholomew, Talbott and Borden were present. At the meeting there was some discussion about the plant, and near the end Borden said, "What is the price?" Respondent replied, "Well, the price is $250,000.00, Mr. Borden, that is the only reason I am here, I guess, to put the price on the property." Respondent did not take any part in the conversation other than to make this statement.

About a month later Talbott introduced respondent to a Mr. Heath as a prospective purchaser. Between the time that respondent first called Talbott's attention to "the purchase of the stock" until respondent met Heath, he (respondent) was at Talbott's office twice and at his home once. On each occasion it was in regard to purchase of the stock. Respondent told Heath the price was $250,000. Respondent told Heath and Talbott that so far as he knew the plant was still for sale; that the business of the company was stamp manufacturing, and that it had war contracts. Heath met respondent at the latter's office on one occasion; Talbott was there with respondent on another occasion. On each occasion the purchase of the stock was discussed. Respondent went to Heath's office three to five times and talked to Talbott or Heath, or both, about various features of the "stock purchase deal." Heath met appellants and they had some negotiations relative to the sale of the stock at which respondent was not present. Neubauer became provoked at Heath and ceased dealing with him. Talbott mentioned a Mr. Cunningham to respondent as a prospective purchaser. Later Talbott arranged to have respondent and Bartholomew meet Cunningham. Respondent knew that Cunningham was connected with Heath, but did not disclose the fact to appellants. He had told Bartholomew that Cunningham was a prospective purchaser. Respondent met Cunningham and introduced Bartholomew to him. The three had lunch together and Bartholomew and Cunningham talked about the purchase of the plant. Respondent testified that that was the purpose of the lunch and that he could not recall whether he participated in the discussion except that he stated the price was $250,000. After the lunch, appellants negotiated with Cunningham respecting the purchase. Respondent did not participate in these negotiations. Talbott and Cunningham were acting for Heath. Cunningham was given an option to purchase at $250,000, which was not exercised because of a dispute as to how the details should be handled. Heath then employed a Mr. Franklin to see if he could purchase the stock. The stock was sold to Franklin for $250,000 on April 7, 1944. Franklin did not disclose to appellants that he was acting for Heath until the purchase was completed. Respondent did not participate in the negotiations with Franklin. The actual purchaser of the stock was either Heath or Trans-Pacific Corporation, of which Heath was chairman of the board of directors. Heath paid Franklin $5000 for this and other services.

Prior to the commencement of the present action, respondent sued Heath, Talbott, Cunningham and Trans-Pacific Corporation for his services in effecting the purchase of the stock and recovered judgment against Heath, Talbott, and Trans-Pacific Corporation for $4,707.75, which was paid.

As we have said, respondent, in the verified complaint in the present action, stated that "during July or August of 1943, plaintiff procured one P. Seymour Heath and one George W. Talbott as prospective purchasers of said stock; that thereafter for a period of six or seven months plaintiff negotiated with defendants and said P. Seymour Heath and George W. Talbott and with agents and employees of said Heath and Talbott, in respect to the sale and purchase of said stock." On the trial he testified that the foregoing statement was true. He was interrogated and testified as follows: "Q. I will ask you if it is or is not a fact that for a period of six or seven months you negotiated with the defendants and with P. Seymour Heath and George W. Talbott and with agents and employees of said Heath and Talbott in respect to the sale and purchase of said stock? A. Yes."

Neubauer testified that respondent was to find a purchaser "for us to negotiate with"; that they (appellants) did not tell respondent, "You can go out and sell our stock to someone"; that respondent had no authority to sell and accept payment or to enter into any contract to sell the stock; that he had no authority to do anything except find a prospective purchaser with whom appellants could negotiate for the sale of the stock; that respondent was to introduce them "to a prospective purchaser, tell him about the plant, facilities we had and so forth." Bartholomew testified that the only thing respondent was to do was to introduce appellants to a prospective purchaser; and that, as far as he knew, all respondent did was to bring these various prospective purchasers to appellants.

[1-8] At the times in question, section 2, subdivision 8 of the Corporate Securities Act, in part, provided: "'Sale' or 'sell' shall include every disposition, *or attempt to dispose,* of a security or interest in a security for value. * * * 'Sale' or 'sell' shall also include a contract of sale, an exchange, *an attempt to sell,* an option of sale, *a solicitation of a sale,* subscription or *an offer to sell,* directly or by an agent, or a circular letter, advertisement or otherwise; * * *." Deering's Gen.Laws, Act 3814, Vol. 2, p. 1420. (Italics added.) Section 2, subdivision 10, in part, provided: "The word 'broker' *includes every person* or company, other than an agent, who shall, in this State, engage either wholly *or in part* in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others, * * *." (Ibid.) (Italics added.) Section 6 of the Act provided that no person shall act as a broker until such person shall have first applied for and secured from the commissioner of corporations a certificate then in effect authorizing such person so to do. Ibid., p. 1424. A violation of the statute is a public offense. Ibid., sec. 18, p. 1430. Whether a person acted as a broker in a given transaction depends upon the nature of the services performed. Gage v. Billing, 12 Cal.App. 688, 693, 108 P. 664. A person whose business it is to bring buyer and seller together is a broker. Eaton v. Yount, 48 Cal.App. 221, 224, 191 P. 1009. The fact that respondent had no authority to effect a sale is of no consequence in determining whether he was a broker. 8 Am. Jur. 1011, secs. 51 et seq; Holway v. Malloy, 70 Cal.App.2d 317, 160 P.2d 893; Mason v. Mazel, 82 Cal.App.2d 769, 187 P.2d 98. Neither does the fact that appellants also may have negotiated with the various prospective purchasers affect the question. Employment as a broker is clearly established where an owner of property lists it with another and the latter acts in pursuance of his request to find a buyer willing to purchase upon his terms. 8 Am.Jur. 999, sec. 17; Holway v. Malloy, supra, 70 Cal. App.2d 317, 160 P.2d 893. Where a property owner, in response to an inquiry by a person with reference to the former's property and the price thereof, gives the price of the property, the terms of sale, and the commission allowable, and the latter immediately seeks to find a purchaser, he is deemed to become the broker of the owner. C. C. Jones Inv. Co. v. Lowrey, 99 Kan. 87, 160 P. 999. The relation between a broker and his customer ordinarily is that of principal and agent, the broker being a

special agent. 12 C.J.S., Brokers, § 11, page 29; Anderson v. Geo. L. Barney Co., Inc., 1 Cal.App.2d 340, 36 P.2d 717. The duty of a broker, in the absence of an agreement enlarging his duties, is merely to bring the principals together to negotiate with each other for the purpose of making a contract. 12 C.J.S., Brokers, § 6, page 10.

[9-13] In his original verified complaint respondent alleged that appellants agreed to pay him for securing a purchaser "and assisting in any such sale" and that he negotiated with Heath and Talbott and their agents and employees "in respect to the sale and purchase of said stock." The amendments made to the complaint in effect contradicted these original allegations. As a general rule a party will not be allowed to amend a pleading to contradict an admission made in his original pleading. Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227; Treager v. Friedman, 79 Cal. App.2d 151, 172, 179 P.2d 387. A party may not make a contention based on a statement of fact contrary to the admissions and allegations in his own pleading. Bloss v. Rahilly, 16 Cal.2d 70, 77, 104 P.2d 1049. The allegations which were stricken are not conclusions of law but allegations of ultimate facts. If from evidentiary facts the allegations can be reached by that process of natural reasoning adopted in the investigation of truth, they are ultimate facts. Levins v. Rovegno, 71 Cal. 273, 275, 278, 12 P. 161. Ultimate facts are the logical conclusions deduced from certain primary facts evidentiary in character. Ellis v. Central California Traction Co., 37 Cal. App. 390, 395, 174 P. 407; see, 24 Cal.Jur. 928, sec. 178 for similar statements held to be statements of ultimate fact. The allegations of the original complaint which were stricken stand as admissions of the facts alleged. A party will not be permitted to disprove admissions in his pleadings. Driver v. International Air Race Ass'n, 54 Cal. App.2d 614, 620, 129 P.2d 771. Further, respondent alleged that as a result of his "work, efforts and services" (assisting in the sale and negotiating with Heath and Talbott), appellants sold the stock. This allegation was not stricken.

[14] As defined in the Corporate Securities Act, a broker is "every person" other than an agent, who shall engage "in part" in the business of "offering for sale" or "negotiating for the sale of" any security. A sale includes every "attempt to dispose" of a security, also "an attempt to sell," also "a solicitation of a sale", and also "an offer to sell." We think it cannot be gain-said from the evidence, which we have related in the light most favorable to respondent, that the services he performed were those of a broker. By his admissions in his pleading and by his testimony he assisted in the sale of the stock, and he negotiated with Heath and Talbott with respect to its sale and purchase. He initiated the conversations with appellants with respect to the sale of the stock. Respondent suggested the preparation of a financial statement, had a copy of it after it was prepared, showed it to Talbott, quoted the price, told Talbott about the plant, met in his office with Talbott and Neubauer, and went to Heath's office on several occasions in regard to the purchase of the stock. He was present at negotiations between appellants and Heath. He told Heath the business of the corporation and that it had war contracts. He discussed the purchase of the stock with Heath at his own office and at Heath's office. He met and had lunch with Cunningham for the purpose of talking about the purchase. Unquestionably, respondent offered the stock for sale. He attempted to dispose of it. He attempted to sell it. He solicited a sale of the stock by appellants. These acts were sufficient to bring him within the terms of the Act. We think also that he negotiated for the sale of the stock. He treated with others with a view to sale of the stock, which is negotiating. Mason v. Mazel, 82 Cal.App. 2d 767, 772, 187 P.2d 98; Grammer v. Skagit Valley Lumber Co., 162 Wash. 677, 299 P. 376, 380; Massie v. Dudley, 173 Va. 42, 3 S.E.2d 176, 180; Baird v. Krancer, 138 Misc. 360, 246 N.Y.S. 85, 88. In Davis v. Chipman, 210 Cal. 609, 619, 293 P. 40, it was held that a mere offer of the plaintiff to sell real property constituted him a broker. The Real Estate Brokers Act at

that time (Stats.1919, p. 1252) included in the definition of a real estate broker a person who, for a compensation, offered for sale, or negotiated the purchase or sale of real estate.

[15] Respondent urges that he was only a "middleman" in the sense that he merely brought the buyer and seller together so that they were able to make their own contract without any aid from him. See, Kennedy v. Johnson, 109 Cal.App. 662, 665, 293 P. 698, 8 Am.Jur. 1083, sec. 167. If a broker takes any part in the negotiations, he cannot be regarded as a middleman, no matter how slight a part it may be. Jensen v. Bowen, 37 N.D. 352, 164 N.W. 4, 5; Crane v. Colonial Holding Corporation, Tex.Civ.App., 57 S.W.2d 316, 320; Shaver v. Consolidation Coal Co., 108 W. Va. 365, 151 S.E. 326, 332. Respondent had a prospective buyer who was interested in purchasing the stock before he discussed the possible sale of the stock with appellants. The part played by respondent in the sale of the stock was much more than merely bringing the parties together so that they could make their own contract without any aid from him. He cannot, upon the uncontroverted evidence, be held to have been only a middleman.

In Ryan v. Walker, 35 Cal.App. 116, 169 P. 417, the plaintiff, an unlicensed person, sued for a commission. The court said, 35 Cal.App. at page 118, 169 P. at page 418: "There can scarcely be any doubt that plaintiff, by introducing defendant to the owner, performed all that the law required of him to entitle him to his commission, even though the owner saw fit subsequently to sell the property or a portion of it at a reduced price. Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St.Rep. 87; Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L.R.A.,N.S., 328." It was held that because the promise to pay was not in writing, the plaintiff could not recover as far as the action concerned the agreement to pay a commission for the sale of the real estate involved, the court saying, 35 Cal.App. at page 119, 169 P. at page 418: "Nor is it any answer to this contention that plaintiff was a 'middleman, and not an agent,' as claimed by appellant. His complaint alleges that he was a real estate broker, and it is settled that a broker is a middleman, whose business is to bring seller and buyer together. He need have nothing to do with negotiating the bargain. 19 Cyc. 186; Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L.R.A., N.S., 328. No such distinction as claimed by appellant is recognized in this state." See, also, Williams v. Kinsey, 74 Cal.App. 2d 583, 593, 594, 169 P.2d 487.

McKenna v. Edwards, 19 Cal.App.2d 327, 65 P.2d 810, relied on by respondent, is not analogous. In McKenna the defendant promised the plaintiff that if she would negotiate a loan for him, to be secured by corporate stock, he would pay her $5000 for her services. She was unable to secure the loan; but one Ray, whom she contacted, suggested that the defendant sell some of the stock. She conveyed Ray's suggestion to the defendant, who concluded to act on the suggestion; whereupon the plaintiff arranged for a conference between the defendant and Ray. The plaintiff was not present at any time during the conference; nor did she participate directly or indirectly in any of the negotiations between the parties. She did not, as did respondent, offer the stock for sale, attempt to dispose of it, attempt to sell it, or negotiate for its sale.

We do not think Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, applicable to the facts of this case. There a demurrer to a complaint was sustained. Judgment for defendant followed. The plaintiffs were not licensed real estate brokers. On appeal it was held that the complaint stated a cause of action because it pleaded that, 190 Cal. at page 573, 213 P. at page 962, "the plaintiffs were only required 'to find' or 'to introduce' to defendant a person 'interested' in purchasing and who subsequently did purchase, in order to recover the sum agreed by defendant to be paid to them" and their only duty was to produce a purchaser. The complaint expressly negatived any further act or acts on the part of the plaintiffs which might tend to bring them within the scope of the definition of a broker. The court held that a complaint predicated on such an agreement stated a good cause of action, saying, 190 Cal. at page 574, 213 P. at page 962: "The acts of plaintiffs, therefore, as alleged in the complaint, fall short of those defined by the Real Estate Brokers' Act, as constituting either a real estate broker or real estate salesman." In that case the plaintiffs, as far as appeared from the face of the complaint, were not required to do, and did not do, anything except to find a person interested in the property and introduce him to the defendant.

[16, 17] The provision of the Corporate Securities Act requiring a broker of stock to first secure a license was designed to protect the public against unscrupulous operators. The efforts of respondent to sell the stock, as shown by the uncontroverted evidence, were illegal and will not support a promise to pay therefor. A contract employing a broker to sell corporate stock is void where the broker is not licensed to sell the stock under the Corporate Securities Act, and the broker may not recover a commission. Van Wyke v. Burrows, 98 Cal.App. 415, 419, 277 P. 190; Brandenburg v. Miley Petroleum Exploration Co., D.C.Cal., 16 F.2d 933; cf. People v. Roth, 137 Cal.App. 592, 606, 31 P.2d 813.

Reversed.

WOOD, J., concurs.

SHINN, P. J., did not participate.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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34 Cal.2d 419

In re GARCIA'S ESTATE.

MARSHALL v. ROGERS.
S. F. 17770.

Supreme Court of California, in Bank.
Nov. 1, 1949.

Proceeding in the matter of the estate of Theresa Garcia on petition of Henry Marshall for distribution of paternal aunt's estate, opposed by Mary Rogers, as administratrix, raising the question whether the petitioner as illegitimate son of the brother of the deceased, and who was later legitimated was entitled to participate as an heir in the distribution of such estate.

Judgment and order for the administratrix were rendered in the Superior Court of San Francisco County, Thomas M. Foley, J. (judgment) and George W. Schonfeld, J. (order) and the petitioner appealed.

The Supreme Court, Traynor, J., reversed the judgment and dismissed the appeal from the order denying petitioner's motion to amend his petition holding that petitioner was entitled to inherit.

Prior opinion, see 204 P.2d 383.

1. Courts 🔑202(5)

An order denying petitioner's motion to amend his petition to participate as an heir in the distribution of his paternal aunt's estate after judgment was not appealable. Probate Code, § 1240.

2. Bastards 🔑100, 105

The civil code section respecting acknowledgment by the father of an illegitimate child, and probate code section respecting inheritance by an illegitimate child provide alternate methods by which an illegitimate child may become the heir of his father and the former section is not qualified by the latter section. Civ.Code, § 230; Probate Code, § 255.

3. Bastards 🔑101

Under the probate code section respecting inheritance by an illegitimate child, with regard to direct inheritance from the father, the words "illegitimate child" are applicable not to every child who is born illegitimate but only to children born illegitimate who have not been legitimated under such section or section of the civil code respecting acknowledgement of an illegitimate child of the father. Civ.Code, § 230; Probate Code, § 255.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Illegitimate Child".

4. Bastards 🔑1

The trend of legislation governing the rights of persons born illegitimate is to give them the same status as though born legitimate.

5. Bastards 🔑10

Where legislature in 1870 enacted statutes providing for legitimation for all purposes of children born illegitimate but repealed a statute of 1850, the only law by which those not legitimated under the new statutes could inherit at all, and then corrected the error by including the whole of the section respecting inheritance by illegitimates in the civil code in 1872, legislature did not intend to limit the effectiveness of the sections of the civil code derived from the act of 1870 under which a person born illegitimate could attain the status of legitimacy for all purposes. Civ.Code, § 230; Probate Code, § 255.

6. Bastards 🔑105

Where petitioner was born the illegitimate son of decedent's brother, but he had been legitimated by his father, though his parents never intermarried, under the statute he was entitled to participate as an heir in the distribution of his paternal aunt's estate. Civ.Code, § 230; Probate Code, § 255.

◆

Benjamin C. Mickle and A. B. Bianchi, San Francisco, for appellant.

J. J. Henderson and Donald E. Wachhorst, Sacramento, as amici curiae on behalf of appellant.

Donahue, Richards, Rowell & Gallagher and A. R. Rowell, Oakland, for respondent.

TRAYNOR, Justice.

[1] Petitioner has appealed from a judgment entered on the pleadings precluding him from participating as an heir in the distribution of his paternal aunt's estate as well as from an order denying his motion

to amend his petition after judgment. The order is not appealable under the provisions of section 1240 of the Probate Code, and the appeal therefrom must be dismissed. The petition on which judgment was entered against petitioner on the pleadings alleged that although born the illegitimate son of decedent's brother, he had been legitimated by his father under the provisions of section 230 of the Civil Code. Respondent, administratrix of the estate of petitioner's aunt, contends that under section 255 of the Probate Code petitioner cannot inherit any part of the aunt's estate because his parents never intermarried.

Section 230 of the Civil Code provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 255 of the Probate Code provides: "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred either lineal or collateral." The issue, therefore, is whether section 255 of the Probate Code qualifies section 230 of the Civil Code and governs the inheritance of all persons born illegitimate whether or not they are subsequently legitimated.

[2, 3] The cases involving the right of a person born illegitimate to inherit directly from his father have uniformly held that section 230 is not qualified by section 255; that the two sections provide alternate methods by which a person may become the heir of his father. In re Estate of Pico, 52 Cal. 84, 87; In re Jessup, 81 Cal. 408, 421-422, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594; In re Estate of Flood, 217 Cal. 763, 767, 21 P.2d 579; In re Estate of Lund, 26 Cal.2d 472, 482, 159 P.2d 643, 162 A.L.R. 606. It is clear, therefore, that with regard to direct inheritance from the father, the words "illegitimate child" in section 255 are applicable, not to every child who is born illegitimate, but only to children, born illegitimate, who have not been legitimated under either section 215 or section 230 of the Civil Code. These words must have the same meaning with regard to inheritance through the father if their meaning has any consistency. Otherwise the restrictive language of section 255* would conflict with the provision of section 230 of the Civil Code that a child legitimated by adoption is thereafter "deemed for all purposes legitimate", and the provision of section 215 of the Civil Code that "A child born before wedlock becomes legitimate by the subsequent marriage of its parents." A child who is "deemed for all purposes legitimate" cannot be regarded as still illegitimate for some purposes, and a child who has become legitimate can no longer be regarded as an "illegitimate child."

[4-6] The statutes are not in conflict when the words "illegitimate child" are interpreted as referring only to children born illegitimate who have not been legitimated under the provisions of the Civil Code. Although this interpretation renders some of the restrictive language of section 255 superfluous, it is supported by the legislative history of the statutes re-

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* "[B]ut he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family * * *."

garding legitimation and inheritance by illegitimates as well as the cases involving the rights of direct inheritance of those born illegitimate. See, 29 Cal.L.Rev. 185, 187–191. The forerunner of section 255 of the Probate Code was enacted in 1850 (Cal.Stats.1850, pp. 219–220) to provide a method by which a person born illegitimate could inherit from his mother, and if his father formally acknowledged him, could inherit from his father, and if his natural parents later married could inherit as a legitimate child. It was not until 1870 that the forerunners of sections 215 and 230 of the Civil Code were enacted to provide for the legitimation for all purposes of persons born illegitimate. (Cal.Stats. 1870, pp. 530–531, §§ 8–9.) While thus mitigating further the burdens of illegitimacy, however, the Legislature repealed the statute of 1850 (Cal.Stats.1870, p. 531), the only law by which those not legitimated under the new statutes could inherit at all. The Legislature corrected this error by ineptly including the whole of section 1387 (now Probate Code section 255) in the Civil Code in 1872. We do not believe that in reenacting the older provision to restore the rights of those who remained illegitimate, the Legislature intended to limit the effectiveness of the sections of the Civil Code derived from the act of 1870 under which a person born illegitimate could attain the status of legitimacy for all purposes. The trend of legislation governing the rights of persons born illegitimate is to give them the same status as those born legitimate. See Rivieccio v. Bothan, 27 Cal.2d 621, 626, 165 P.2d 677. It would be unreasonable to conclude that because the Legislature readopted an old provision made partially obsolete by later legislation to fill the gap created by the statutory changes of 1870, it intended to limit the effect of the general legitimation statutes. It would be even more unreasonable to hold that the words "illegitimate child" appearing in section 255 have one meaning when read with the part of the statute providing for direct inheritance and another when read with the provision governing collateral inheritance. Accordingly, those words refer, not to every child who is born illegitimate, but only to such children who have not been legitimated under the provisions of sections 215 or 230 of the Civil Code. The dictum of this court to the contrary in its opinion on denial of hearing in Wolf v. Gall, 32 Cal.App. 286, 163 P. 346, 350, is disapproved.

The judgment is reversed. The appeal from the order denying petitioner's motion to amend his petition is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

34 Cal.2d 426

PEOPLE v. CORRALES.

Cr. 4999.

Supreme Court of California, in Bank.

Nov. 4, 1949.

Victoriano Corrales was convicted in the Superior Court of Sacramento County, Raymond T. Coughlin, J., on two counts of first-degree murder, and he appealed.

The Supreme Court, Edmonds, J., affirmed the judgment, holding that evidence of the corpus delicti of one of the two murders was sufficient to allow introduction in evidence of defendant's confessions and extrajudicial statements and that the evidence on both counts was sufficient to show deliberation and premeditation required to establish first-degree murder.

1. Criminal law 🔑535(2)

The corpus delicti must be proved by evidence outside of defendant's extrajudicial declarations and statements.

2. Criminal law 🔑414

To authorize reception in evidence and consideration by jury of defendant's extrajudicial declarations and statements, prosecution is not required to establish corpus delicti by proof as clear and convincing as is necessary to establish defendant's guilt, but slight or prima facie proof is sufficient.

3. Criminal law ⚷563

The corpus delicti may be proved by circumstantial evidence and reasonable inferences therefrom.

4. Criminal law ⚷517(4)

Evidence of corpus delicti of one of two murders charged against defendant was sufficient to allow introduction in evidence of his extrajudicial confessions and statements.

5. Homicide ⚷253(3)

Evidence was sufficient to show deliberation and premeditation required to establish defendant's guilt of two murders in first degree.

◆

Elvin F. Sheehy, Public Defender, Sacramento, for appellant.

Fred N. Howser, Attorney General, Doris H. Maier and C. J. Scott, Deputy Attorneys General, John Quincy Brown, District Attorney, Sacramento, and Albert H. Mundt, Chief Deputy District Attorney, Represa, for respondent.

EDMONDS, Justice.

Victoriano Corrales was convicted by a jury upon two counts of first degree murder and has been sentenced to death. Upon the appeal from the judgment and the order denying a new trial, the only questions presented for decision concern the sufficiency of the evidence to establish the corpus delicti of one crime and to justify the conviction of first degree murder in either of them.

In September, 1948, at Steamboat Slough on the Sacramento River, the torso of a woman was found floating about five feet from shore. It was wrapped in two blankets tied with electric cord. Inside the blankets there was a scrap of cloth. The several members were not recovered, and there was nothing to identify the body.

Six months later, a body was seen floating in the American River. It was found to be "the body of a female and the head had been taken off and both legs." A head and leg, which were later recovered from the river, proved to be those severed from this body. Medical evidence based upon an examination of the severed head indicated that death resulted from blows upon it. Although a bracelet was found on one of the arms, the body was not identified.

For a number of months before the first of these bodies was found, Corrales, an agricultural worker, occupied a cabin on the Anderson farm near Sacramento, about one mile from the American River. During that time, a woman known as his wife lived with him. The woman disappeared. Corrales also left and, after a short absence, he returned to the ranch with another woman. Later this woman also disappeared.

Soon after the discovery of the second body, the Andersons became suspicious and notified the sheriff. Officers arrested Corrales, who, upon being questioned, voluntarily made a detailed confession of the murder of Alberta Gomez and Maria Pulida, which included a statement as to the disposal of each of the bodies. He did not testify during the trial, but the brief presented in support of his appeal from the judgment states the facts in regard to the two homicides as he related them to the officers. These facts may be summarized as follows:

In December, 1946, Corrales went to Mexico for the purpose of visiting his mother. During his visit there, he met Alberta and asked her if she cared to return to the United States "for the purpose of keeping company with him". She agreed to do so and came across the border from Mexico illegally.

Corrales and Alberta lived together as husband and wife on the Anderson farm for about 18 months. One day, when Corrales came home from his work, Alberta was not at home. Subsequently she arrived and when Corrales asked her where she had been, she replied: "It is not your business." Further, she stated: "You aren't even husband." Appellant said he knew that but she would have to tell him what she had been doing. Alberta again said "not your business" and in the conversation, according to Corrales, he was told to shut his mouth. Corrales lost his temper, picked up a hammer and struck Alberta twice in the head. She weighed approximately 135 pounds and when Corrales found that he could not lift her, he dismembered the body by removing the head, legs and arms. In two trips to the river he disposed of the remains.

Six months passed and Corrales again went to Mexico, where he met Maria Pulida. She agreed to come to the United States with him and entered this country illegally. When they reached Sacramento, Corrales secured a room in a hotel, registering and paying rent for one week. He immediately set out to find a dwelling for her and rented the same cabin where he and Alberta had lived.

Corrales cleaned the cabin and purchased some new furnishings. When he believed the premises were habitable, he went to the hotel to get Maria. She was not there and Corrales subsequently found her in a barroom in an intoxicated condition. He called a taxicab and took Maria to the ranch. Before leaving the taxicab, there was an argument between Corrales and Maria. She wanted more liquor; Corrales insisted that she had taken too many drinks and should go into the cabin.

She finally did so but soon afterward told Corrales she did not like the place. Corrales replied that it was all he could find. Then, according to Corrales, Maria said: "I had a chance to get a young man." Her statement enraged Corrales, and with a hammer he struck Maria in the head twice. The blows caused her death. Corrales then removed her head and legs and, as before, by again making two trips, disposed of the torso and dismembered parts in the American River.

Corrales presents two contentions: (1) that as to the murder of Alberta, his confessions and extrajudicial statements were admitted in evidence without establishment of the corpus delicti; and (2) the evidence upon both counts is insufficient to show the deliberation and premeditation required to establish murder of the first degree.

[1-4] The rule is well settled that "the corpus delicti must be proved by evidence outside of the extrajudicial declarations and statements of a defendant. [Citations.] But it is likewise well settled that to authorize their reception in evidence and consideration by the jury, the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is necessary to establish the fact of guilt; rather slight or prima facie proof is sufficient for such purpose. [Citations.] It may be proved by circumstantial evidence and by inferences reasonably drawn therefrom. [Citations.]" People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12, 17. Tested by these rules, the evidence of the corpus delicti of the murder of Alberta is clearly sufficient.

The torso was found wrapped in a blanket containing a piece of cloth identified as similar to the dress worn by Alberta; the blanket was tied with wire of the kind missing from the cabin occupied by her and Corrales, and she was never seen after the date of the alleged murder. This evidence established a prima facie showing of identity of the deceased. It is argued, however, that the People failed to prove the fact of Alberta's death by means of the unlawful act of another. Although the existence of a mutilated body does not constitute conclusive evidence of death by means of such an act, it is sufficient to support an inference to that effect. This fact, taken in connection with testimony that Alberta was seen in good health the day of her disappearance and the sickening similarity between the two bodies taken from the water, one of which was clearly shown to be the result of murder, are factors which strengthen the inference of homicide to a point sufficient to allow the introduction of the confessions or statements of Corrales.

[5] It is next contended that the evidence on both counts does not show the deliberation or premeditation necessary for first degree murder. Evidence tending to prove an identical pattern of conduct in each of the crimes supports the determination of deliberate and premeditated killing. Twice Corrales went to Mexico and there found a mistress. She came to the United States illegally and he lived with her until

she tired of him, whereupon he killed her. He then dismembered the body and disposed of it in the river. Within any reasonable definition, such conduct certainly shows deliberation and premeditation. His first plan worked so well that, in the case of Maria, he failed to vary even the most superficial details. He found Maria in the same town in Mexico where he had met Alberta and brought both of them across the border at the same point. He took each woman to the same cabin, and, after a quarrel, hit her on the head with the same hammer, and dismembered her body with the same implements. The bodies were disposed of by the same means and at the same place.

The judgment and the order denying a new trial affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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34 Cal.2d 423

KOPASZ v. KOPASZ.

L. A. 21077.

Supreme Court of California, in Bank.

Nov. 4, 1949.

Rehearing Denied Dec. 1, 1949.

Action by Edith Louise Lawrie Kopasz against John Charles Kopasz for separate maintenance.

The Superior Court for Los Angeles County, Carl A. Stutsman, J., rendered judgment for plaintiff and directed defendant to pay plaintiff's costs and attorney's fees on appeal and defendant appealed.

The Supreme Court, Traynor, J., granted plaintiff's motion to stay defendant's appeal until he paid her costs and attorney's fees on appeal.

1. Husband and wife 🔑295, 301

When a valid marriage has been admitted and the issue before the court is the validity of a foreign divorce decree, the trial court may in a proper case grant costs and attorney's fees on appeal until effect of foreign decree has been finally determined.

2. Husband and wife 🔑205(6)

In actions involving matrimonial status, court will not proceed with an action against spouse who is unable to pay amounts actually necessary to conduct defense unless spouse seeking the assistance of court is able to and does pay such amount.

3. Husband and wife 🔑205(6)

The rule that the husband's inability to pay the wife's necessary costs of litigation is no defense to a stay of proceedings is applicable to proceedings in the appellate court and trial court, as the former is in no better position to protect an unrepresented respondent than a trial court is to protect an unrepresented defendant.

4. Husband and wife 🔑299(4)

Wife's motion to stay husband's appeal from judgment in her favor in separate maintenance action and order directing husband to pay wife's costs and attorney fees on appeal on grounds she was without funds to pay her costs and fees on appeal and that husband failed to comply with the order was granted over husband's objections that he was unable to pay them.

◆

Blanche & Fueller, John K. Blanche and Charles M. Fueller, Pasadena, for appellant.

Louis Kaminar and Wm. U. Handy, Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff has moved to stay her husband's appeals from a judgment in her favor in a separate maintenance action and from an order directing defendant to pay her costs and attorney's fees on appeal. The motion is made on the grounds that plaintiff is without funds to pay such costs and fees and that defendant has failed to comply with the order of the trial court that he pay them. Defendant has filed an affidavit in opposition to the motion, alleging that he is unable to comply with the order of the trial court and that if the appeal is stayed he will be precluded from presenting his contention on appeal that the trial court in the separate maintenance action failed to give full faith and credit to a Nevada decree of divorce that defendant secured against plaintiff before the separate maintenance action was instituted. The basis of the trial court's judgment was that the Nevada decree was void because defendant never acquired a bona fide domicile in Nevada.

[1] When a valid marriage has been admitted and the issue before the court is the validity of a foreign divorce decree, the trial court may in a proper case grant costs and attorney's fees on appeal until the effect of the foreign decree has been finally determined by the courts of this state. Baldwin v. Baldwin, 28 Cal.2d 406, 417, 170 P. 2d 670. Accordingly, since defendant is not resisting plaintiff's motion on the ground that she is herself able to pay her costs and attorney's fees on appeal, the only question now presented is whether defendant's alleged inability to pay such costs and fees is a valid defense to plaintiff's motion.

[2] In protection of the rights of the respective parties it has been generally held in actions involving matrimonial status that the court will not proceed with an action against a spouse who is unable to pay the amounts actually necessary to conduct a defense, unless the spouse seeking the assistance of the court is able to and does pay such amounts. Allen v. Superior Court, 133 Cal. 504, 505, 65 P. 977; Dunphy v. Dunphy, 161 Cal. 87, 90, 118 P. 445; Yusuke Takehata v. Superior Court, 130 Cal.App. 133, 135, 19 P. 2d 833; Farrar v. Farrar, 45 Cal. App. 584, 585, 188 P. 289; see also, Borenstein v. Borenstein, 11 Cal.2d 301, 302, 79 P. 2d 388. The theory supporting this rule is that it is less harmful to leave the parties in status quo than to run the risk that the moving party will obtain an unfair advantage because of the inability of the other party to make an adequate defense.

[3, 4] It has been suggested, however, that the rule that the husband's inability to pay the wife's necessary costs of litigation is no defense to a stay of proceedings is applicable only to proceedings in the trial court. See, Yusuke Takehata v. Superior Court, 130 Cal.App. 133, 135, 19 P.2d 833; Pugliese v. Pugliese, 200 Cal. 652, 653, 254 P. 266. The reasons, however, for staying trial until the moving party is able to pay the necessary costs of litigation are equally applicable when the losing party in the trial court is seeking to have the judgment reversed on appeal. An appellate court is in no better position to protect an unrepresented respondent than a trial court is to protect an unrepresented defendant, and no reason has been advanced for applying different rules in the two situations. In view of the cases holding that proceedings in the trial court will be stayed until the moving party is able to pay costs and attorney's fees essential to the defense, it can consistently be held only that defendant's appeal should be stayed until he is able to pay plaintiff the costs and fees necessary for her to resist the appeal. In Pugliese v Pugliese, 200 Cal. 652, 254 P.266, relied upon for the contrary rule, there was no allegation that the wife was unable to pay her own costs or that the husband was able to pay them. In the present case the wife's uncontradicted affidavit alleges that she is unable to pay her own costs and attorney's fees. The Pugliese case is therefore not controlling here.

Proceedings on the merits in the two appeals are stayed until defendant complies with the order of January 7, 1949 for the payment of plaintiff's costs and attorney's fees on appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

ORNALES v. WIGGER et al.

Civ. 16897.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1949.

Hearing Granted Dec. 29, 1949.*

Louise Ornales sued Myrtle E. Wigger and another for personal injuries sustained in a pedestrian-automobile collision.

The Superior Court of Los Angeles County, Harry R. Archbald, J., rendered a judgment for defendant, and plaintiff appealed.

The District Court of Appeals, Moore, P. J., affirmed the judgment and discussed instructions given and refused. The court found no prejudicial error, and held that whether the pedestrian was contributorily negligent in obscuring her view with a parasol or was injured as a result of her intoxication were questions for the jury.

1. Automobiles 🔑245(72, 73, 90)

In pedestrian's action against motorist for injuries sustained in collision at crosswalk in rain, whether pedestrian was contributorily negligent in obscuring her view with a parasol or was injured as result of her own intoxication were questions for the jury. Vehicle Code, §§ 560, 565.

2. Negligence 🔑135(1)

In a personal injury action, either jury's refusal to believe plaintiff or acceptance of defendant's evidence is sufficient to support an implied finding that plaintiff was contributorily negligent.

3. Evidence 🔑594

Fact that testimony of a witness is not contradicted does not require jury to accept it as true. Code Civ.Proc., §§ 1847, 2061.

4. Automobiles 🔑242(1)

To avoid liability for failure to yield to pedestrian at crosswalk, a motorist must show that failure resulted from causes beyond his control. Vehicle Code, § 560.

5. Trial 🔑207, 259(1)

Where testimony was objectionable as hearsay, but was admissible for purpose of impeachment, court was required upon timely request clearly to instruct jury to consider the testimony for the limited purpose.

6. Appeal and error 🔑1170(7)

Where jury could properly have found plaintiff contributorily negligent without resort to hearsay evidence, and witness was asked whether he told his wife that plaintiff walked into side of automobile, error in refusing to instruct that wife's testimony should be considered for impeachment purposes only was not prejudicial. Const. art. 6, § 4½.

7. Trial 🔑244(4)

In pedestrian's action against motorist for injuries sustained in collision, instructions regarding contributory negligence disclosed a reasonable attempt to cover all phases of the evidence and were not objectionable as "over-instructing" on contributory negligence. Vehicle Code, §§ 560, 565.

◆

Marcus, Rabwin & Nash and Robert M. Newell, Los Angeles, for appellant. By Robert M. Newell, Los Angeles.

Bauder, Gilbert, Thompson, Kelly & Veatch, Los Angeles, for respondents. By Roger E. Kelly, Los Angeles.

MOORE, Presiding Justice.

While walking westerly across Main street in Los Angeles appellant collided with respondents' automobile which had approached from her right. Her claims having been rejected by the jury, she now demands a reversal of the ensuing judgment on the grounds of insufficient evidence and errors in not giving certain instructions.

Mrs. Wigger testified that while accompanied by her husband she drove carefully southward in the rain along Main street and about the center of the west side thereof. She saw no one in the crosswalk as she approached Workman street. After her car had entered the intersection, a parasol went up at her left window and a woman screamed. She crossed Workman street and stopped when both respondents left their automobile. When she looked back her husband was assisting appellant. The latter kept repeating, "Don't let the police take me; don't let them fight me." She talked "a little irrational * * * her breath was very strong of liquor." She pleaded for some one to find her purse only to discover that she had not brought it. She stated: "It is no more your fault than mine; I had the parasol down in front of me."

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* Subsequent opinion 218 P.2d 531.

[1] From such evidence the jury could have determined that appellant's intoxication and having her parasol down before her were negligence and that they contributed to her injuries. No damage was done to the automobile except a bend in the stem of the rearview mirror which was attached to the front frame of the left door. Mr. Wigger's testimony was in its essentials the same as that of his wife.

[2, 3] Appellant testified that she looked both ways before starting to cross Main street and looked again just before crossing the center of the street. The jury were not obliged to believe that she did either. From a disbelief of her own assertions of having exercised care as well as from the evidence of her contributory negligence the jury could have found her not entitled to recover. Either the refusal to believe appellant or the acceptance of respondents' evidence was sufficient support for the implied finding that appellant was contributorily negligent. Hinkle v. Southern Pacific Company, 12 Cal.2d 691, 695, 87 P.2d 349. The fact that the testimony of appellant was not contradicted did not require the jury to accept it as true. Beadle v. Northrup, 90 Cal.App.2d 510, 203 P.2d 552. The jury is not required "to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds * * * against * * * other evidence satisfying their minds." Code Civ.Proc., sec. 2061. Appellant may have been impeached by her manner of testifying. Code Civ.Proc., sec. 1847. The jury could properly have found her to have been intoxicated and that such intoxication contributed to her injury. Vehicle Code, sec. 565.

[4] Inasmuch as respondents' failure to yield to appellant in the crosswalk, Vehicle Code, sec. 560, is not shown to have resulted from causes beyond their control, Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 589, 177 P.2d 279; Mathers v. County of Riverside, 22 Cal.2d 781, 785, 141 P.2d 419, the verdict is supported only by appellant's contributory negligence in excluding her own view of the street as she attempted to traverse it and in colliding with the side of the motor car. Therefore the propriety and correctness of the instruction with reference to negligence arising out of respondents' breach of a statute, Vehicle Code, sec. 560, becomes moot. Since all intendments favor the judgment it must be assumed that the verdict was based upon contributory negligence.

[5, 6] It is true that the court erred in refusing to instruct the jury that the testimony of Mrs. Trujillo should be considered only as impeachment of the witness Barrere. The latter while standing 55 feet away from the scene of the collision heard the impact and assisted in carrying appellant to the Trujillo porch. For the purpose of impeaching him he was asked: "Did you tell Mrs. Trujillo that Mrs. Ornales walked into the side of a car?" Notwithstanding (1) appellant's objection that it called for hearsay and (2) her motion that the jury be instructed to consider the Trujillo answer for the purpose of impeachment only, the court declined so to instruct the jury. The only response was the statement, "I am admitting this for the purpose of impeachment, if it is so." It is the duty of the court upon timely request clearly to instruct the jury to consider such evidence for the limited purpose of impeachment. In re Estate of Relph, 192 Cal. 451, 458, 221 P. 361. Such testimony was hearsay and if it were the only proof of appellant's walking into respondents' car, as Barrere had allegedly told Mrs. Trujillo, it would have been incurably prejudicial. But there was other competent proof from which the jury might reasonably have inferred that appellant caused her own injuries, namely, the testimony of respondents and the bent step supporting the mirror. In view of the

pertinence and force of such proof it can hardly be said that the hearsay testimony of Mrs. Trujillo prejudiced appellant's cause. Since the jury could properly have found appellant contributorily negligent without resort to the hearsay evidence, a reversal would not be justified. Constitution, Art. VI, sec. 4½.

[7] Appellant complains that the jury was "over instructed" regarding contributory negligence. While such criticism is too vague to require discussion, a review of the instructions discloses nothing more than a reasonable attempt to cover all phases of the evidence by appropriate instructions.

Judgment affirmed.

McCOMB, and WILSON, JJ., concur.

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94 Cal.App.2d 574

In re CAPOLINO'S ESTATE.

Civ. 7682.

Sac. 6026.

District Court of Appeal, Third District, California.

Nov. 9, 1949.

Rehearing Denied Dec. 2, 1949.

Hearing Denied Jan. 4, 1950.

Helen Miller, as administratrix of the estate of Joseph Capolino, deceased, brought a proceeding for settlement of her account, to which Hilda Capolino Matthews filed objections, opposed by Arthur Miller, as administrator of deceased administratrix' estate.

From a judgment of the Superior Court of Merced County, R. R. Sischo, J., approving, allowing and settling the account, the objector appealed.

The District Court of Appeal, Adams, P. J., affirmed the judgment, holding determination of trial court was conclusive.

1. Executors and administrators 🔑510(11)

On appeal from judgment settling administratrix' account, appellant objector's arguments that appellate court should disregard trial court's findings, supported by evidence, that properties held by administratrix in her own name were her separate properties and not held in trust for decedent or any one else, and reversed judgment with instructions to compel respondents to account to estate for such properties, cannot properly be considered.

2. Appeal and error 🔑1008(1)

An appellate court has power to reverse a judgment only when trial court's fact findings, on which judgment is based, are without substantial support in record.

3. Appeal and error 🔑994(3), 1012(1)

The weight of evidence, inferences therefrom, and witnesses' credibility are matters for determination by trial court exclusively, not appellate court.

4. Appeal and error 🔑931(1)

All intendments are in favor of judgment appealed from, and to justify reversal thereof, appellant must show that evidence most favorable to respondent furnishes no substantial support for trial court's fact findings.

5. Property 🔑9
Trusts 🔑89(1)

One claiming ownership of property, legal title to which stands of record in another or is held by him in trust for claimant, must establish claim by clear, satisfactory and convincing evidence.

6. Appeal and error 🔑1010(1)

Whether evidence clearly, satisfactorily, and convincingly establishes claim of ownership of property, legal title to which stands of record in another than claimant or is held by such other in trust for claimant, must be determined by trial court, whose determination will be accepted by appellate court as conclusive.

C. H. McCray, Merced, Edward A. Hayes and Otho S. Bowling, New York City, for appellant.

Leonard G. Ratner, Beverly Hills, C. P. Dorr, San Francisco, for respondent.

ADAMS, Presiding Justice.

Joseph Capolino died in Merced County November 22, 1945, whereupon Helen Capolino, representing herself as the surviving wife of decedent, was appointed administratrix of his estate, on December 3, 1945. On May 16th Helen Capolino filed an inventory and appraisement showing the assets of the estate to be of the approximate value of $50,000. In July, 1946, Hilda Matthews, daughter of Joseph Capolino by his prior marriage, filed in the estate proceedings a will executed by decedent in August, 1930, which named his said daughter as principal beneficiary. Helen Capolino then filed her first account and report as administratrix, together with her resignation. Hilda Matthews filed objections to the inventory and to the account and report of the administratrix, claiming that Helen Capolino held in her own name property which should be included in the estate of Joseph Capolino. Prior to a hearing on said objections Helen Capolino died, her son, Arthur Miller, was appointed administrator of her estate, and the administration of the estate of Joseph Capolino was turned over to the public administrator. Hearings on the objections of Hilda Matthews were had on April 18, 1947, and April 30, 1948, Arthur Miller appearing in opposition to said objections. The trial court decided that the property standing in the name of Helen Capolino was her separate property, that no constructive or resulting trust in any of same had been established therein, and that none of it should be included in the estate of Joseph Capolino. Findings of fact and conclusions of law were filed and a decree entered approving, allowing and settling the account of Helen Capolino. A motion for a new trial, which was based in part on insufficiency of the evidence, was denied, and this appeal followed.

The findings recite the following facts. Joseph Capolino and Helen Miller met in New York City prior to 1928. Both were then married to other persons, but they secured divorces in that year and began living together, though they never married. Helen had substantial business and property interests of her own which included a one-half interest in the Roma Cheese Company, shares of stock and life insurance. Joseph and Helen engaged in business enterprises in New York, the capital for which was largely furnished by Helen. In 1935 the two came to Merced where they organized the Capolino Food Products Company, then the Ripon Canning Corporation, and, in 1940, the Capolino Packing Corporation, the capital, approximately $63,000, being supplied in large part by Helen from her separate funds. All the shares of stock of the latter two corporations were issued to Helen. The two parties kept their respective funds in separate bank accounts. In 1940 the Capolino Corporation borrowed $37,500 from Amerigo Vitelli, and about $7,500 from Gus Sclafani, such loans being negotiated by Joseph, but ultimately repaid by the corporation. In 1939 the Ripon Canning Corporation borrowed $17,391.33 from Domenico D'Angiola, Helen negotiating the loan, which was repaid by the Capolino Packing Corporation. In 1941 the Capolino Packing Corporation borrowed $50,000 from D'Angiola, said loan also being negotiated by Joseph but paid by the Capolino Packing Corporation. In 1940 the Capolino Packing Corporation owed the American Can Company $33,000 in part payment of which debt the Can Company took Joseph's note for $25,000, the remainder being paid in cash by the Capolino Packing Corporation. In March, 1945, Joseph's note was paid by Helen out of funds in her name.

In January, 1944, the Capolino Packing Corporation was sold. The contract of sale was signed by both Joseph and Helen, and it expressly represented that Helen was the owner of all of the shares of stock, "free and clear of all liens and encumbrances of every kind, nature and description and that no other person, firm or corporation has any right, title, claim or interest in or to any of the shares of the capital stock of said corporation." Helen received the proceeds of the sale and undertook to pay off certain outstanding obligations of the corporation. Federal income tax returns of Joseph and Helen were prepared by Joseph, and in Helen's return the entire gain from the sale of the corporation was set forth as her separate income. In 1942 and 1943 both parties engaged in separate business transactions and lent money.

The findings also recite that the account and inventory in Joseph's estate set forth all of the known assets; and that all moneys, shares of stock, notes, etc., in the name of Helen were her separate property and none of them was held by her in trust for Joseph or any other person.

[1-4] On this appeal it is not asserted that the evidence before the trial court is insufficient to support the foregoing findings, but it is urged that "The evidence establishes that the property belonged to Joseph Capolino"; and that, though it was put in the name of Helen to delay a creditor, the parties were not in pari delicto and equity will give relief; and that, in any event, there was either a constructive trust or a resulting trust. Appellant reviews such portions of the evidence as are most favorable to the aforesaid contentions, and draws conclusions therefrom that tend to support her theory. But the sum and substance of her argument is that the trial court should have found in accordance with her theory, and that this court should disregard the findings and reverse the decree with instructions to the trial court to compel respondents to account to the estate of Joseph Capolino for certain designated properties.

Obviously appellant's arguments are not such as are proper to be considered by an appellate court. Only when it can be said that the findings of fact of a trial court are without substantial support in the record has such appellate court power to reverse a judgment which is supported by the evidence in the case. The weight of the evidence, the inferences to be drawn from it, and the credibility of the witnesses, are matters exclusively for determination by the trial court; all intendments are in favor of the judgment, and in order to justify a reversal thereof an appellant must show to an appellate court that the evidence most favorable to the respondent fails to furnish substantial support for the findings. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Rinker v. McKinley, 65 Cal.App.2d 109, 110, 149 P.2d 859; Poe v. Lawrence, 60 Cal.App.2d 125, 131, 140 P.2d 136; Wright v. Sellers, 25 Cal.App.2d 603, 604, 78 P.2d 209, and cases therein cited.

[5, 6] In Redsted v. Weiss, 73 Cal.App.2d 889, at page 892, 167 P.2d 735, 737, (hearing in Supreme Court denied), the court, quoted as follows from Palmer v. Burnham, 72 Cal.App.2d 626, 627, 165 P.2d 50: "In Harris v. Harris, 136 Cal. 379, 384, 69 P. 23, 25, it was said: 'The rule is well settled that one who would claim the ownership of property of which the legal title stands of record in another, or that the same is held by such person in trust for the one so claiming, must establish such claim by evidence that is clear, satisfactory, and convincing. Woodside v. Hewel, 109 Cal. 481, 42 P. 152; Plass v. Plass, 122 Cal. 3, 54 P. 372. Whether the evidence in any particular case is of this character must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive.' In accord are 25 Cal.Jur. p. 348; Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Noble v. Learned, 153 Cal. 245, 251, 94 P. 1047; Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947; Taylor v. Bunnell, 211 Cal. 601, 606, 296 P. 288."

We have reviewed the record and are satisfied that it sufficiently supports the findings; and since appellant does not contend that such findings are without support it is not incumbent upon this court to extend its opinion by a recitation of such evidence.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

94 Cal.App.2d 395

DOUGLAS et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 17332.

District Court of Appeal, Second District, Division 3, California.

Nov. 2, 1949.

Proceeding in prohibition by Edwin S. Douglas, Jr., and others to restrain the Superior Court of the State of California in and for the County of Los Angeles from taking any further proceedings in a divorce action.

The District Court of Appeal, Vallée, J., held that cross-complaint filed more than five years before cause was brought to trial was properly dismissed and that court then had no jurisdiction to proceed on supplemental cross-complaints, though less than five years had elapsed since it was filed, and overruled respondent's demurrer to petition and ordered issuance of peremptory writ.

1. Dismissal and nonsuit ⚷60(1)

The statutory provision for dismissal of action unless brought to trial within five years is mandatory. Code Civ.Proc. § 583.

2. Pleading ⚷138

Where a cross-complaint is filed, two simultaneous actions are pending between the parties and the issues joined on the cross-complaint are severable from the issues under the original complaint and answer.

3. Dismissal and nonsuit ⚷60(2)

Action must be dismissed unless brought to trial within five years from date of filing of original complaint or cross-complaint, and the filing of amended or supplemental complaint or cross-complaint does not extend the time of mandatory dismissal to five years after such filing. Code Civ.Proc. § 583.

4. Dismissal and nonsuit ⚷60(2), 80

Cross-complaint filed more than five years before cause came to trial was properly dismissed and court was then without jurisdiction to proceed on supplemental cross-complaint, though less than five years had elapsed since it was filed. Code Civ.Proc. § 583.

A. Maxson Smith, Los Angeles, and Robert A. Keller, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Petitioners seek a writ of prohibition to restrain respondent court from taking any further proceedings in a divorce action entitled Edwin S. Douglas v. Fay H. Douglas, on the ground that respondent is without jurisdiction. As its return to the alternative writ heretofore issued, respondent has demurred to the petition on the ground it does not state facts sufficient to justify the issuance of the writ. The question presented is one of law alone. The defendant in the divorce action filed a cross-complaint. The basis of the claim of want of jurisdiction is that the action was not brought to trial within five years after the filing of the cross-complaint.

Petitioners are named as cross-defendants in the supplemental cross-complaint to be referred to.

The relevant dates are these:

April 28, 1944—Complaint filed.

June 1, 1944—Answer and cross-complaint filed, naming plaintiff and petitioner Edwin S. Douglas, Jr. as cross-defendants.

March 21, 1946—Supplemental cross-complaint filed by leave of court, naming petitioners Grace Kunkle and Telegraph Delivery Service, a corporation, as cross-defendants in addition to plaintiff and petitioner Edwin S. Douglas, Jr.

June 28, 1949—Cause came on for trial. Petitioners moved for dismissal of cross-complaint and all matters supplemental thereto under Code of Civil Procedure, section 583.

July 5, 1949—Motion to dismiss cross-complaint and all matters supplemental thereto denied.

July 5, 1949—Court on its own motion dismissed the action of the plaintiff.

July 7, 1949—Cause again came on for trial. Petitioners objected to further proceedings on the ground the court was without jurisdiction under Code of Civil Procedure, section 583. Objection overruled. Petitioners moved to dismiss the action of defendant and cross-complainant. Court dismissed cross-complaint and ordered cause to trial on supplemental cross-complaint. Petitioners again objected to court proceeding. Objection overruled.

July 8, 1949—Cause submitted.

July 25, 1949—Mistrial declared.

Code of Civil Procedure, section 583, in part, provides: "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. * * *"

The parties did not enter into or file a stipulation in writing that the five-year period provided by section 583 might be extended and it was not shown that any party to the action had been absent from the state or concealed therein, or his whereabouts unknown to the other, or not discoverable to the other party upon due diligence.

[1] The provision for dismissal after the lapse of the statutory time is mandatory. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 116, 56 P.2d 950; Meier v. Superior Court, 55 Cal.App.2d 675, 131 P.2d 554.

[2, 3] Where a cross-complaint is filed there are two simultaneous actions pending between the parties wherein each is at the same time both a plaintiff and a defendant. The issues joined upon a cross-complaint are completely severable from the issues upon the original complaint and answer. Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 90 A.L.R. 384; Schrader v. Neville, 34 Cal.2d 115, 207 P.2d 1059; Lori, Ltd. v. Wolfe, 85 Cal.App.2d 54, 61, 192 P.2d 112; 22 Cal.L.Rev. 695; Anno. 90 A.L.R. 387. It is settled that the statutory period commences to run from the filing of the original complaint and not from the filing of any subsequent amended complaint. Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 124, 47 P.2d 716; Smith v. Wiget, 75 Cal.App.2d 591, 593, 171 P.2d 563. The filing of an amended or supplemental complaint does not have the effect of extending the time of mandatory dismissal to five years after its filing. Rosefield Packing Co. v. Superior Court, supra, 4 Cal.2d 120, 124, 125, 47 P.2d 716. The holdings in these cases with respect to the effect of the filing of an amended or supplemental complaint is equally applicable to the filing of an amended or supplemental cross-complaint; it does not have the effect of extending the time of mandatory dismissal to five years after its filing. The law says that the action shall be dismissed "unless such action [the action on the cross-complaint] is brought to trial within five years after the plaintiff [cross-complainant] has filed his action." The action on the cross-complaint is commenced when the cross-complaint is filed. To sustain respondent's view we would have to recast the section so as to substitute for the word "action" the words "last amended complaint [cross-complaint]," or "last supplemental complaint [cross-complaint]." We may not so revise the statute. If the statutory period could be extended by the filing of an amended or supplemental cross-complaint a party could keep an action alive indefinitely.

[4] When the cause finally came to trial on June 28, 1949, more than five years had elapsed from the date of the filing of the cross-complaint, to-wit, June 1, 1944. The court, therefore, properly dismissed the cross-complaint. It was thereafter without jurisdiction to proceed in the action as the filing of the so-called supplemental complaint, whether it be in fact a supplemental complaint or an amended complaint, did not have the effect of extending the

time of mandatory dismissal to five years after its filing.

The demurrer is overruled. Let a peremptory writ issue as prayed. Each party to pay his own costs.

SHINN, P. J., and WOOD, J., concur.

94 Cal.App.2d 431

DEPARTMENT OF SOCIAL WELFARE OF STATE v. GARDINER.

Civ. 3974.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Rehearing Denied Nov. 22, 1949.

The Department of Social Welfare of the State of California sued Henry C. Gardiner, executor of the estate of Williams H. Carter, deceased, for double the amount of old age aid paid deceased during his lifetime.

From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., for plaintiff, defendant appealed.

The District Court of Appeal, Barnard, P. J., affirmed the judgment, holding that the statute under which the action was brought is not unconstitutional as bill of attainder or contrary to public policy.

1. Constitutional law 🔑82

A "bill of attainder" is a legislative act inflicting punishment without judicial trial.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Bill of Attainder".

2. Penalties 🔑1

Imposition of penalty by statute for purposes of furthering end desired and securing compliance with law is within state's legislative power.

3. Constitutional law 🔑82
Paupers 🔑2

The statute authorizing recovery from decedent's estate of double amount of old age aid paid decedent during his lifetime, while he had money and personal property exceeding amount allowed by law to recipients of such aid, is not unconstitutional as a "bill of attainder." Welfare and Institutions Law, § 2223.

4. Paupers 🔑2

The statute authorizing recovery from decedent's estate of double amount of old age aid paid decedent during his lifetime, while he possessed money and personal property exceeding amount allowed recipients of such aid, is not invalid as against public policy. Civ.Code, § 1667; Welfare and Institutions Law, § 2223.

◆

Henry C. Gardiner, San Diego, for appellant.

Fred N. Howser, Attorney General, Elizabeth Miller and Kent C. Rogers Deputy Attorneys General, for respondent

BARNARD, Presiding Justice.

This action was brought under section 2223 of the Welfare and Institutions Code to recover double the amount of old age aid paid to the decedent during the period from June 1, 1944, through January 31, 1948. A demurrer to the complaint was overruled, with ten days to answer. The defendant refused to answer, and judgment was accordingly entered in favor of the plaintiff. The defendant has appealed on the judgment roll.

This action was filed on August 10, 1948. From the allegations of the complaint it appears that the deceased applied for and was granted such aid; that he was paid such aid during the period above mentioned; that he died on January 20, 1948; that upon his death it was found that he was possessed of money and personal property in excess of the amount allowed such a recipient of old age security aid under the provisions of the law; that during all of the period in question during which he had received such aid in a named amount he had owned and possessed money and personal property of a value in excess of the amount allowed by law; that he had failed, refused and neglected to disclose that fact to the board of supervisors during said period; that letters testamentary were issued to this defendant on February 6, 1948, and he has since been, and now is, the duly qualified and acting executor of said estate; that a creditor's claim for double the amount of the payments thus made to the deceased was filed on June 21, 1948; and that this claim was rejected by the executor on June 30, 1948.

[1-3] The appellant first argues that section 2223 of the Welfare and Institutions Code is unconstitutional since it is a bill of attainder. It is argued that it is a bill of attainder because it provides for a criminal penalty to become effective after the death of the recipient of the security, so that the recipient "becomes a criminal" only after he has died. While any such penalty does not become effective until the death of the recipient of the aid, he is neither deprived of a trial nor adjudged a criminal. While it may be in the nature of a penalty, it is one imposed by statute and is made effective as against the estate of the recipient. Department of Social Welfare v. Stauffer, 56 Cal.App.2d 699, 133 P.2d 692, 694. The decision in that case quotes from 21 R.C.L., page 212, in part as follows: "'Penalties are imposed in furtherance of some public policy, and as a means of securing obedience to law. Persons who incur them are, either in morals or law, wrongdoers, and not simply unfortunate debtors unable to perform their pecuniary obligations.'"

A bill of attainder is "a legislative act which inflicts punishment without a judicial trial." People v. Camperlingo, 69 Cal.App. 466, 231 P. 601, 603; People v. Israel, 91 Cal.App.2d 773, 206 P.2d 62. Section 2223, by its terms, requires that certain facts be established which necessitate a judicial trial. Such penalties have frequently been imposed and they are exacted for the purpose of furthering the end desired and securing compliance with the law, rather than for the purpose of obtaining money for the benefit of the governing power. The imposing of such a penalty is within the legislative power of the state. Shalz v. Union School District, 58 Cal.App.2d 599, 137 P.2d 762. The statute in question cannot be held unconstitutional for the reason here advanced.

[4] The only other point raised is that the complaint here failed to state a cause of action because section 2223 is "unlawful" in purpose and effect since it is against public policy. Citing section 1667 of the Civil Code. It is argued that the policy of the state, as disclosed by all old age security legislation, is that those needing such assistance should be treated as honorable pensioners and not as paupers; that they should be treated with courtesy and without undue publicity; and that section 2223 is cruel and shocking in its effect, and is contrary to the public policy thus established.

While it is true that the legislature has enacted certain laws designed to preserve the self respect of those who receive such public assistance, with a resultant policy in that connection, it has also, under section 2223, established a further policy relating to any who may secure such aid when not entitled thereto. This further policy is designed to aid and protect the general policy adopted, and is not inconsistent therewith. The policy thus established involves not only a reimbursement for payments illegally obtained, but a practical method of discouraging the practice of obtaining payments in that manner. There are sound reasons for establishing a somewhat different policy in this class of cases, and this has been done by the action of the legislature in adopting section 2223. McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141 P.2d 4.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

94 Cal.App.2d 446

MITCHELL v. MORRIS.

Civ. 17192.

District Court of Appeal, Second District, Division 1, California.
Nov. 3, 1949.

Delvin J. Mitchell sued Gilbert Morris, Superintendent and General Manager of the Department of Building & Safety of the City of Los Angeles, for a writ of mandate to compel the issuance of a building permit.

The Superior Court of Los Angeles County, Clarence M. Hanson, J., denied the writ, and plaintiff appealed.

The District Court of Appeal, White, P. J., affirmed the judgment and held that the ordinance providing that a dwelling house may not be built upon a lot which does not front upon a street, but that the planning commission may determine that the ordinance shall not operate when a private easement provides adequate access to the lot from a public street, was not unconstitutional as an unlawful delegation of legislative power.

1. Administrative law and procedure 🔑209
Constitutional law 🔑62

An attempted delegation of power to an administrative board where no standards are established by which board shall be governed in its actions is invalid as an attempted delegation to such board of power to enact a law.

2. Municipal corporations 🔑601(1)

A municipality might properly prohibit entirely the erection of a dwelling on property which has no access to a public street except through an easement on land of another or might impose conditions of resubdivision or public dedication of the means of access.

3. Administrative law and procedure 🔑209
Municipal corporations 🔑591

Ordinance permitting construction of dwellings only on lots which front on a public street or on a private easement determined by city planning commission to be adequate was not invalid for want of standard on which the determination of planning commission was to be based with respect to adequacy of easement.

4. Municipal corporations 🔑601(17)

Under ordinance providing that a dwelling house may not be built on a lot which does not front on a street but that planning commission may determine that ordinance shall not operate when a private easement provides adequate access to lot from a public street, protection of aggrieved parties lies in the right to resort to the courts against arbitrary or discriminatory action by the commission.

5. Administrative law and procedure 🔑205
Municipal corporations 🔑591

Municipal ordinance providing that a dwelling house may not be built on a lot which does not front on a street, but that planning commission may determine that ordinance shall not operate when a private easement provides adequate access to lot from a public street, was not unconstitutional as an unlawful delegation of "legislative power," but was merely the grant of "quasi-judicial power" or perhaps "administrative power".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Administrative Power", "Legislative Power" and "Quasi-Judicial Power".

6. Administrative law and procedure 🔑302
Constitutional law 🔑318

Essential requirement of due process is met when administrative body is required to determine the existence or non-existence of necessary facts before any decision is made.

◆

A. K. Phelps, Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Alan G. Campbell, Deputy City Attorney, Los Angeles, for respondent.

WHITE, Presiding Justice.

Appellant herein sought a writ of mandate to compel respondent Superintendent of the Department of Building and Safety of the City of Los Angeles to issue a building permit pursuant to an application therefor. Upon presentation of the petition to the Superior Court an alternative writ was denied, no hearing being had or evidence taken.

The allegations of the petition for a writ of mandate are that in December, 1948, plaintiff filed with the Department of Building and Safety plans and specifications and an application for a permit to build a dwelling house, and paid the fees required by law; that plaintiff amended the plans and specifications "and caused them to fully comply with all lawful requirements of the Department of Building and Safety and with all lawful provisions of the Building Code of the City of Los Angeles."

It was then alleged:

"That nevertheless the officials and employees of the Department of Building and Safety refused and continue to refuse to issue to plaintiff a building permit, stating and giving as the reason of such refusal that the lot upon which plaintiff proposes to construct the dwelling house, as shown upon the said plans and specifications does not front upon a public street nor upon a private easement determined by the City Planning Commission of the City of Los Angeles to be adequate.

"That plaintiff thereafter requested the City Planning Commission to approve the private easement upon which plaintiff's proposed building lot fronts, but that said City Planning Commission wrongfully, arbitrarily, and capriciously has refused and continues to refuse to approve said private easement.

"That the ordinances of the City of Los Angeles purport to invest the City Planning Commission with the power to determine whether or not a private roadway easement is adequate; but that the ordinances of the City of Los Angeles wholly fail to set up any standards of any kind whatsoever upon which said determination of the City Planning Commission is to be based.

"That there is no lawful authority, directing and empowering the officials and employees of the Department of Building and Safety to withhold and refuse the granting of a building permit upon the grounds specified in the rejection of plaintiff's application. That the action of the defendant and the various employees acting under his direction in refusing to grant the said building permit in accordance with plaintiff's application is wholly unreasonable, arbitrary, capricious and wrongful."

Appellant in his brief states that this appeal is based "upon the sole ground that the ordinance requiring that private easements be approved by the City Planning Commission is unconstitutional." It is asserted that the legislative body, the city council, has attempted to delegate its lawmaking powers to the planning commission, in that it has left to the commission the determination of whether a private easement is "adequate for purposes of access" without establishing any standard by which the commission might determine, as a fact, whether such easement is adequate, and thus has attempted to vest in the commission the power to enact laws and determine policy.

The applicable ordinance was not brought here on this appeal, but we deduce from the statements in the briefs that under the building ordinances of the city, a dwelling house may be constructed only upon a "lot"; that section 12.03 of the zoning ordinance defines a lot as "a parcel of land occupied or to be occupied by a use, building or unit group of buildings and accessory buildings, together with such yard, open spaces, lot width and lot area as are required by this article, and having frontage upon a street (other than an alley) or a private easement *determined by the (Planning) Commission to be adequate for purposes of access.*" (Emphasis added.)

[1] There can be no quarrel with the rule of law upon which appellant relies, that an attempted delegation of power to an administrative board, where no standards are established by which the board shall be governed in its actions is in effect an attempted delegation to such board of the power to enact a law. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703; Tarpey v. McClure, 190 Cal. 593, 600, 213 P. 983. Nor would there be any useful purpose served in attempting to distinguish cases cited by appel-

lant, such as In re Peppers, 189 Cal. 682, 209 P. 896, 897, where an act purported to empower the Director of Agriculture to prohibit the shipment of oranges "frosted to the extent of endangering the reputation of the citrus industry"; or Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 40, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750, authorizing revocation of a physician's license for using "grossly improbable statements" in advertising.

[2] As pointed out by respondent, a more necessary regulation could hardly be imagined than one which forbids the erection and maintenance of a dwelling house in a modern city except where such dwelling has adequate and permanent access to a public street. A municipality is properly interested that every dwelling house within its limits may be reached by the fire department, police department, and other agencies charged with the responsibility of protecting the public peace, safety and welfare. A municipality might properly prohibit entirely the erection of a dwelling upon property which had no access to a public street except through an easement upon land of another, or might impose conditions of resubdivision or public dedication of the means of access, which would be much more onerous than the requirement here that the private easement be "adequate for purposes of access."

[3] We are in accord with the contention of respondent that the city council has by its ordinance set up as complete a standard as could be devised, having regard to the complexity of situations that could arise. Indeed, had the council set up more detailed standards, by specifying, for instance, the width, pavement, grade, drainage, length and other matters which would affect adequacy, as well as standards as to the creation and assured indefeasibility of such easements, the result might well be that many otherwise meritorious applications would have to be rejected for failure to comply strictly with such standards. Further, in answer to the objection that no sufficient standard is provided, it can be suggested that the policy of the legislative body can be found in its enactments of a zoning plan, standards for public streets and alleys, and a host of other regulations.

Adopting the view, as we do, that the city council could lawfully have prescribed rigid standards for easements to serve as substitutes for streets, the authority granted the planning commission is analogous to its authority to grant variances from zoning regulations. A proper construction of the ordinance would appear to be that a dwelling house may not be built upon a lot which does not front upon a street, but that the planning commission may determine that the ordinance shall not operate when a private easement provides adequate access to the lot from a public street.

[4] Concededly, discretion is vested in the Planning Commission, but it is not an uncontrolled and unguided discretion, even though it may call for the exercise of "judgment of a high order." Tarpey v. McClure, 190 Cal. 593, 600, 213 P. 983, 987; see also Riley v. Chambers, 181 Cal. 589, 595, 185 P. 855, 8 A.L.R. 418. The legislative policy has been declared as definitely as is practicable. The commission is, in effect, empowered to grant what amounts to a "variance" in any case where it finds that a private easement is an adequate substitute for frontage on a street. The protection of appellant and others similarly aggrieved lies in the right to resort to the courts against arbitrary or discrimintary action by the commission.

[5] So far as we can ascertain from the briefs on file herein, we are convinced that the discretionary powers vested in the City Planning Commission to ascertain the necessary facts to justify the granting of a permit under the ordinance is an exercise of quasi judicial, or perhaps administrative power, and does not amount to an exercise of legislative power. Wheeler v. Gregg, 90 Cal.App.2d 348, 203 P.2d 37; Nider v. Homan, 32 Cal.App.2d 11, 15, 89 P.2d 136; Swars v. Council of City of Vallejo, 64 Cal.App.2d 858, 864, 149 P.2d 397; Wallace v. Board of Education, 63 Cal.App.2d 611, 616, 147 P.2d 8; Irvine v. Citrus Pest District, 62 Cal.App.2d 378, 385, 144 P.2d 857.

[6] As was said by this court in Wheeler v. Gregg, supra, at page 362 of 90 Cal. App.2d, at page 46 of 203 P.2d. "The essential requirement of due process is met when the administrative body is required to determine the existence or non-existence of the necessary facts before any decision is made. Such a discretion is not arbitrary, or so unguided as to invalidate the statute or ordinance. People v. Walton, 70 Cal.App.2d Supp. 862, 870, 161 P.2d 498.

"As was said by the Supreme Court in Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349:

"'Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523.' See also Dierssen v. Civil Service Comm., 43 Cal.App.2d 53, 59, 110 P.2d 513, and Carter v. Stevens, 211 Cal. 281, 289, 295 P. 28."

Appellant here makes no charge that the commission abused its discretion, or that its action was arbitrary or discriminatory, in refusing to approve his easement. In fact, there is no allegation as to what sort of easement appellant has, and the members of the commission are not joined as defendants. Appellant's proper remedy would be to allege and prove facts concerning the nature of his easement which will support a finding that the action of the commission was, as to him, arbitrary, discriminatory, and an abuse of discretion.

The judgment or order appealed from is affirmed.

DRAPEAU, J., concurs.

DORAN, J., concurs in the judgment.

94 Cal.App.2d 399

Ex parte DONOVAN.

Cr. 4390.

District Court of Appeal, Second District, Division 3, California.

Nov. 2, 1949.

John F. Donovan petitioned for writ of habeas corpus to secure release from custody.

The District Court of Appeal, Shinn, P. J., ordered petitioner discharged from custody, holding that fact findings of court did not sustain adjudication that petitioner was guilty of contempt of court and that execution of judgment was suspended during pendency of petitioner's appeal from judgment enjoining petitioner from doing certain acts so that petitioner could not be held in contempt of court for disobeying injunction pending appeal.

1. Appeal and error 🔑447
Injunction 🔑201

An injunction prohibiting use of premises except as single family dwelling, and requiring petitioner to remodel dwelling by removal of living units occupied by tenants and to convert structure into a single family dwelling, was entirely mandatory and not partially prohibitory, so that execution of judgment was suspended during pendency of petitioner's appeal, and petitioner could not be held in contempt of court for disobeying injunction during pendency of appeal.

2. Injunction ⚷230(3)

In proceeding to hold petitioner in contempt of court for disobeying injunction, petitioner was entitled to benefit of presumption that he believed injunction to be unenforceable in whole or in part until his appeal was decided, in absence of evidence to the contrary.

3. Injunction ⚷226

Petitioner would not be guilty of contempt of court in violating injunction during pendency of his appeal if petitioner had good reason to believe and did believe that injunction was not in effect.

4. Habeas corpus ⚷85(1)

In habeas corpus proceeding by petitioner who was in custody for contempt of court for violating an injunction, no inferences could be indulged to supply deficiencies in the findings of court of facts composing the offense.

5. Injunction ⚷230(1)

Findings of fact made by court in adjudging petitioner guilty of contempt of court in violating injunction during pendency of petitioner's appeal were insufficient to support adjudication of contempt in absence of finding that petitioner did not honestly believe injunction was unenforceable during pendency of appeal.

6. Injunction ⚷230(1)

Findings of fact made by court in adjudging petitioner in contempt of court during a period which included interval between remittitur filed with trial court after petitioner's unsuccessful appeal from injunction and issuance of order requiring petitioner to show cause why he should not be adjudged guilty of contempt of court for disobeying injunction were insufficient to support adjudication of contempt in absence of finding tending to show that petitioner during the interval intentionally disobeyed injunction with knowledge that it was then in force.

7. Injunction ⚷230(1)

Judgment that petitioner was guilty of contempt of court for violating injunction could not be supported by findings as to acts of petitioner subsequent to conviction and while free under conditional suspension of sentence.

8. Injunction ⚷230(1)

An adjudication that petitioner was in contempt of court for violating injunction was void where facts found upon which adjudication of contempt was founded were insufficient to establish contempt of court.

◆

Chester C. Kempley and James S. McKnight, Los Angeles, for petitioner.

W. E. Simpson, District Attorney, Los Angeles County, Robert Wheeler, Deputy District Attorney, Los Angeles, for respondent Sheriff of Los Angeles County.

SHINN, Presiding Justice.

A writ of habeas corpus was issued on the petition of John F. Donovan who was at the time confined in the county jail under commitment following his conviction of contempt of court. His alleged offense consisted of disobedience of an injunction theretofore issued by which he was required to remodel a dwelling in the City of Santa Monica by the removal of thirteen living units and the conversion of the main structure on the premises into a single family dwelling; also, to remodel a garage structure, remove a cottage, etc. He was enjoined from using, occupying or maintaining the premises except as a single family dwelling. The basis of the injunction was that the buildings in question had been converted from a single family residence into multiple units in violation of certain ordinances of the City of Santa Monica. Petitioner had instituted an action against the city for declaratory relief by which he sought to avoid compliance with the terms of the ordinances. The injunction in question was issued on a judgment in favor of the City, cross-complainant in that action. Petitioner appealed from the judgment. The decision, which upheld the validity of the ordinances, is reported in Donovan v. City of Santa Monica, 88 Cal.App.2d 386, 199 P.2d 51. A remittitur was filed with the superior court January 12, 1949. On January 14th an order to show cause was issued requiring petitioner to show cause why he should not be adjudged guilty of contempt of court for wilfully disobeying the injunction. On February 8, 1949, petitioner was adjudged in contempt in that continuously since the date of the judgment, November 26, 1945, he had used, occupied and maintained said premises for purposes other than a single family dwelling and had not remodeled the same. He was sentenced to five days in jail and fined $500, the unpaid portion of which was to be liquidated by confinement at the rate of $2 per day. Sentence was suspended conditionally. The trial court called it placing petitioner on probation. Generally stated, the terms were that petitioner was to comply with the injunction. It appears that he took certain unsuccessful means to eject his tenants, a necessary step in the course of compliance with the judgment, that these were unsatisfactory to the court, that "probation" was eventually revoked and petitioner committed to jail under the terms of the original order.

The recital as to the acts and omissions of petitioner found in the commitment relate exclusively to the alleged failure to comply with the terms of probation. We deem it unnecessary to determine whether probation was properly revoked. There is presented to us the question of the validity of the adjudication of contempt.

Disobedience of the judgment, of course, was not in contempt of the authority of the court unless it occurred while the injunction was in force. Respondent concedes that the mandatory features of the injunction were stayed by the appeal but contends that it contained prohibitive features that were not stayed and that petitioner violated these provisions. The former provisions are, generally, those which required the remodelling of the building, and the latter those which prohibited the use of the premises except as a single family dwelling. Petitioner maintains that the appeal stayed execution of the entire judgment for the reason that the injunction was wholly mandatory, in that it required not only the remodelling of the building but also required him to take affirmative action to dispossess his tenants and to alter his own status by vacating the premises and discontinuing their use until they had been remodeled.

[1] Petitioner's position on this point is unquestionably correct. Not only was he deprived of the right to use the premises himself or to permit their use until they had been remodeled, but he was required to eject his numerous tenants who were occupying separate apartments. Under existing laws and regulations this would have required persistent effort and probably a considerable amount of litigation. Execution of the judgment was stayed by the appeal. City of Pasadena v. City of Alhambra, 75 Cal.App.2d 91, 170 P.2d 499, and cases cited; Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640. Disobedience of the injunction pending decision of the appeal was not in contempt of the authority of the court.

[2-5] Although the unenforceability of the judgment pending the appeal furnished sufficient justification for petitioner's failure to comply with it during that time, there is another feature of the matter which deserves mention. The presumption is that petitioner was not guilty of a wilful violation of the injunction. In the absence of evidence to the contrary it was to be presumed that he believed the injunction to be unenforceable in whole or in part until the appeal had been decided. Disobedience of the injunction would have been wilful and with intent to defy the authority of the court only in case petitioner had knowledge, express or implied, that the injunction was at all times in full force and effect. If he had good reason to believe and did believe otherwise his disobedience would have fallen short of contempt. In such circumstances, even if he had been mistaken as to the effect of the appeal there would still have been lacking the element of intent to do what he had been forbidden

to do. In adjudging petitioner guilty the court made extensive findings but there was no finding which negatives an honest belief on the part of petitioner that the judgment was unenforceable during the pendency of the appeal. No inference can be indulged to supply deficiencies in the findings of the court of facts composing the offense. In re Felthoven, 75 Cal.App.2d 465, 171 P.2d 47; Groves v. Superior Court, 62 Cal.App.2d 559, 145 P.2d 355; In re Mackay, 140 Cal.App. 400, 35 P.2d 385; Lapique v. Superior Court, 68 Cal.App. 407, 229 P. 1010; In re Lake, 65 Cal.App. 420, 224 P. 126. The findings are insufficient to support an adjudication of contempt based upon acts of petitioner prior to January 12, 1949.

[6] The same reasoning applied to the period January 12th to January 14th. It appears by petitioner's affidavit, which is not in any manner contradicted, that he had no knowledge or information as to the final determination of his appeal until some time after the issuance of the order to show cause. The court made a finding that "the said John F. Donovan has at divers times during the period from November 26, 1945, to and including the present time (February 8, 1949) wilfully and intentionally disobeyed and violated the terms and provisions and mandate of the judgment, decree and permanent injunction entered in the above entitled court on the 26th day of November, 1945, as aforesaid, and that by reason thereof the said John F. Donovan is guilty of contempt of the authority of the above entitled court as charged." The "aforesaid" acts are those committed pending the appeal and the omissions between the filing of the remittitur and the issuance of the order to show cause. It was not found by the court that petitioner committed any act or acts in violation of the injunction between the time the remittitur was filed, January 12th, and the order to show cause was issued, January 14th, although petitioner does not contend that in that interval he took any affirmative steps to comply with the injunction. There is nothing in the findings tending to show that petitioner in that brief time wilfully disobeyed the injunction with knowledge that it was then in force. The general finding quoted above does not cure the deficiencies which we have pointed out.

It appears from what we have said that the acts of petitioner, prior to the issuance of the order to show cause, furnish an insufficient basis for the conviction of contempt.

[7] As already stated, the facts which are recited in the commitment relate exclusively to the conduct of defendant after he had been adjudged guilty. It appears that he filed petitions with the Office of Housing Expediter, Office of Rent Control, seeking an eviction certificate as to each of his tenants which would enable him to institute legal proceedings to recover possession of the several rented units. In his petitions he set forth the substance of the injunction that had been issued and based his petition upon that ground and represented that he was required to withdraw the property from the rental market. His petitions were denied. It is evident that the court did not regard the efforts that had been made as sufficient compliance with the terms of theinjunction and the so-called probation order. This is an immaterial issue. The judgment may not be supported by findings as to petitioner's subsequent acts. Manifestly, petitioner could not be convicted on the basis of acts for which he had not been cited and tried. 75 Cal.App.2d 465, 171 P.2d 47, supra.

[8] Petitioner served two days in jail in February, two days in March, under an interim order, and one day in July. He has not paid the $500 fine but appears to have paid $96 of a fine of $100 ordered on March 28, 1949. As nearly as we can determine, this fine and the two days sentence to jail purported to be some sort of a modification of the "probation" order. This additional sentence was based upon the conviction of February 8th under which petitioner was later committed to jail for five days. The jail sentence has been satisfied. The facts found upon which the adjudication of contempt was founded were insufficient to establish the offense, and the

order is void. Groves v. Superior Court, 62 Cal.App.2d 559, 569, 145 P.2d 355, and cases cited.

The petitioner is ordered discharged from custody.

WOOD and VALLÉE, JJ., concur.

EARL v. SAKS & CO.

SAKS & CO. et al. v. BARBEE.

Civ. 17142, 17143.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1949.

Hearing Granted Dec. 29, 1949.*

Action by Mrs. Richard Earl against Saks and Company for alleged conversion of a fur coat, wherein defendant filed a cross-complaint against plaintiff and against A. K. Barbee, also known as Al Barbee.

The Superior Court of Los Angeles County, Thomas J. Cunningham, J., rendered judgments for plaintiff and cross-complainant, and cross-defendant appealed.

The District Court of Appeal, Moore, P. J., affirmed the judgments, and held that a valid sale of the coat to the cross-defendant and a valid gift by him to the plaintiff had been made, and that neither could be avoided on ground of fraud.

1. Trial 🔑395(5)

In action for alleged conversion of coat, finding that ownership of coat passed by sale from seller to buyer and then by buyer's gift to plaintiff was a finding of an "ultimate fact."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ultimate Fact".

2. Trial 🔑404(2)

A conclusion of law does not lose its character as such because placed by the court among findings of fact.

3. Sales 🔑23(4), 38(5)

Where buyer expressed willingness to pay as much as $4,000 for woman's coat, and during his temporary absence salesman agreed with woman to sell coat for less than that price provided woman paid a stipulated difference, and thereafter sale was made to buyer, who signed sales slip without knowledge of the agreement, and no special confidential relationship existed between seller and buyer, valid contract existed, which could not be avoided on ground of fraud or failure of minds of parties to meet. Civ.Code, § 1710, subd. 3.

4. Sales 🔑52(2)

Undisclosed sentiment or purpose of buyer existing at time of sale of coat which remained undisclosed was self-serving and immaterial with respect to issue of meeting of minds of the parties.

5. Gifts 🔑38

Either a gift or any other transfer of property may be avoided because of its being induced by fraud.

6. Gifts 🔑38

Where seller sold fur coat to buyer at price buyer stated he was willing to pay without disclosing secret agreement with woman that she would pay an additional amount, and buyer signed sales slip and then gave coat to the woman, a valid gift was completed, which could not be avoided on ground of fraud.

Chas. L. Nichols, Ivan Miller, William R. Law and R. S. McLaughlin, Los Angeles, for appellant.

Wright & Millikan, Loyd Wright, Herschel B. Green, Los Angeles, for respondents. Also Thomas D. Mercola, Beverly Hills.

MOORE, Presiding Justice.

On April 4, 1947, appellant and respondent Earl together visited the store of respondent Saks and Company. While there appellant informed a salesman that he wished to purchase a fur coat for Mrs. Earl. The couple were shown a mink coat priced at $5,000. Appellant expressed a willingness to pay as much as $4,000 but no more. The salesman emphatically rejected the offer several times. While appellant was absent from the fur salon for a brief period Mrs. Earl informed the salesman that if the store would sell the coat for $4,000 to appellant she would pay the difference between $4,000 and the purchase price including taxes. Upon appellant's return his companion temporarily absented herself, whereupon the salesman sold the coat to appellant for $3,981.25 and appellant signed the sales slip. When Mrs. Earl returned a discussion arose about alterations of the coat. Appellant stated: "It is no longer my coat, it is hers. I have given it to her, talk to her about it, make your arrangements with her. It is her coat, ask her. I have given her the coat, it is a gift to her, ask her." Appellant then assisted Mrs. Earl to don the coat and they left the store together. On April 5th Mrs. Earl returned the coat to Saks for alterations and paid $916.30 in fulfilment of her agreement. On the next succeeding day appellant notified Saks not to deliver the coat to Mrs. Earl. On April 11 Saks offered to refund $916.30 to Mrs. Earl but she rejected the offer and demanded the coat.

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* Subsequent opinion 226 P.2d 340.

On May 21, 1947 Mrs. Earl instituted an action against Saks for conversion of the coat. Saks denied the conversion, by cross complaint interpleaded appellant and prayed that Mrs. Earl and appellant be required to litigate the title and right to possession of the coat. Appellant denied that he had purchased or received the coat, and alleged that the agreement between Mrs. Earl and Saks had been made without his knowledge or consent and had been fraudulently concealed from him. Thereafter, Saks sued appellant on the common counts for $3,981.25. Appellant raised the same defenses but in neither action asked affirmative relief. The cases having been consolidated for trial the facts were found contrary to appellant's claims and judgment was entered in the Earl case in favor of Mrs. Earl for the recovery of the coat, and in the Saks case judgment was entered against appellant for $3,981.25.

In the Earl case the findings having recited that appellant signed the sales slip evidencing his purchase of the coat, proceeded: "Thereupon Saks and Company delivered said mink coat to the said A. K. Barbee who, in turn, and while at said store made a gift of and delivered possession of said mink coat to the said Mrs. Richard Earl; that ever since said date the said Mrs. Richard Earl has been and is now the owner of said mink coat and is entitled to possession thereof. That in said transaction there was no fraudulent concealment from said A. K. Barbee by said Saks and Company nor was Saks and Company guilty of any fraudulent conduct."

Appellant contends that the quoted findings are not findings of fact but conclusions of law and as such are not supported by the evidence or prior findings; that "if they are findings of fact, they are (a) findings of ultimate fact; (b) inconsistent with and contrary to the probative facts found * * * and (c) not supported by the evidence and must give way to the probative facts found. * * *"

[1, 2] It is a settled rule of practice that a finding as to ownership is a finding of an ultimate fact. In re Estate of Hill, 167 Cal. 59, 63, 138 P. 690; Gossman v. Gossman, 52 Cal.App.2d 184, 192, 126 P.2d 178. In the instant case there is no conflict in the evidence as to what the parties did and said, and the probative findings of the court are supported by the testimony of appellant, Mrs. Earl and the Saks salesman. From the undisputed facts as recited above the court properly found that the ownership of the coat passed by sale from Saks and Company to appellant and then by the latter's gift to Mrs. Earl. The finding of ownership is in no way contrary to prior findings as to the acts of the parties. Furthermore, appellant has failed to point out in what respect there is a conflict between the findings of facts other than by the bald assertion of inconsistency. Even assuming that the finding of ownership is a conclusion of law, it is in no way depreciated by having been included among the findings of fact. Gossman v. Gossman, supra.

[3] By way of further specifications of error appellant asserts that there was no valid contract of sale between himself and Saks because it was procured by fraud, and because there was no meeting of the minds of the parties due to the secret agreement of Mrs. Earl with Saks and Company. No allegations of a substantial fraud on the part of Saks and Company were alleged and no proof of such fraud was made. The lady was a willing recipient of the coat with appellant's paying the $5,000. She desired the garment no less even if she should pay a part of the sale price. Appellant bought it for a gift. As such, its intrinsic worth was not depreciated by the fact that he could acquire it for $1,000 less than the sum at first demanded. It remained the same coat. In no actionable respect was appellant cheated. On the contrary, Saks' private agreement with Mrs. Earl enabled appellant to obtain the coat at a price he was willing to pay. Fraud is deception practised for the purpose of causing loss or hindrance to another; an artifice by which the interest of another is injured. The Oxford Dictionary. Saks' agreement with Mrs. Earl caused no detriment to appellant. All prior offers and counter offers had been rejected by the parties. No false representations were made to appellant by either Mrs. Earl or by the representative of Saks. The only statement made by Mrs. Earl during the negotiations was her promise to pay the $916.30. This she did. No representation was made by Saks and Company to appellant other than that he would be required to pay only $3,981.25 for the coat, which he voluntarily agreed to do by affixing his name to the sales slip.

[4] Appellant's position would be otherwise if there had existed a confidential relationship between himself and Saks, requiring full disclosure of the company's dealing with respect to the coat. But such relationship did not exist. The parties stood at arm's length throughout their negotiations. Therefore the merchant was under no obligation to disclose its agreement with Mrs. Earl. Civ.Code, sec. 1710, subd. 3; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 433, 159 P.2d 958; Fink v. Weisman, 129 Cal.App. 305, 311, 18 P.2d 961. Appellant testified that he would not have purchased the coat or signed the agreement of purchase had he known that Saks was selling it for more than the $4,000; he had offered that sum and he had no intention of entering into a joint purchase of said coat with Mrs. Earl. But his secret sentiment or purpose was not disclosed and was therefore not competent evidence. The court could have rejected it as self-serving, and immaterial. All that Saks knew was appellant's wish to purchase the coat for a sum not to exceed that which he agreed to pay. That the testimony of his undisclosed desire was uncontradicted is of no significance since in no degree does it affect or detract from the testimony which was adopted by the court and which furnishes abundant support for the judgment.

[5, 6] Appellant's final contention is that there was no valid gift to Mrs. Earl. The court determined that there was a gift and the testimony above quoted amply supports the finding. While either a gift or any other transfer of property may be avoided on account of its being induced by fraud there is no evidence here that any fraudulent representation, concealment or nondisclosure on the part of Saks and Company or of Mrs. Earl induced appellant to make the gift. In such circumstances the finding that appellant made a valid gift of the coat to Mrs. Earl is warranted by the evidence.

The judgments are affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 473

SATCHELL et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 17220.

District Court of Appeal, Second District, Division 3, California.

Nov. 4, 1949.

Proceeding by Clara Lancaster, widow of Alex Lancaster, deceased employee, and others for an award of burial expenses and benefits for death of deceased resulting from drinking a cleaning fluid under belief that it was whisky, opposed by Edward Satchell, and others, a copartnership doing business as Washington Cleaners and Dyers, employer, and National Automobile and Casualty Insurance Company, insurance carrier.

The Industrial Accident Commission awarded compensation for death and employer and insurance carrier petitioned for review of the order.

The District Court of Appeal, Shinn, P. J., affirmed the award, holding that drinking whisky was reasonably contemplated by terms and conditions of employment and that death arose out of and in course of employment.

1. Appeal and error ⚷931(3)

Reviewing court will not imply findings of fact which would find support in evidence and are necessary to support judgment, if record clearly shows that trier of facts declared that such facts had not been established by evidence.

2. Workmen's compensation ⚷1935

Where record established that referee gave credit to testimony that employer's Christmas party at which employees drank whiskey, was given a few days before Christmas rather than the day before Christmas, a finding that the party was held on day before Christmas would not be supplied by implication so as to support award of benefits for death of employee.

3. Administrative law and procedure ⚷784
Workmen's compensation ⚷1939

In widow's proceeding for benefits for death of her husband from drinking cleaning fluid the day before Christmas, at cleaning establishment at which he was employed, believing fluid to be whiskey, whether whiskey drinking was reasonably contemplated by terms of employment so that death arose out of and occurred in course of his employment, was a fact question for Industrial Commission.

4. Workmen's compensation ⚷1558

Evidence justified award to widow for death of employee from drinking cleaning fluid the day before Christmas, at cleaning establishment at which he was employed, believing fluid to be whiskey, on ground that whiskey drinking was reasonably contemplated by terms and conditions of employment and that death arose out of and in course of employment.

5. Workmen's compensation ⚷604

An injury is compensable if employee is at the time engaged in doing something he might reasonably have been expected to do while in the performance of his duty.

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Kearney, McCartney, Scott & Clopton, Los Angeles, for petitioners.

T. Groezinger and Robert Ball, San Francisco, for Industrial Accident Commission.

Frank W. Troost, Los Angeles, for other respondents.

SHINN, Presiding Justice.

Review of an award of burial expenses and death benefit payable to Clara Lancaster, widow of Alex Lancaster. The question for decision is whether there was substantial evidence to justify the finding of the Industrial Accident Commission that the injury sustained by Alex Lancaster arose out of and occurred in the course of his employment. He was a spotter for Washington Cleaners and Dyers, a partnership composed of Edward Satchell, James Henry Satchell and Edward Henry Satchell, Jr. In the afternoon of December 24, 1947, Mr. Lancaster, while at his place of employment, drank carbon tetrachloride from a bottle which he evidently believed contained whiskey. Five days later he died from the effects of the poison.

The record in this matter is lengthy. Our labor has been greatly increased by the deficiencies of the practice that is followed in these review proceedings. It is not customary to have the evidence transcribed unless a writ is issued. The statement of the evidence by the petitioner, which is wholly inadequate in the instant proceeding, and that of the respondents, having been prepared before a transcript was available, and not being supplemented in any manner thereafter, have no transcript references. Important items of evidence disclosed by reading the entire transcript of the evidence have been overlooked by the parties.

The Satchells had some 45 employees, among whom were five or more spotters. Lancaster had been in their employ for six years. The employers gave a Christmas party at the plant for which they provided food and drinks, including a case of whiskey, procured by Edward Satchell, which was entirely consumed during the course of the party. While all the direct and positive evidence was that this party was given on the evening of December 20th it is argued by respondents that there was substantial evidence it was held on the 24th and that we must assume the referee so decided. It is not seriously contended by petitioners that the death would not have been compensable if the fatal drink had been taken at the employers' party. It is strenuously argued, however, that any drinking which took place on another occasion would not have arisen out of or in the course of the employment. After a careful study of the record and mature consideration of the questions we are unable to agree with either contention.

[1, 2] A police officer testified that about December 30th Edward Satchell, who was the head of the firm, told him that the employers' party was given the afternoon of December 24th. A daughter of decedent testified that on the evening of the 24th her father, who had returned home about 4 p.m. and was suffering great distress, told her there had been a party and that he had drunk carbon tetrachloride. Evidence of Satchell's alleged statement, although contradicted by strong and positive testimony of interested and disinterested witnesses, would no doubt be sufficient to support a finding, had one been made, that the party was held on the 24th. No such finding was made and upon the record it cannot be supplied by implication. The rule that it will be presumed by a reviewing court that the trier of facts made all determinations of fact, and that all findings should be implied which are necessary to support the judgment or order, and which would find support in the evidence, has limitations which a reviewing court cannot conscientiously ignore. If the record clearly shows that the trier of facts declared that a state of facts entering into his decision had or had not been established by the evidence, it would be an absurd reliance upon a fiction, and a grave injustice, for a reviewing court to imply a finding in support of the judgment or order contrary to such oral declaration. It is clear from the record that the referee in the instant proceeding gave credit to the testimony of the witnesses who swore that the employers' party was given the afternoon of December 20th. He did not find that the fatal drinking took place during a party given by the employers. He stated in his report: "It is the opinion of the undersigned that there probably was a party of some sort on December 24, 1947; *that while the so called Christmas party may have been on Saturday before Christmas Eve (December 20th) there was also drinking on the day before Christmas.* (Emphasis added.) Futhermore, after hearing the witnesses and observing them it is my opinion that the employers had no objections to such drinking on Christmas Eve. It is, therefore, my conclusion that the decedent employee met his death as the result of an injury arising out of and occurring in the course of his employment."

We shall therefore assume that no employers' party was given on the 24th. It is true that there was evidence that Edward Satchell was generally opposed to drinking on the premises. He testified that he had orally so informed his employees, although Alex Lancaster, Jr., an employee, testified that he had never been so informed. It was the practice for the spotters to play cards Friday afternoons, but to remain on the premises in order to perfect their work if the inspectors found it needed further attention. There was testimony that there was usually a good bit of drinking during these card games. Alex Lancaster drank some every day, although not to excess. Edward Satchell testified that he warned Lancaster against drinking "maybe several times a week." Other spotters bought whiskey from time to time, consumed it on the premises, but usually concealed their bottles in a trough outside the building and threw empty ones in an ashcan of a neighboring business. There was evidence that on the afternoon of December 24th a card game was in progress in which Edward Satchell participated. There was no evidence that the players were drinking during the course of the game. The morning of the 24th Alex Lancaster had received a present of a bottle of whiskey and had consumed it. Tom Satchell, a relative and employee of the partners, was drinking and saw Lancaster drinking.

Among the cleaning agents used were amyl acetate and carbon tetrachloride. Sam Messler, a friend of the Satchells, from whom they had purchased hangers, came to the plant the afternoon of the 24th. He had spots of paint on his clothing. He asked Edward Satchell for cleaning fluid. Satchell told Lancaster to give him carbon tetrachloride, which Messler could take home with him. Lancaster went outside, got a brown whiskey bottle, went to one of the large cans that cleaning fluid was kept in, filled the bottle, told Messler it was not "the right thing for it", put the bottle on a board behind where he worked, had Messler take off his jacket, cleaned it, and then told Messler he should use amyl acetate for paint spots. Edward Satchell asked Messler if Lancaster had given him what he wanted and Messler replied that Lancaster had told him that the contents of the bottle was not for paint spots, and he asked Satchell to have a bottle of amyl acetate for him the next time he came in. Several days later a small colored bottle was found where Lancaster had worked. There was doubt as to its contents and it was thrown away. A police officer testified that after the death of Lancaster he inspected the premises, was shown about by Edward Satchell and observed flat whiskey bottles containing cleaning fluid. Alex Lancaster, Jr. testified that whiskey bottles were used for that purpose. There was also testimony that cleaning agents were sometimes kept in brown whiskey bottles, and unlabeled brown bottles similar to whiskey bottles; that one reason for the practice was that some of the cleaning fluids deteriorated if kept in clear glass bottles.

Two questions are presented: (1) Was it a question of fact for decision by the commission whether whiskey drinking on the day before Christmas was reasonably contemplated by the terms and conditions of Lancaster's employment. (2) Was there sufficient evidence to justify the commission's affirmative answer to the first question.

[3, 4] The first question is clearly one of fact. So far as the drinking of whiskey was concerned the practices followed in the plant were somewhat unique. It will become obvious that our discussion is related to an unusual state of facts. Since moderate drinking was tolerated it must have been considered that the efficiency of the workmen would not thereby be seriously impaired. The Friday afternoon card games and drinking, indulged in during a recess in the work of the spotters was a recognized and customary practice. Although it appears that Edward Satchell was opposed to drinking by the employees, and there was testimony that two employees had previously been discharged for drinking, moderate drinking, nevertheless, went on without any effective steps being taken to prevent it. The fact that the employers gave a Christmas party on the 20th instead of the 24th was merely one of many circumstances to be considered by the commission. The fact that the party was held on the 20th did not foreclose the holding of some sort of a party by the employees on the 24th, nor did it mean that there would be no drinking on the 24th, especially during the slack period when the usual card game was going on. The question for the commission to decide

would have been altogether different if the employers' Christmas party had been the only occasion when drinking took place with the express or implied consent of the employer, or if there had been no evidence of the peculiar business practice of keeping cleaning fluids in whiskey bottles. All the circumstances we have related had to be weighed by the commission in determining whether the drinking that took place on December 24th was in the course of practices which were customary with the particular class of employees to which Lancaster belonged. It is clear that the commission could properly find that the drinking of whiskey under the circumstances related was to be anticipated under the conditions of Lancaster's employment. The decision was therefore one of fact.

[5] It is too well settled to admit of question that an injury is compensable if the employee is at the time engaged in doing something he might reasonably have been expected to do while in the performance of his duty. Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911; Pacific Indem. Co. v. Industrial Acc., Comm., 26 Cal.2d 509, 513, 159 P.2d 625; Lockheed Aircraft Corp. v. Industrial Acc. Comm., 28 Cal.2d 756, 172 P.2d 1; Elliott v. Industrial Acc. Comm., 21 Cal.2d 281, 131 P.2d 521, 144 A.L.R. 358.

Particularly appropriate to the instant case are the remarks found in the opinion of the District Court of Appeal, adopted by the Supreme Court in Whiting-Mead Commercial Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 1106, 5 A.L.R. 1518, with respect to whether smoking in the course of certain employment was necessarily contemplated. The court said: "The petitioner, in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a self-created appetite and not a natural appetite. The argument does not appeal to us. In an endeavor to determine what indulgences of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to the depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us, and must deal with it as it is. It will not do to say that mankind would be better for a lack of the weed, even if that statement be true. Tobacco is universally recognized to be a solace to him who uses it, and it may be that such a one, unless he finally shakes off the habit, cannot perform the labors of his life as well without it as with it." An injury to the employee, Duarte, occasioned by his smoking was held to be compensable. It was to be anticipated that Duarte would smoke while he worked. The facts of the present case justify the same conclusion with respect to Lancaster's drinking. As previously stated, the testimony was that he drank some every day. He had worked for the Satchells for six years; Edward Satchell's testimony that he reminded Lancaster of the rule against drinking "maybe three times a week" was rather convincing evidence that he knew of Lancaster's drinking, warned him against it, knew that his warnings were ineffectual, and yet preferred to keep him, despite his drinking, rather than get along without him. It may be conceded that Edward Satchell was opposed to the drinking but it could also be inferred that his protests to Lancaster were so feeble as to lead the latter to believe they were expressed as advice and not as an attempted enforcement of a rule against drinking. Under the circumstances we cannot hold, as a matter of law, that the drinking of whiskey by Lancaster during working hours was not well known to his employers and tolerated by them. It should not be understood that this would be deemed a sufficient reason for affirming the award. This is no mere case of a workman's having sustained injury through drinking while at work, with the implied consent of his employer. It is the concurrence of all the conditions we have discussed that persuades us that under the peculiar facts of the case the injury could reasonably be held to have arisen out of and to have occurred in the course of the employment.

There is, of course, a proximate relationship between Lancaster's drinking the fatal dose and the practice in the plant of keeping poisonous fluids in whiskey bottles and similar bottles, for the use of the spotters in the course of their work. It may not be doubted that this business practice was peculiarly hazardous to an employee who was accustomed to drinking whiskey from bottles. There was ample evidence to justify the findings and conclusions of the commission.

The award is affirmed.

WOOD and VALLÉE, JJ., concur.

94 Cal.App.2d 434

PEOPLE v. BECKER.

Cr. 681.

District Court of Appeal, Fourth District, California.
Nov. 2, 1949.

Evelyn Marie Becker was convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., of arson and with burning insured property with intent to defraud an insurer, and she appealed.

The District Court of Appeal, Griffin, J., affirmed the judgment, and held that the evidence sustained the conviction, that instructions given were proper, and that certain remarks of the trial judge were not prejudicial.

1. Arson 🔑37(1)

Evidence sustained conviction of arson and burning insured property with intent to defraud an insurer. Pen.Code, §§ 447a, 450a.

2. Criminal law 🔑517(4)

In prosecution for arson and burning insured property with intent to defraud insurer, evidence established corpus delicti prior to admission in evidence of extrajudicial statements of accused. Pen.Code, §§ 447a, 450a.

3. Criminal law 🔑867

In prosecution for arson and burning insured property with intent to defraud insurer, denial of motion for mistrial on ground that during a recess a juror made remark to a witness that witness was very alert was not an abuse of discretion. Pen.Code, §§ 447a, 450a.

4. Criminal law 🔑808½

In prosecution for arson and burning insured property with intent to defraud insurer, instruction in language of statute that in every crime there must exist a union or joint operation of act and intent or criminal negligence was not error on ground that reference to criminal negligence had no application to case. Pen. Code, §§ 20, 447a, 450a.

5. Criminal law 🔑829(1)

Where matters in requested instructions were covered by instructions given, refusal of trial court to repeat requested instructions was not error.

6. Criminal law 🔑808½

In prosecution for arson and burning insured property with intent to defraud insurer, instruction giving definition of word "willfully" as set forth in statute was not error. Pen.Code, §§ 7, subd. 1, 447a, 450a.

7. Criminal law 🔑485(1)

While hypothesis contained in question addressed to an expert witness should have some evidence to sustain it, question may be framed on any reasonable theory which can be deduced from evidence, and statement may assume any facts, within limits of evidence, on which opinion of expert is derived, provided question is not unfair or misleading.

8. Criminal law 🔑485(1)

In prosecution for arson and burning insured property with intent to defraud insurer, question directed to expert concerning length of time required to obtain an explosive mixture of gas under certain conditions, which assumed certain facts, was not error, where assumed facts were warranted by evidence. Pen.Code, §§ 447a, 450a.

9. Witnesses 🔑282¾

On cross-examination of defendant, trial judge was authorized to call defendant's attention to apparently conflicting statements and give him an opportunity to explain or reconcile them.

10. Criminal law ⚿1166½(12)

Remark addressed to defendant's counsel that trial court was not going to have defendant answer questions twice, give two different versions, without some explanation, was not reversible error, on ground that trial court exceeded right to comment on evidence. Pen.Code, § 447a, 450a.

11. Criminal law ⚿1035(3)

Misconduct could not be predicated on certain remarks of trial judge where such remarks were not cited as misconduct at time they were made.

12. Criminal law ⚿656(2)

Remark of trial judge directed to counsel for defendant that his question was not intelligent, accompanied with explanation why trial judge thought so, was not error.

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Richard J. Weller, San Bernardino, for appellant.

Fred N. Howser, Attorney General, Norman H. Sokolow, Deputy Attorney General, for respondent.

GRIFFIN, Justice.

Defendant and appellant Evelyn Marie Becker was charged with the crime of arson in the burning of a dwelling house in Crestline, and with burning insured property with intent to defraud an insurance company. The jury convicted her on both counts. She appeals from the judgment and order denying her motion for new trial.

Defendant and her present husband (Michael) were living in the house which was transferred to defendant and her former husband (Max Keller, now deceased) by joint tenancy deed in January, 1946. Shortly before his death he transferred his joint tenancy interest to another and at the time of trial litigation concerning the title to the property was pending.

On the night of October 24, 1948, a neighbor of defendant, living about 52 feet from her property, was awakened by what she described as an "explosion", which blew out the windows of her house. She arose and saw high flames emanating from the house of defendant, particularly from the northeast corner of the building. She gave an alarm.

Another witness saw the fire and the entire rear portion of the house in flames. The wall was blown out. He tried the windows and doors but found them to be closed and locked.

The fire chief, who lived about 1000 feet away, heard the explosion which sounded like a "muffled concussion". Several minutes later, when he arrived, the entire building had been consumed by fire. The next day he made an inspection of the debris and discovered a "gas space heater" and along side of it a piece of pipe which was a supply gas pipe to the space heater. The end of that pipe contained a valve which was described by the witness as being in the "on" position. In his presence was discovered two flare pots operated by wick and fuel oil. They were found covered with dirt, soot and debris under the northeast corner of the building. It was necessary for the caps on these flare pots to be off before they would burn. One was found with the cap off and the other was on. These flare pots are similar to ones used on highways as danger signals. They were found a short distance from the rear foundation walls and were 12 to 18 inches apart and several feet from where the gas space heater was located. An expert testified that he examined and measured the orifice that mixed the amount of fuel which went to the burner and that it was the standard house pressure and passed 20,000 B.T.U.'s per hour, and that perfect combustion for gas would require about 10,471 cubic feet of air for each cubic foot of gas; that when the gas reaches that proportion of air and an open flame is introduced a combustion will likely take place; that in a room 12 x 14 x 8 feet with all doors and windows closed and gas escaping at the rate described with an open flame at about floor level, it would take about seven hours to accumulate that mixture; that any changes of air would take longer. (Defendant stated she was away at the time of the fire; that she left Crestline about noon that day. The fire occurred about 10 p. m.)

An insurance agent testified that he sold defendant a policy of fire insurance on February 28, 1946, expiring February 28, 1949, in the name of Max and Eva Keller, husband and wife, covering two units located on the lots belonging to defendant, totaling $17,500. $8,000 was on unit No. 1 that burned, and $3,000 on the personal household property therein. On January 25, 1946, defendant and Max Keller executed a trust deed in the sum of $7,620 on the property, which was later assigned to one Dorosh, son-in-law of defendant. Dorosh testified that he never received any payments thereon and was instigating foreclosure proceedings thereunder, and on July 28, 1948, gave notice of default to defendant and notice that he was exercising his option to sell the property. He likewise stated that he saw the policy of fire insurance for $17,500, covering the property, in escrow when he purchased the trust deed. The policy shows this change of first beneficiary thereunder as of July 29, 1948. On September 29, 1948, defendant, under the name of Keller, executed a note in the sum of $1,400, secured by a chattel mortgage on all her personal property and furniture, specifically describing each article, which note and mortgage ran in favor of the Seaboard Finance Company. After the fire defendant went to the finance company and wrote a letter to the insurance company to deduct the amount of that note from the proceeds of the policy payable on the furniture "that was burned up in my home", and ordered it paid to the finance company.

An insurance adjustor testified that defendant and her husband came to his office on October 25, about 2 p. m.; that she said she intended to present a claim for her loss and that he gave her his sympathy and asked if she had any knowledge as to how the fire originated; that she said she did not know. He told her he had examined the charred premises and that there was supposedly some explosion before the fire. She stated that she had visited the scene that day and that she was afraid someone was trying to "get even" with her. She was asked if she had any trouble with the wiring or heating units; if she had left any of them on when she left, and she said "no"; that all were shut off. She then claimed that she had lost everything she owned in the fire, including clothing and household goods. She was asked if she had transferred any "stuff" from the Crestline home to Wilmar, where she had rental property, and she stated she had not with the possible exception of a wash rack or something of that type. The adjustor then asked her the type of house that was insured. She described it as a three-bedroom, two-story cabin, with a large living room, kitchen and bath, and with a ½ basement underneath; two large bedrooms upstairs; that they were all well furnished with good rugs, two or three radios, one combination phonograph player; about 400 records; a small bar; several bottles of expensive whiskey; lamps; a high oven kitchen range; ice box; and a bedroom containing an expensive inlaid walnut brass-trimmed bedroom suite; and that the bedrooms upstairs were completely furnished; that she also lost a collection of dolls imported from Austria; linen; a one-carat diamond ring valued at $1400; and $950 in fifty-dollar bills. She stated she did not know Dorosh, the holder of the trust deed. She, through her attorney, about a week later, presented a schedule of the items lost in the fire, together with the estimated cost to replace the building. This schedule was received in evidence and it itemised ten rooms of furniture and equipment valued at approximately $12,000, which included dishes and glassware valued at more than $600, three radios, five beds with springs and mattresses, one described as a seven-piece set valued at $600.

The day after the fire she went to the office of the finance company and told the manager that everything she had was burned in a fire and that that included everything covered by his chattel mortgage. She stated that she was a widow and hoped to be married in the near future, and would sign a letter directed to the insurance company requesting it to pay $1400 of the insurance money to the finance company.

The appraiser for the finance company testified that he saw the furnishings mentioned in the chattel mortgage in the Crestline home of defendant and that he saw the inlaid walnut bedroom suite there at that time, as well as a radio with an alligator-skin case.

An arson investigator, duly qualified as such, testified that he only inspected fires to determine if they were of incendiary origin; that he arrived on the scene the next morning; that he was shown a space heater and pipe with the valve "turned on" and the flare pots. He testified that the men of the fire department sifted the debris and ashes from the burned building and discovered but very little glassware or dishes and that there were only two bedsprings, which would not burn; that early that morning defendant went to the premises with him for the first time and he questioned her about the space heater in connection with her heating system; that she stated none were in use; that as a result of the fire, she stated she had "lost everything I own in this world". He later asked her if her place was insured and she stated that it was. He then asked if she owned other property and she stated she owned a house and lot at Wilmar. He asked her if she had any other place rented. She stated she had been given permission to live in the Zinnen cottage in Crestline since the fire. She was asked if she had any furniture stored any place at all and she answered in the negative. He then asked her if she didn't know about a cottage rented at Arrowhead, known as the "Rickabaugh cottage". She evaded the question at first and then said she did. The investigator asked if she would take him to that house and she did. She led him and the deputy sheriffs to a padlocked garage door in which were stored a great number of boxes and cartons containing dishes, hard liquor, many boxes of groceries, cooking utensils, silverware, portable radio with alligator leather case, books, many cartons of clothing, Christmas tree decorations, 50 feet of rubber hose, brooms, shovels and tools. They then went upstairs to the main part of the cottage which was found to be fully furnished and which included the very fine inlaid walnut bedroom suite which had been listed in the schedule of losses, together with certain dolls. There was also found a mahogany trimmed screen, bedclothing, satin comforters, table model radio, vacuum cleaner, personal pictures, red leather chair, electric heater, coffee table, throw rugs, bed with spring and mattress, floor lamps and many other items.

The investigator then testified that the agent for the finance company visited this cottage and identified the furnishings as those he appraised in the Crestline house which were listed as security for its loan. Defendant was asked why she did not live there as it was pretty well furnished. She did not answer this question. A check payable to Mr. Decker in the sum of $53.50, which defendant claimed was burned, was likewise found under a mat in this cottage.

Deputy sheriffs and others testified that they endeavored to locate defendant at the time of the fire but were unable to do so; that about three o'clock in the morning they located her and her husband at the home of defendant's then attorney in Crestline and questioned her about the fire. They testified that she stated she had locked the doors when she left and said "I lost everything I had in the fire * * * I don't have anything left, only the clothing I have on" and that she lost a $1400 diamond ring in the fire and that her husband lost $900 and all his clothes and that all of their belongings "went up in the fire."

Witnesses were produced who testified that defendant and her husband, on the day of the fire, about 4:30 p. m. went to the Zinnen home next door to the Wilmar home owned by defendant but which was rented out to others. They stayed there until 8:30 p. m. The day after the fire they returned and asked Mrs. Zinnen to type a list of furniture destroyed, which she did do. This list was copied from a pencil memo furnished by defendant. Defendant was asked where she expected to live now and she replied that she would like to borrow the Zinnens' cabin in Crestline for a couple of weeks and this permission was given. The insurance policy here involved and personal papers of defendant were found in a strong-box in the Zinnen cottage then occupied by the defendant.

A Mr. Rickabaugh testified that defendant, on October 8th, came to his home and asked permission to rent his garage and unfurnished cabin and later returned on the 12th and rented it, giving her name as "Bock". Although this house was about 40 feet from his home he never saw anyone moving furniture into it. Defendant refused a receipt for the rent and stated she was from Big Bear and had been staying with friends there. He asked her to sign up for the electric current but she told him to leave it as it was and she would pay him. This is the cabin where the furniture was found to be stored.

After the people rested their case defendant endeavored to account for the fire as being possibly due to two or three defects, one, overheating of the refrigerator; two, faulty wiring; and three, leaking gas jet. The refrigerator agent testified that overheating of the refrigerator would not cause a fire and that it would automatically shut off when overheated. Defendant claims she moved her furniture to the Rickabaugh cottage because of prowlers that frequented her Crestline home on several occasions and that she stated that "is the main reason why I get married, for protection".

The deputy sheriff stationed in that district testified that defendant never made any complaint to him about prowlers. Defendant then stated that she and her husband stayed some nights in the Rickabaugh cabin but went back to the Crestline home to eat. She endeavored to account for her actions in general and denied that she burned the property or intended to defraud the insurance company in any manner. Character witnesses were called in her behalf.

[1] Defendant, on appeal, first contends that the evidence was insufficient to sustain the verdicts. Although the evidence was susceptible of a different conclusion the jury was justified in believing, as maintained by the prosecution, that the fire was of incendiary origin; that the gas heater in one room was purposely turned on and that a lighted flare-pot was purposely placed in the room so that it would ignite the gas escaping from the heater and cause an explosion at some delayed hour. Defendant admitted being in the house up until noon on the day of the fire and on her departure she said she locked all doors and all windows were closed. Her actions and conduct, according to the evidence above related, and in not going to the scene of the fire that same night justifies and fully supports the conclusion reached by the jury. Sections 447a and 450a, Penal Code; People v. Miller, 41 Cal.App.2d 252, 106 P.2d 239; People v. Gilyard, 134 Cal.App. 184, 25 P.2d 35.

[2] It is next argued that there was no evidence tending to establish the corpus delicti prior to the admission in evidence of extrajudicial statements of the accused. There is no merit to this contention. People v. Holman, 72 Cal.App.2d 75, 164 P.2d 297; People v. Roganovich, 77 Cal.App. 158, 246 P. 132; People v. Saunders, 13 Cal.App. 734, 110 P. 825; People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873.

[3] Counsel for defendant moved for a mistrial after claiming misconduct of a juror. The reporter's transcript shows that during a recess the juror remarked to one of the witnesses about his "being very alert". The witness asked her if she was a juror and being informed that she was the witness walked away. The fact that a witness impressed a juror as being alert would not necessarily indicate that she would regard his testimony in a more favorable light than it merited. The question of a mistrial was presented to the trial court. In exercising its discretion we perceive no abuse of that discretion in denying the motion. People v. Murphy, 92 Cal. App. 729, 268 P. 927; People v. Galloway, 202 Cal. 81, 92, 259 P. 332; People v. Quimby, 6 Cal.App. 482, 490, 92 P. 493.

[4] The trial court instructed the jury in the language of sec. 20, Penal Code, that "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." It is argued that in the commission of the

crime denounced by sec. 447a of the Penal Code the act must be both willful and malicious, and that the portion of the instruction in reference to "criminal negligence" has no application and is therefore erroneous, citing People v. George, 42 Cal. App.2d 568, 109 P.2d 404.

The court, in reading sec. 20 of the Penal Code, obviously referred to crimes generally and not to the particular one before the court. The instruction is correct as an abstract proposition of law. People v. Rowland, 12 Cal.App. 6, 106 P. 428.

In People v. Womble, 67 Cal.App.2d 885, 155 P.2d 838, a similar instruction was criticized for the same reason as here advanced and it was there stated that no useful purpose was served by including in the instruction reference to the element of criminal negligence, but concludes with the statement, which is applicable here, that the jury could not have been misled by the use of the term "criminal negligence" in view of the evidence and the ample instructions which covered specifically the elements of the crime charged. Instructions substantially in the form of CALJIC Instructions Nos. 902, 904, 906 and 907 were given. No prejudicial error resulted.

[5] Defendant's refused instructions were to the effect that it must be found that the fire was set and started intentionally and was not accidental, and that in the crime of burning insured property there must be a specific intent to defraud the insurance company. The court gave instructions practically in the same language as secs. 447a and 450a of the Penal Code as well as the instructions above noted from CALJIC. Every element of the refused instructions were contained in the instructions given. The court did not err in declining to repeat them. People v. Ramsey, 83 Cal.App.2d 707, 727, 189 P.2d 802; People v. Bickerstaff, 46 Cal.App. 764, 775, 190 P. 656.

[6] Complaint is made because the court gave a definition of the word "willfully" as set forth in section 7, subdivision 1 of the Penal Code, citing People v. Snyder, 15 Cal.2d 706, 104 P.2d 639. It is argued that the giving of such an instruction is reversible error. The sections of the Penal Code under which defendant was charged recite that the person who so acts must "willfully and maliciously" set fire to "any dwelling house" or "any person who willfully and with intent to injure or defraud the insurer sets fire to * * * goods, wares," etc. is guilty of a public offense. In People v. Geibel, 93 Cal.App.2d 147, 208 P.2d 743, it was held that it was error in a forgery case to define the word "willfully" in connection therewith. In Penal Code section 470 (the forgery statute) the word "willfully" is not stated as a necessary element. It was said in 4 Cal. Jur. 10-yr. Supp. pp. 810–811, sec. 376, that there is no error in giving such an instruction together with an instruction in the language of Penal Code sec. 20 in a case in which they may properly be applied. People v. Saunders, 61 Cal.App. 341, 345, 215 P. 120, 121, is given as authority for the statement that "When taken as a whole the instruction was but a definition of the word 'willfully.' Moreover, it was a definition which was not improper to be given to the jury, even though it be granted that the giving was not strictly necessary. It was proper for the reason that the information charged that appellant 'willfully and unlawfully' committed the acts alleged against him." It was there held that there was no error in giving both of such instructions in proper cases.

[7, 8] Defendant objects to a question asked of the expert concerning the length of time required to obtain an explosive mixture of gas under certain conditions. It is contended that his opinion was based on an assumed state of facts not in evidence because the building was entirely destroyed by fire and there was no testimony as to the size of the room or the location of the flare pots or the gas space heater, and that there was no evidence that the flare pots were burning or that they were in the same room prior to the time of the fire. The jury had the right to draw reasonable conclusions from the evidence produced, both circumstantial and direct, i. e., the position and location of the gas space heater and flare pots discovered in the debris in relation to the rooms de-

scribed by the witnesses. A fire resulted without question, and there must have been a flame somewhere to cause the explosion. While the hypothesis contained in the question should have some evidence to sustain it, the question may be framed on any reasonable theory which can be deduced from the evidence and the statement may assume any facts, within the limits of the evidence, upon which the opinion of the expert is derived provided the question is not unfair or misleading. Hutter v. Hommel, 213 Cal. 677, 680, 3 P.2d 554; Treadwell v. Nickel, 194 Cal. 243, 267, 228 P. 25; People v. Wilson, 25 Cal.2d 341, 349, 153 P.2d 720; Guardianship of Jacobson, 30 Cal.2d 312, 324, 182 P.2d 549. The facts assumed for the purpose of the question were sufficiently warranted by the evidence.

[9-11] The next complaint is that the oral comments of the trial court during the course of the trial and in the presence of the jury were prejudicial to the defendant and exceeded the right of the court to comment on the evidence. The transcript of defendant's testimony on cross-examination showed a previous inconsistency as to whether she did or did not have a certain conversation. In a question propounded by the court defendant finally admitted having such a conversation. The trial judge asked her "why she hadn't said so". Objection was made to the court's question. It was overruled and the court remarked to counsel: "I am not going to have this witness answer questions twice, give two different versions, without some explanation." On cross-examination of a defendant a trial judge is authorized to call the defendant's attention to apparently conflicting statements and give him an opportunity to explain or reconcile them. People v. Butterfield, 40 Cal.App.2d 725, 105 P.2d 628. Apparently this was the purpose of the question. The second remark was addressed to counsel for defendant in overruling the objection and not to the jury or to the witness. The trial court instructed the jury that it was the exclusive judge of the credibility of the witnesses. While the remark may have been better unsaid in the presence of the jury we are convinced that no prejudicial error resulted. Other remarks were cited as error. We have examined them and find that no prejudicial error resulted. The remarks of the court were not cited as misconduct at the time. People v. Knocke, 94 Cal.App. 55, 57, 270 P. 468.

[12] In one instance the trial judge told counsel for defendant that his question was not intelligent and endeavored to explain why he thought so. Exception is taken to this. We see no merit to this exception.

Finally, it is claimed that the court erred in denying the motion for new trial based upon the errors here alleged. This claim has been fully covered in disposing of those claimed errors.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

94 Cal.App.2d 514

BURCHAM v. CAPRIO.

Civ. 17031.

District Court of Appeal, Second District,
Division 2, California.

Nov. 7, 1949.

Hearing Denied Jan. 4, 1950.

Gouley Burcham, an individual, doing business under the fictitious firm name and style of Gouley Burcham Company, brought action against Gene Caprio, an individual, doing business under the fictitious firm name and style of Caprio Distributing Company, to recover commissions for sales made by plaintiff as a merchandise broker of defendant's pickles. Defendant filed a counterclaim for damages because of alleged negligence of plaintiff in sale of two carloads of pickles and relishes.

The Superior Court of Los Angeles County, Wm. S. Baird, J., rendered judgment for the plaintiff, the defendant appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment, holding that evidence was insufficient to establish any negligence on part of plaintiff, that oral agreements for commissions in excess of those provided for in earlier written contract, were not alterations or modifications of written contract, and that plaintiff was entitled to recover commissions specified in oral contracts.

1. Brokers ⚿38(1)

Where buyer of carload of pickles from packer through merchandise broker, was justified in cancelling subsequent order for two additional carloads, because first carload was of inferior quality and not up to standard of samples, and broker, who had acted without any bad faith or fraud, forwarded notice of cancellation to packer who accepted notice without protest, packer was not entitled to recover from broker for loss sustained because of cancellation.

2. Brokers ⚿71

Where merchandise broker and packer of pickles entered into a written contract whereby packer agreed to pay broker 5 per cent commission on sales, and thereafter oral agreements were made for commissions bearing from 6 to 10 per cent, and packer and broker's bookkeeper together computed commissions under oral agreements, and percentages were written down and agreed on between packer and broker's sales manager, oral agreements were not modifications or alterations of written agreement but were new agreements, and broker was entitled to recover thereunder.

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Larwill & Wolfe, Los Angeles, for appellant.

Haas & Home, Los Angeles, for respondent.

WILSON, Justice.

Appeal by defendant from a judgment in favor of plaintiff.

Plaintiff is a merchandise broker and defendant is a manufacturer and packer of pickles and relishes. In 1945 and 1946 plaintiff acted as a merchandise broker selling defendant's products on commission. There was a written contract between the parties whereby defendant agreed to pay plaintiff a commission of 5 per cent on the value of sales made by the latter. The rate of commission was changed by oral agreement from time to time covering individual sales, varying from 6 to 10 per cent. Plaintiff brought this action to recover a balance unpaid for commissions extending over a considerable period of time. Defendant answered denying the material allegations of the complaint and pleaded a counterclaim for damages arising out of alleged negligence on the part of plaintiff concerning the sale of two carloads of pickles and relishes.

The facts relating to plaintiff's alleged negligence are as follows: One Frank J. Foley, a merchandise broker of Minneapolis, Minnesota, while in plaintiff's office in Los Angeles, saw sample jars of defendant's pickles and relishes; he told plaintiff that Nash-Finch Company of Minneapolis would buy such products if they were up to the standard of the samples which Foley examined; Foley communicated with the vice president of Nash-Finch Company and was authorized to buy a carload of pickles; Foley placed the order with plaintiff who relayed it to defendant; the latter shipped a carload of pickles to Nash-Finch Company and before the same was delivered that company authorized Foley to secure two additional cars of defendant's pickles, the same to be according to the specifications that had applied to the first carload; pursuant to such instruction Foley ordered two carloads of pickles from plaintiff and the latter delivered a sales memorandum to defendant covering the order.

After the latter order had been given Nash-Finch Company began receiving complaints concerning the first carload of pickles and an officer of the company directed Foley to cancel the order for the additional two carloads. Foley sent the order of cancellation to plaintiff and he delivered it to defendant. Defendant accepted the cancellation without protest. Defendant sold the pickles but at a price much less than he would have received under the Nash-Finch Company's order. Defendant's claim for damages against plaintiff is based on allegations in his answer and counterclaim that plaintiff fraudulently represented to defendant that the former had sold defendant's merchandise to Nash-Finch Company; that he had not sold merchandise as represented by him, and that plaintiff wrongfully cancelled the sale of the merchandise without authorization from defendant and wrongfully accepted the cancellation from the purchaser. There is nothing in the record to show any bad faith or fraud on the part of plaintiff. He received the order from Foley who in turn had been authorized by Nash-Finch Company to place the order. The evidence does not bear out defendant's allegation that plaintiff had not sold the merchandise but on the other hand shows positively that the sale had been made to Nash-Finch Company. Nor is the allegation that plaintiff wrongfully cancelled the sale sustained by the evidence. The fact is that plaintiff did not cancel the sale but merely transmitted the cancellation which Nash-Finch had given to Foley who in turn transmitted it to plaintiff.

Furthermore the evidence shows that Nash-Finch Company was justified in cancelling the order for the two carloads of merchandise. Foley testified that while he was in plaintiff's office in Los Angeles he examined samples of defendant's pickles and found that they were well cured, crisp, firm and uniform in size. The evidence shows that when the first carload was received by Nash-Finch it was found that the pickles were not according to sample, were not well cured, "tasted like raw cucumbers," were not uniform in size and were of "very inferior quality."

[1] Because of the poor quality of the merchandise sent in the first carload Nash-Finch Company cancelled the order for the other two carloads. There is nothing in the record to negate the evidence that the first shipment was of inferior quality, hence Nash-Finch Company was justified in cancelling the second order. Furthermore, when defendant received notice of the cancellation he made no protest and accepted it with the statement, "Well, that's just one of those things, Clyde. We will sell them somewhere else."

Defendant contends that ever since the commencement of his business transactions with plaintiff the contract for commission has been in writing which provided for a 5 per cent commission, and that the amount for which judgment was awarded to plaintiff is excessive for the reason that some of the commissions were for amounts in excess of 5 per cent.

The evidence is to the effect that the rate of commissions varied with the different sales; that at the time the sales were made defendant made no objection to the additional commissions; that defendant and plaintiff's bookkeeper together computed the commissions, and that the percentages were written down and agreed upon between defendant and plaintiff's sales manager.

[2] The oral agreements made by the parties for individual sales were not modifications or alterations of the written agreement but were new agreements concerning each separate sale superseding the written contract. McClure v. Alberti, 190 Cal. 348, 350, 212 P. 204; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 331, 290 P. 613; Treadwell v. Nickel, 194 Cal. 243, 258, 228 P. 25.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 404

MANTER et al. v. HOWARD et al.

Civ. 7644.

District Court of Appeal, Third District, California.

Nov. 2, 1949.

Rehearing Denied Dec. 1, 1949.

Hearing Denied Dec. 29, 1949.

J. A. Manter, and others, doing business as Wildwood Lumber Company, brought action against D. E. Howard, individually, and others, to recover amount allegedly due for lumber sold, and the defendants filed a counterclaim.

The Superior Court of Shasta County, Warren Steel, J., rendered judgment against D. E. Howard, and denied the application of D. E. Howard and of George T. Goggin, trustee in bankruptcy of the estate of D. E. Howard, to vacate the judgment, on ground that it was the result of mistake, and excusable neglect, and they appealed.

The District Court of Appeal, Thompson, J., reversed the judgment and orders, holding that Superior Court abused its discretion in refusing to set aside the judgment.

1. Judgment 🔑143(3)

Where referee in bankruptcy issued a restraining order against plaintiff in state court and his attorneys enjoining them from proceeding with trial until discharge in bankruptcy of defendant was determined, and order was personally served and was called to attention of trial judge when case came on for trial, defendant could assume that order would result in a continuance of the trial, and therefore trial judge who thereafter rendered default judgment, abused his discretion in denying application to have judgment set aside, on ground of mistake, inadvertence, surprise, and excusable neglect. Code Civ.Proc. § 473.

2. Bankruptcy 🔑145(1)

On adjudication of bankruptcy, federal court was immediately vested with authority and control for benefit of bankrupt's creditors, over all property of bankrupt, including bankrupt's chose in action. Bankr. Act, §§ 2, 70, 11 U.S.C.A. §§ 11, 110.

3. Bankruptcy 🔑151, 156

Trustee in bankruptcy, as an officer of the bankruptcy court, was vested with title to bankrupt's property, and was authorized to represent creditors in any pending litigation in which the bankrupt was interested.

4. Bankruptcy 🔑156

Regardless of fact that trustee in bankruptcy was not a party to pending suit against bankrupt, he was entitled to apply to court for relief from judgment against bankrupt, on ground of mistake or inadvertence. Code Civ.Proc. § 473.

5. Bankruptcy 🔑156

Trustee in bankruptcy was not required to be actually substituted as a party defendant in action against the bankrupt in order to entitle him to represent bankrupt's creditors in the action, and he could continue that litigation as trustee, in the name of the bankrupt, without actually becoming a party to the record.

Gendel & Chichester, Los Angeles, for appellants.

Carr & Kennedy, Redding, for respondents.

THOMPSON, Justice.

Defendant, D. E. Howard, has appealed from a judgment rendered against him and from the order denying his application to vacate and set aside the judgment under Section 473 of the Code of Civil Procedure. George T. Goggin, Trustee of the bankrupt estate of the defendant, has also appealed from the order refusing his motion to vacate and set aside the judgment.

Plaintiffs brought suit in Shasta County September 4, 1947, for $30,318.18, for money due on the purchase of lumber. Messrs. Carr & Kennedy appeared as attorneys for the plaintiffs. An attachment was issued against the defendant's property, which was released upon his furnishing bond for $17,500. Defendant answered, admitting the purchase of the lumber, but alleged that it was unfit for use to a large extent on account of deterioration and dry rot. In a counter-claim defendant asked for damages and credit on the purchase price which when set off against plaintiffs' demand would leave a balance in favor of the defendants. Mr. Glenn E. Newton appeared as attorney for the defendants. Plaintiffs' attorneys were notified that unless the defendant, D. E. Howard, could reorganize his business he would be forced into bankruptcy. The case was first set for trial for May, 1948, but was twice continued on motion of the defendants. The defendants demanded a jury trial, which was refused. The case was finally set for trial for June 8, 1948. June 4, 1948, the defendant Howard filed a petition in bankruptcy in the United States District Court in Los Angeles and was thereupon adjudged a bankrupt. On June 7th Mr. Newton received notice from Sherman W. Sheppard, attorney for the defendant Howard in Southern California, of the filing of said petition and the proceedings thereon. Upon order to show cause, the referee in bankruptcy issued a restraining order against the plaintiff Manter and his attorneys, enjoining them from proceeding with said trial in Shasta County, and from further proceedings until the "Discharge in Bankruptcy" of the defendant doing business as Mill Products Company "is determined." That restraining order was personally served on plaintiff and his attorneys "in open court", and called to the attention of the trial judge on June 8, 1948, when the case came on for trial. Mr. Newton was then present. In effect, he objected to the trial, although he did not specifically so state. When it became evident that the case would then be tried, Mr. Newton asked the court to permit him to withdraw as an attorney for the defendant, which was refused on the ground that the application did not conform to the provisions of Section 284 of the Code of Civil Procedure. Mr. Newton then said, "I want the record to show that my name be withdrawn as attorney in the case." Without objection Mr. Newton then withdrew from the court room and did not participate in the proceedings which followed. Mr. Carr, the attorney for plaintiff, who was then present, said he would not like to participate in the trial in view of the restraining order against him and his client. The judge then said, with respect to the restraining order, "I believe (it) is invalid. * * * It is not addressed to the Court. I am not being restrained here." Mr. Carr did not participate in the proceedings of the trial. But the court called to the stand and personally examined three of plaintiffs' witnesses who were then in court. No one appeared as attorney for either side. There was no cross-examination of witnesses. Upon completion of the testimony, the court awarded judgment for plaintiffs in the sum of $12,818.18 and costs in the sum of $397.75. Defendants' counter-claim was denied. No findings were adopted. The judgment to that effect was signed, filed and entered September 20, 1948.

On June 30, 1948, George T. Goggin was appointed and qualified as Trustee in bankruptcy and under the bankruptcy laws was authorized to appear and defend, in behalf of the bankruptcy estate, in any pending suit. Upon due notice, the defendants moved on October 11, 1948, to vacate and set aside the judgment and for relief therefrom under Section 473 of the Code of Civil Procedure, on the ground of mistake, inadvertence, surprise and excusable neglect. At the same time, the Trustee in bankruptcy of defendant's estate also moved for relief from the judgment on the same grounds. The motions were heard on affidavits averring the proceedings in detail, including the preceding statement of facts. The motions were denied. From the judgment and the orders denying relief this appeal was perfected.

It is contended the court abused its discretion in denying said motions for relief, and that the judgment is void for lack of due process.

[1] We are convinced the court abused its discretion in refusing to set aside the judgment and in denying relief therefrom, under the circumstances of this case. After an adjudication of bankruptcy, of which the court had actual notice, the trial judge examined the witnesses and decided the case against the defendant on his counter-claim in the absence of the defendant and his

attorney. Defendant and his attorney had a right to assume that the restraining order against plaintiff and his attorneys would result in a continuance of the trial. We may not presume they were not in good faith in failing to procure the attendance of their witnesses at that hearing. The court knew that the defendants were then unable to proceed with the trial. Even though the restraining order may have been voidable, which is unnecessary for us to determine, the fact remains that defendants did not have their day in court. The doctrine of comity entitled that restraining order to full respect until it was set aside or modified in a proper proceeding. Plaintiffs' attorney recognized that fact. Mr. Carr said: "We should be entitled to a brief continuance for the purpose of having that order dissolved." The continuance was not granted. It was stated by Mr. Carr that, in his belief, there was a lack of jurisdiction to make that order. It would seem that a challenge to the jurisdiction of the bankruptcy court to make the order should be presented to the federal court for determination. With respect to the question of jurisdiction of the federal court to determine the merits of a petition for removal of a case, it has been held that the issue of fact raised by the pleadings may "be determined in the Federal court", Chesapeake & Ohio R. Co. v. Cockrell, 232 U.S. 146, 34 S.Ct. 278, 281, 58 L.Ed. 544; Queensboro National Bank v. Kelly, D.C., 15 F.2d 395, and that after its determination by that court the State court is bound by that decision. Chesapeake & O. R. Co. v. McCabe, 213 U.S. 207, 29 S.Ct. 430, 53 L.Ed. 765. No such procedure was adopted in the present case. The court failed to grant a continuance for that purpose. Not only was the defendant prejudiced by the court's procedure in this case, but the creditors of the bankrupt were thereby deprived of their defense to the action, and of their day in court upon the merits of their counter-claim.

[2] Immediately, upon the adjudication of bankruptcy in this case, the federal court was vested with authority and control, for the benefit of the creditors, over all property of the bankrupt, wherever found, including the chose in action involved in the pending suit. Nuckolls v. Bank of California, 10 Cal.2d 266, 274, 74 P.2d 264, 114 A.L.R. 708; Wells v. California Tomato Juice, Inc., 47 Cal.App.2d 634, 636, 118 P.2d 916. In the Wells case it is said in that regard, quoting with approval from Straton v. New, 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060:

> "'The purpose of the Bankruptcy Act * * * is to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. Acme Harvester Co. v. Beekman Lumber Co., 22 U.S. 300, 32 S.Ct. 96, 56 L.Ed. 208.'" [47 Cal.App.2d 634, 636, 118 P.2d 918.]

To the same effect, see, 5 Remington on Bankruptcy, 4th ed., 571, sec. 2370, 11 U.S.C.A. § 11; 11 U.S.C.A. § 110.

[3-5] The Trustee, as an officer of the Bankruptcy Court, was vested with title to the bankrupt's property, and was authorized to represent the creditors in any pending litigation in which the bankrupt was interested. Regardless of the fact that the Trustee was not a party to the pending suit in Shasta County, he was entitled to apply to the court under Section 473 for relief from the judgment on the ground of mistake or inadvertence. Nuckolls v. Bank of California, supra; Hammond Lumber Co. v. Gilkey, 120 Cal.App. 252, 7 P.2d 724; Schroeter v. Abbott, 185 Cal. 146, 149, 196 P. 39. The Trustee did not have to be actually substituted as a party defendant to entitle him to represent the creditors in the Shasta County case. He could continue that litigation as Trustee, in the name of the bankrupt, without actually becoming a party to the record. Williams v. Lane, 158 Cal. 39, 42, 109 P. 873.

The judgment and the orders denying relief are reversed.

ADAMS, P. J., and PEEK, J., concur.

94 Cal.App.2d 376

FRIED v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al.

Civ. 17233.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1949.

Nathan Fried petitioned for writ of mandate directing The Municipal Court of the City of Los Angeles, and Urban F. Emme, clerk thereof, to enter a default against a certain person in joint debtor proceeding.

The Superior Court of Los Angeles County, Hartley Shaw, Edward T. Bishop and Jess E. Stephens, JJ., rendered judgment dismissing the proceedings, and the petitioner appealed.

The District Court of Appeal, Wilson, J., affirmed the judgment, holding that complaint in the joint debtor proceeding failed to state a cause of action against the alleged joint debtor.

1. Judgment ⚿855(2)

A judgment against a joint debtor under statute providing that when a judgment is recovered against one or more of several persons jointly indebted on an obligation those not originally served and who did not appear in action may be summoned to show cause why they should not be bound by the judgment, must be based on the same cause of action as that on which judgment was entered. Code Civ.Proc. § 989.

2. Judgment ⚿855(2)

A joint debtor proceeding under statute providing that when a judgment is recovered against one of several debtors, those who were not originally served and did not appear may be summoned to show cause why they should not be bound by the judgment, is statutory and exclusive and is in the nature of an action on the judgment. Code Civ.Proc. § 989.

3. Judgment ⚿855(2)

If complaint does not state a cause of action against alleged joint debtor, a judgment cannot be entered against him under statute providing that when a judgment is recovered against one or more of several debtors, those who were not originally served and did not appear may be summoned to show cause why they should not be bound by the judgment. Code Civ.Proc. § 989.

4. Pleading ⚿408

An objection to sufficiency of complaint to state a cause of action may be taken at any stage of the case. Code Civ. Proc. § 434.

5. Judgment ⚿855(2)

Where it was alleged in action on written conditional sales contract for household furniture that buyer entered into the contract, but there was no allegation that other defendants were parties to contract or jointly indebted on obligation, and it was merely alleged that other defendants may have assumed obligation by a separate instrument, complaint did not state a cause of action against the other defendants, and therefore seller of furniture could not maintain a joint debtor proceeding against the other defendants after obtaining a judgment against the buyer. Code Civ. Proc. §§ 414, 989–994.

6. Judgment ⚿855(2)

In joint debtor proceeding, judgment could not be entered against one who was sued in main action under a fictitious name, where complaint was not amended to substitute his true name. Code Civ.Proc. §§ 474, 989–994.

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Geo. P. Cook, Glendale, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

WILSON, Justice.

Appeal from judgment dismissing a petition for writ of mandate.

Petitioner brought an action in the municipal court of Los Angeles on a written contract signed by Mae Christian for the purchase of household furniture. Two persons were named as defendants under fictitious names. Defendant Christian failed to answer, whereupon a judgment by default was entered against her for the balance due on the contract, together with attorney's fees.

Thereafter petitioner, plaintiff in the municipal court action, filed an affidavit with the clerk pursuant to section 989[1] of the Code of Civil Procedure against one Neceph O. Fhren, purported to have been sued under the fictitious name of John Doe. A summons was issued against him in the so-called joint debtor proceeding. Upon his failure to respond to the summons his default was entered by the clerk. The plaintiff then applied for a judgment against Fhren pursuant to sections 989 to 994 of the Code of Civil Procedure. The clerk refused to enter judgment against him and upon application to the presiding judge of the court he likewise refused. The parties to this proceeding agree that the reason for the refusal was that Fhren did not sign the contract upon which the action was brought.

Petitioner than commenced the instant proceeding in the superior court praying for a writ of mandate directing the municipal court and its clerk to enter judgment by default against Fhren. A demurrer to the amended petition was sustained without leave to amend and judgment was entered dismissing the proceedings, from which this appeal comes.

[1, 2] A judgment against a joint debtor must be based upon the same cause of action as that on which the judgment was entered. In a joint debtor proceeding the complaint must be examined for the purpose of determining the obligation on which the original judgment was entered. The entire proceeding is statutory and exclusive and is in the nature of an action on the judgment. Cooper v. Burch, 140 Cal. 548, 551, 74 P. 37.

[3, 4] If the complaint does not state a cause of action against the alleged joint debtor a judgment cannot be entered against him. An objection to the sufficiency of the complaint to state a cause of action may be taken at any stage of the case. Code Civ.Proc. sec. 434; Bell v. Thompson, 147 Cal. 689, 694, 82 P. 327; Shahabian v. Najarian, 14 Cal.App.2d 435, 440, 58 P.2d 396.

[5] The complaint in the municipal court action did not state a cause of action against Fhren, the alleged joint debtor. The allegation is that Mae Christian entered into a written conditional sales contract for household furniture at an agreed price "which said sum said defendants agreed to pay." There is no allegation that Fhren or any fictitiously named person was a party to the contract or that any person was jointly indebted upon the obligation of Christian. Petitioner's supposititious statement that Fhren may have assumed the obligation by a separate instrument without having signed the original contract does not avail to sustain the instant proceeding. A hypothetical case is not a substitute for fact. Since plaintiff did not plead such an instrument it will be presumed that none existed.

[6] Furthermore, the court was without power to enter a judgment against Fhren since he was purportedly sued under a fictitious name and the complaint was not amended by substituting his true name. Code Civ.Proc. sec. 474; Roseborough v. Campbell, 46 Cal.App.2d 257, 263, 115 P.2d 839; Flores v. Smith, 47 Cal.App.2d 253, 262, 117 P.2d 712.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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[1] Section 989 reads: "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons."

Section 414, referred to in section 989, reads as follows: "When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants."

94 Cal.App.2d 379

PEOPLE v. HOFFMAN.

Cr. 4383.

District Court of Appeal, Second District,
Division 2, California.
Nov. 2, 1949.

John W. Hoffman was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of receiving a wager on a horse race, and he appealed from an order denying a new trial.

The District Court of Appeal, Wilson, J., affirmed the order and dismissed appeals from the judgment and sentence holding that the evidence sustained conviction and that a remark of the court was not prejudicial.

1. Criminal law ⚷1023(13)

Where notice of appeal by defendant recited appeals "from the orders, judgment and sentence of the Court pronounced and entered against him" but there was no judgment or sentence the purported appeals therefrom would be dismissed and appellate court would consider the appeal of defendant as being from the order denying a new trial.

2. Gaming ⚷98(1)

Evidence established corpus delicti and was sufficient to sustain the conviction of receiving a wage on a horse race. Pen. Code, § 337a.

3. Gaming ⚷73, 96

Code section penalizing bookmaking does not require that the racing paraphernalia be found in possession of one charged therewith or that such person's handwriting appear on a racing form, scratch sheet or owe sheet, but only requirement is that defendant receive the money as a wager on a race or on a purported race, and proof that the race is actually run is unnecessary. Pen.Code, § 337a, subd. 3.

4. Criminal law ⚷656(1)

In prosecution for bookmaking, where during argument after evidence had closed court stated it would take judicial notice that bookmakers do not now do so much writing as formerly, statement was not improper where the evidence was ample to prove the corpus delicti and to sustain the conviction, without the presence of any writing made by defendant and there was no conflict in the evidence. Pen.Code, § 337a.

5. Criminal law ⚷260(11)

In prosecution for bookmaking, remark of court that it would take judicial notice that bookmakers do not now do so much writing as formerly was not prejudicial where there was no jury and the judge himself was the only person who could have been influenced and the remark was not made for purpose of substituting judicial notice for oral or documentary evidence but was made during the argument after the evidence was closed. Pen. Code, § 337a.

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William Herbert Hall, Los Angeles, for appellant.

Fred N. Howser, Attorney General, Stanford D. Herlick, Deputy Attorney General, for respondent.

WILSON, Justice.

[1] Defendant was charged with having received a wager on a horse race (bookmaking) in violation of subdivision 3 of section 337a* of the Penal Code. He pleaded not guilty. A jury trial having been waived he was tried by the court and found guilty as charged. His motion for a new trial was denied, proceedings were suspended and he was placed on probation for three years, six months to be spent in jail. His notice of appeal recites that he appeals

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*. Sec. 337a: "Every person, * * *
"3. Who * * * receives, holds, * * * or purports or pretends to receive, hold * * * any money * * * bet or wagered, or to be * * * bet or wagered, or offered for the purpose of being * * * bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of * * * speed * * * between * * * beasts, * * *
"Is punishable by imprisonment * *."

"from the orders, judgment, and sentence of the Court pronounced and entered against him." Since there was no judgment or sentence the purported appeals therefrom will be dismissed and we shall consider his appeal as being from the order denying a new trial.

Defendant contends that the corpus delicti was not proved and that the evidence is insufficient to support the conviction.

Police officer Barnes testified that he entered a pool hall and shortly thereafter saw defendant enter and converse with an unknown man who was looking at a scratch sheet. When the conversation ended the man gave defendant some folded currency which he placed in his pocket. The officer witnessed three or four other such transactions. He then followed defendant to a gasoline station where the latter used a pay telephone. Barnes returned to the pool hall and occupied a seat at the lunch counter next to another unknown man. Defendant returned and the unknown man left his seat and extracted a scratch sheet from beneath a beer case; after examining the scratch sheet he approached defendant who was standing directly in front of the witness; the latter heard the man say, "Give me two to win on Bomber Knight," and at the same time handed defendant two one-dollar bills. Defendant nodded his head, placed the bills in his pocket and left the premises. Shortly thereafter the officer went to defendant's home where he, with two other police officers, found defendant, another man and three women. A search of the premises disclosed three scratch sheets on the dining room table, 18 scratch sheets elsewhere in the house covering the period from January 13 to January 24, 1949. At the pool hall the officer found three scratch sheets known as "National Scratch Sheets" under the same beer case from which the unknown bettor had taken his scratch sheet, all dated January 25, the date on which the above described events took place. A "Reporter's Scratch Sheet" was found behind the lunch counter in the pool hall. An examination of the scratch sheets disclosed that a horse named Bomber Knight was listed in the sixth race at Santa Anita Race Track on January 25. The scratch sheets found in defendant's home contained notations on races, prices and scratches for the various races listed therein.

The officer had had three years' experience in investigating bookmaking activities in Los Angeles County. A slip of paper recovered from a box in the dining room of defendant's home was identified by the officer as a type of paper commonly called an "owe sheet" used in recording horserace transactions. At the top of the sheet were the words "win" and "lose." The paper contained the names of several people but no names of horses. The officer testified that in his opinion, based on his experience, the paper is the type used to record the winnings and losses of horserace bettors.

Defendant was arrested and on the trip to the police station officer Barnes, in the presence of two other officers, asked defendant why he did not quit bookmaking. Defendant replied, "I guess I will have to. I know where the beef came from, my party line." There was a telephone in the house where the arrest took place and defendant admitted that he lived at that address.

Defendant was the only witness called in his own behalf. He did not deny any of the evidence given by officer Barnes. Only one question was asked him, which with his answer is: "Q. Do you recall an unknown man coming up to you and saying, give me two dollars to win on Bomber Knight? A. No, sir, I don't."

[2] The foregoing evidence establishes the corpus delicti and is ample to sustain the conviction—in fact no conclusion or inference can be drawn other than that defendant received money waged on the result or purported result of a horse race in violation of subdivision 3 of section 337a of the Penal Code. The receipt of currency by defendant from several persons who had scratch sheets in their hands, one of whom indicated he desired to bet on a named horse, the telephone calls, the fact that the scratch sheet for the current date showed that such horse was listed to run at a race track on the same day, the presence of scratch sheets and the "owe sheet" in de-

fendant's residence, his response to the officer's question, all together unmistakably establish that defendant was engaged in the business of bookmaking.

[3] The code section does not require that racing paraphernalia be found in the possession of one charged with the crime of bookmaking or that such person's handwriting appear on a racing form, scratch sheet or owe sheet. The only requirement is that he receive money, People v. Aggie, 37 Cal.App.2d 110, 112-113, 98 P.2d 806, as a wager on a race or a purported race, and it is not necessary to prove that the race was actually run. Penal Code, sec. 337a, subd. 3; People v. Vertlieb, 22 Cal.2d 193, 196, 137 P.2d 437; People v. Carroll, 54 Cal.App. 684, 686, 202 P. 885. Defendant did not deny he had received the money but merely testified he did not "recall" that the money was handed to him. Other cases in which convictions were sustained on evidence no stronger than that in the instant case are People v. Newman, 56 Cal.App.2d 394, 132 P.2d 539; People v. Bateman, 57 Cal.App.2d 585, 135 P.2d 192; People v. Taylor, 40 Cal.App.2d 324, 104 P.2d 846; People v. Pertak, 91 Cal.App.2d 801, 205 P.2d 1084; People v. Raze, 91 Cal.App.2d 918, 205 P.2d 1062.

Defendant relies for a reversal on People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818. That case is inapplicable in that (1) the evidence was conflicting, the police officer who made the arrest having been contradicted by the evidence of the defendant and two other witnesses,—in the instant case the police officer's evidence is uncontradicted; (2) the appellate court weighed the evidence and decided in accordance with the testimony of witnesses who were not believed by the trial court and contrary to the evidence that the court had accepted as true; (3) in ruling on the motion for a new trial in the Banks case the trial judge acted on personal knowledge acquired by him outside the court.

[4, 5] The only other assignment of error, quoting defendant's language, is that "The court erred in taking judicial notice of bookmakers signs and writings," citing People v. Hinkle, 64 Cal.App. 375, page 379, 221 P. 693, 694, where the court, in holding that two officers were qualified by experience to give expert testimony as to the nature of the hidden meaning of documents taken from the defendant's possession, stated "Neither the judge nor the jury could properly speculate upon what was the peculiar significance to be given to the cabalistic letters and figures which appeared on the papers taken from appellant, or what meaning they would convey to the minds of men instructed in the bookmakers' school." In the instant case the court did not take judicial notice of signs or characters on papers found in defendant's possession since there were none. During the argument after the evidence had closed the court stated it would take judicial notice that bookmakers do not now do so much writing as formerly. Such statement was not objectionable since (1) the evidence was ample to prove the corpus delicti and to sustain the conviction without the presence of any writing made by defendant. (2) There is no conflict in the evidence. (3) Since the Hinkle case the reports have been full of decisions involving the conviction of bookmakers in which the methods adopted to conceal their activities are set forth. Through the opinions in such cases courts have acquired knowledge of the means adopted by bookmakers in attempting to cover up their unlawful commerce and are in a position to take judicial notice of many matters which were required to be proved meticulously in the earlier years of such prosecutions. (4) The remark was not prejudicial since there was no jury and the judge himself was the only person who could have been influenced. (5) The statement was not made for the purpose of substituting judicial notice for oral or documentary evidence but was made during the argument after the evidence had been closed.

The order denying defendant's motion for a new trial is affirmed. The purported appeals from the judgment and sentence are dismissed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 384

In re RAWNSLEY'S ESTATE.

DEMPSTER v. RAWNSLEY et al.

Civ. 17056.

District Court of Appeal, Second District,
Division 3, California.
Nov. 2, 1949.

Petition by Ann Seddon Dempster to determine distribution of estate of Ann Seddon Rawnsley, also known as Ann Seddon Wilkinson, deceased, opposed by James Rawnsley and Ena Solly.

The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered a decree adjudging that petitioner was entitled to receive and have distributed to her one-third of the estate free of any life or other interests of James Rawnsley and that James Rawnsley was entitled to a life interest in remaining two-thirds and Ena Solly was entitled to remainder of said two-thirds on the death of James Rawnsley, and James Rawnsley appealed.

The District Court of Appeal, Vallee, J., held that parol evidence offered by James Rawnsley was incompetent for the purpose of proving an advancement to petitioner and affirmed the judgment.

1. Descent and distribution 🔑93

An "advancement" is an irrevocable gift in praesenti of property to an heir by an ancestor to enable the donee to anticipate his inheritance to the extent of the gift. Probate Code, §§ 1051, 1053, 1054.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Advancement".

2. Descent and distribution 🔑97

An advancement is not limited to an irrevocable gift to a child by a parent. Probate Code, §§ 1051, 1053, 1054.

3. Descent and distribution 🔑94

Where section of probate code relating to advancements was substantially same as former civil code section, section of probate code would be construed as a continuation thereof and not as a new enactment. Probate Code, § 1050.

4. Descent and distribution 🔑99

Under statute requiring a writing by donor or written acknowledgment by donee for an advancement, a gift before death will not be taken as an advancement to an heir unless ancestor's writing has expressed his intention that it is to be so taken or donee acknowledges gift in writing to be an advancement. Probate Code, § 1050.

5. Descent and distribution 🔑99

Under statute requiring a writing by donor or a written acknowledgment by donee for an advancement, no special form of writing, not even signature of decedent is required to constitute an advancement so long as writing was done by decedent, and showed intent to charge property given as an advancement rather than a gift or loan. Probate Code, § 1050.

6. Descent and distribution 🔑99

Under a statute requiring a writing by the donor or written acknowledgment by donee for an advancement, a transfer not in writing which would otherwise be an advancement is in legal effect not an advancement. Probate Code, § 1050.

7. Descent and distribution 🔑99

Where statute prescribes mode and manner and by what evidence advancement must be established, manner so prescribed must be pursued and such evidence and no other can be introduced. Probate Code, § 1050.

8. Descent and distribution 🔑116

Under statute requiring writing by the donor or written acknowledgment by the donee for advancement, parol evidence is not admissible to show an advancement. Probate Code, § 1050.

9. Descent and distribution 🔑102½

Statute requiring a writing by the donor or written acknowledgment by the donee for an advancement, applies to a case of partial intestacy. Probate Code, § 1050.

10. Descent and distribution 🔑99
Wills 🔑766

Under statute providing that a gift before death shall be considered as an ademption of a bequest or devise of the property given, but such gift shall not be taken as an advancement to an "heir" or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such, quoted word in section does not restrict application to advancements of realty. Probate Code, § 1050.

11. Descent and distribution ⚷21

The "heir" of a person is the one law appoints to succeed to his estate, including both real and personal property, in case he dies without disposing of it by will.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Heir".

12. Descent and distribution ⚷116

Parol evidence offered by testatrix's husband to show that daughter, omitted from will, had received advancements from testatrix, was properly excluded under statute requiring a writing by the donor or written acknowledgment by the donee for an advancement. Probate Code, § 1050.

◆

A. Moresby White, Los Angeles, for appellant James Rawnsley.

No appearance for appellant Ena Solly.

L. L. James and Carl E. Day, San Francisco, for respondent.

VALLÉE, Justice.

Appeal by James Rawnsley from a decree determining the persons to whom distribution of an estate shall be made.

Ann Seddon Rawnsley died testate. She left surviving, as her only heirs, James Rawnsley, her husband, and Ann Seddon Dempster and Ena Solly, daughters. In her will she bequeathed and devised her entire estate to James Rawnsley for life, remainder to Ena Solly. She omitted to provide in the will for her daughter, Ann Seddon Dempster, and it does not appear from the will that such omission was intentional. Ann Seddon Dempster petitioned the probate court to determine to whom distribution of the estate should be made, alleging that she was a pretermitted heir and entitled to distribution of one-third of the estate. James Rawnsley and Ena Solly filed an opposition to the granting of the petition, admitting that Ann Seddon Dempster was an heir and alleging that on various occasions at or about the time of the execution of the will decedent stated in the presence of witnesses that she had made various advancements to Ann Seddon Dempster in substantial amounts from time to time and that she had adequately provided for her.

On the hearing of the petition, appellant stated that the only issue before the court was whether Ann Seddon Dempster should be charged with certain advances. He offered to prove by parol evidence that decedent had made advancements to Ann Seddon Dempster. The court held such evidence inadmissible and sustained objections thereto. No other proof was offered or received. The decree adjudged that Ann Seddon Dempster "is entitled to receive and have distributed to her, and there is vested in her," one-third of the estate free of any life or other interest of James Rawnsley therein; and that James Rawnsley is entitled to a life interest in the remaining two-thirds, and Ena Solly is entitled to the remainder of said two-thirds interest on the death of James Rawnsley.

Appellant claims that the court erred in rejecting the offered evidence. He concedes that Ann Seddon Dempster is a pretermitted heir and that she is entitled to share in the estate. Prob.Code, secs. 90, 221. He claims that all advancements must be deducted from her statutory share, which is one-third.

[1, 2] An advancement is, strictly, an irrevocable gift in praesenti of property to an heir by an ancestor to enable the donee to anticipate his inheritance to the extent of the gift. 26 C.J.S., Descent and Distribution, § 91, page 1161. In some jurisdictions an advancement is limited to an irrevocable gift to a child by a parent. Ibid. In this state it does not appear to be so limited. Prob.Code, secs. 1051, 1053, 1054.

[3-6] Probate Code section 1050 reads: "A gift before death shall be considered as an ademption of a bequest or devise of the

property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such." Section 1050 is substantially the same as former Civil Code sections 1351 and 1397 and must be construed as a continuation thereof, and not as a new enactment. Prob.Code sec. 2. Section 1050 means a gift before death shall not be taken as an advancement to an heir unless the ancestor in writing has expressed his intention that it is to be so taken or unless the donee acknowledges it in writing to be such. The statute removes some of the indefiniteness and uncertainty prevailing in many jurisdictions as to whether or not an advancement is intended in a particular transaction. See, 11 No.Car.L.Rev. 266, 297, 298. It is settled that no special form of writing, not even the signature of the decedent, is required to constitute an advancement as prescribed by the statute so long as the writing was done by the decedent and shows the intent to charge the property given as an advancement rather than as a gift or loan. But there must be a writing. In re Estate of Hayne, 165 Cal. 568, 573, 133 P. 277, Ann.Cas.1915A, 926; In re Estate of Vanderhurst, 171 Cal. 553, 558, 154 P. 5; cf. In re Estate of Hudelson, 18 Cal.2d 401, 407, 115 P.2d 805; 26 C.J.S., Descent and Distribution, § 100b, page 1172; 84 A.L.R. 164; 1 Cal.L.Rev. 532; Vernier, American Family Laws IV, p. 115. Under a statute requiring a writing by the donor or written acknowledgement by the donee for an advancement, a transfer not in writing, which would otherwise be an advancement, is, in legal effect, not such. 26 C.J.S., Descent and Distribution, § 100b, page 1172. There can be no advancement unless the statutory conditions exist. In their absence no charge may be made against the heir's statutory share of the estate. It is only where there is a writing that the heir is required to bring a gift into hotchpot.

[7,8] Where the statute prescribes the mode and manner and by what evidence an advancement must be established, it is self-evident that the manner so prescribed must be pursued. Such evidence, and no other, can be introduced. 3 Woerner, Am.Law. Adm., 3d Ed., 1895, secs. 558, 559; Elliott v. Western Coal & Mining Co., 243 Ill. 614, 90 N.E. 1104, 1105, 134 Am.St.Rep. 398, 17 Ann.Cas. 884. The statute does not expressly declare that parol evidence is excluded; but that undoubtedly is its meaning. It has been consistently so held in other jurisdictions under statutes almost identical with ours. Elliott v. Western Coal & Mining Co., 243 Ill. 614, 90 N.E. 1104, 1105, 134 Am.St.Rep. 398, 17 Ann.Cas. 884; Porter v. Porter, 51 Me. 376, 380; Bulkeley v. Noble, 2 Pick. 337, 340, 19 Mass. 337, 340; Cummings v. Bramhall, 120 Mass. 552, 559; Olney v. Brown, 163 Mich. 125, 128 N.W. 241, 143; Stark v. Stark, 128 Neb. 524, 259 N.W. 523, 524; Arthur v. Arthur, 143 Wis. 126, 126 N.W. 550, 553. We hold that the effect of Probate Code section 1050 is to exclude parol evidence to show an advancement.

[9–11] Contrary to appellant's contention, section 1050 applies to a case of partial intestacy. In re Estate of Hayne, 165 Cal. 568, 573, 133 P. 277, Ann.Cas.1915A, 926. The use of the word "heir" in the section does not restrict its application to advancements of real property as appellant suggests. In this state, the "heir" of a person is the one the law appoints to succeed to his estate,—including both real and personal property—in case he dies without disposing of it by will. In re Estate of McCrum, 97 Cal.App. 576, 579, 275 P. 971.

[12] We conclude that the evidence offered by appellant was incompetent for the purpose of proving an advancement and that the probate court correctly sustained objections thereto.

Affirmed. Respondent to recover her costs on appeal.

SHINN, P. J., and WOOD, J., concur.

94 Cal.App.2d 562

RAWLEY v. RAWLEY.

Civ. 17172.

District Court of Appeal, Second District,
Division 2, California.

Nov. 9, 1949.

George W. Rawley sued Mary Rawley for divorce, and interlocutory judgment of divorce was awarded to defendant on her cross-complaint, by the Superior Court of Los Angeles County, Edwin L. Jefferson, J. From this judgment and from an order denying a new trial, the defendant appeals.

The Court of Appeal, Wilson, J., affirmed the judgment and dismissed the attempted appeal from the original interlocutory judgment, and from modified findings of fact and conclusions of law, holding that the record did not show an abuse of discretion in the division of property and the award of only $45 per month for support of the partys' daughter in college, and nothing for support of wife.

1. Divorce 🔑235

Where husband was earning $240 to $245 per month, out of which he was required to pay $45 for support of daughter, and wife was earning $110 per month for three days' work per week, receiving $38.50 monthly rental from one unit of a duplex which was community property, and lived in other unit of duplex rent free, failure to award support money to wife in divorce decree was not an abuse of discretion.

2. Divorce 🔑252, 286

Division of property when divorce is granted to wife on ground of cruelty is discretionary, and wife has burden of showing that discretion was abused. Civ.Code, § 146.

3. Divorce 🔑252

Where husband's cruelty, proved by wife in divorce suit, was not flagrant and adultery was not claimed, award to wife of half of community realty and somewhat more than half of community personalty was not inadequate. Civ.Code, § 146.

4. Divorce 🔑308, 312.6(7)

Whether divorced husband shall be compelled to give child a college education is for trial court to determine, considering all facts and circumstances in evidence, and court may require such payment during minority if it is for child's best interests and father is financially able, though child is over 16 years old. Civ.Code, § 138.

5. Divorce 🔑308

Where divorced husband was making $240 to $245 per month, decree compelling him to pay only $45 per month for college education of daughter which was costing approximately $85 per month was not so inadequate as to be an abuse of discretion. Civ.Code, § 138.

6. Divorce 🔑164, 177

Original interlocutory judgment of divorce ceased to be a judgment when it was superseded by modified judgment of divorce, and attempted appeal therefrom was from a nonexistent judgment and must be dismissed.

7. Divorce 🔑177

Purported appeal from modified findings of fact and conclusions of law in divorce suit must be dismissed.

* * *

Fetterly & Fetterly, Los Angeles, for appellant.

George H. Pratt, Los Angeles, for respondent.

WILSON, Justice.

By an interlocutory judgment or divorce it was adjudged that defendant was entitled to a decree of divorce on her cross-complaint, community property was divided, the custody of the minor child of the parties was awarded to defendant, and plaintiff was ordered to pay the sum of $45 per month to defendant for the support and maintenance of the minor. Upon the hearing of defendant's motion for a new trial the judgment was ordered modified by awarding to defendant, in addition to the property assigned to her by the original judgment, all right, title and interest of the parties in certain policies of insurance upon the respective lives of plaintiff, defendant and their minor child. In other particulars the motion for a new trial was denied. A modified interlocutory judgment was entered, the only difference between the latter and the original judgment being the inclusion therein of the insurance policies above mentioned. Defendant has appealed (1) from the interlocutory judgment, (2) from the order denying her motion for a new trial, (3) from the modified interlocutory judgment. There is also a purported appeal from the modified findings of fact and conclusions of law.

While defendant has appealed from both the original and the modified interlocutory judgments, in her brief she limits her grievances to the contentions that the court abused its discretion by failing (1) to provide for the payment of permanent support to her; (2) to award her all the community real property; (3) to provide for the payment of a sum greater than $45 per month for the support and maintenance of the minor child of the parties.

[1] The evidence shows that at the time of the trial plaintiff was earning $240 to $245 per month, out of which he was required to pay $45 for the support of his daughter. Defendant was earning $110 per month for three days' work per week and was receiving as rental from one unit of a duplex, which is the community property of the parties, the sum of $38.50 per month. She resided in the other unit of the duplex, presumably rent free since there is no mention in the record of rent being charged to her. Out of her income she had been able to repay a loan of $300 within a period of eight months. The court had before it evidence as to the circumstances and conditions, physical and financial, of the parties and there is nothing in the record to indicate an abuse of discretion in its failure to award support money to defendant.

The court awarded to defendant (1) household furniture valued at $2,000 according to the uncontradicted evidence of plaintiff, upon which there was an unpaid balance of $276.98; (2) the insurance policies above mentioned, the face value of which was $3,050. There is no evidence as to the worth of the policies but it is conceded that they had a cash value. Plaintiff was awarded a 1937 model Ford automobile valued at $275. The community real property, valued at $16,000, was assigned to the parties share and share alike.

Defendant refers to the general rule that where a divorce is granted on the ground of extreme cruelty the innocent party should be awarded more than one half of the community property, and contends that since she was granted a divorce by reason of plaintiff's cruelty the court should have awarded her more than she received. The real property was divided equally and she was given substantially more than half of the personal property—furniture, the net value of which is approximately $1,700, and the insurance policies which admittedly have some value. Plaintiff was awarded nothing but an old automobile valued at $275.

[2,3] The matter of the division of property in such cases as this is lodged in the discretion of the court. Civ.Code, sec. 146. The burden is on defendant to show that the discretion was abused. She relies on Arnold v. Arnold, 76 Cal.App.2d 877, 174 P.2d 674 and similar cases. In the Arnold case the acts of cruelty were flagrant and had been committed over a long period of time, and in addition the husband admitted acts of adultery continuing over a period of two years. There is no claim of adultery in the instant case and the cruelty proved by defendant is not of such flagrant character as to sustain the contention of an abuse of discretion in the division of the property.

The remaining question is whether the court should have required plaintiff to pay more than $45 per month for the support of the minor daughter of the parties, who was 18 years of age at the time of trial. Defendant maintains that since the daughter was attending college and the evidence shows that her expenses approximated $85 per month for tuition, books, clothes and miscellaneous college expenses, plaintiff should have been required to pay a sufficient amount to cover such outlay.

[4, 5] Plaintiff concedes that it was his duty to pay for the maintenance and support of his child but contends that her college expenses cannot be imposed upon him, relying on Boens v. Bennett, 20 Cal.App.2d 477, where, at page 482, 67 P.2d 715, at page 718, the court said: "The father is under no legal duty, after his son has attained the age of 16 years, to send the latter to college, no matter what the father's financial circumstances may be. * * * And if the child, as in the instant case, is past the age of 16 years, the father cannot be compelled by law to give the latter a college education." We are not in accord with such theory. We agree with what is said in Hale v. Hale, 55 Cal.App.2d 879, 882, 132 P.2d 67, to the effect that the question is one for the trial court to weigh and determine, considering all the facts and circumstances in evidence, and if it is for the best interests of the child to be sent to college and the father is financially able to pay the expense, the court has power under section 138 of the Civil Code to require him to provide the cost of the college education during the child's minority. This is in consonance with the theory expressed in a substantial majority of the modern cases which are collected in 133 A.L.R., the annotation upon this subject beginning on page 911. The court found that plaintiff was able to pay for the support and maintenance of the minor child and by awarding the sum of $45 per month for that purpose in effect found that he was not able to pay more and that he did not have the financial ability to pay for any of her expenses in college over and above that amount. Defendant has not shown that the court's discretion was abused in this particular. If the circumstances of the parties should change the court has power during the minority of the child to modify the order for support. Civ.Code, sec. 138.

[6, 7] The modified interlocutory judgment of divorce and the order denying a new trial are affirmed. Since the original interlocutory judgment ceased to be a judgment when it was superseded by the modified judgment the appeal is from a nonexistent judgment and is therefore dismissed. The purported appeal from the modified findings of fact and conclusions of law is dismissed.

MOORE, P. J., and McCOMB, J., concur.

94 Cal.App.2d 412

ROUNDS v. DIPPOLITO et al.

Civ. 3833.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Rehearing Denied Nov. 22, 1949.

Hearing Denied Dec. 29, 1949.

Action by C. E. Rounds against Joseph Dippolito, and others, and against George J. Garecht and Raymond H. Marks, doing business as Grading and Excavation Company, to recover money allegedly due for removing trees. The action was consolidated for trial with an action by Garecht and Marks against Joseph Dippolito, and others.

The Superior Court of San Bernardino County, Stanley H. Mussell, J., made an order refusing to vacate the judgment, and George J. Garecht and Raymond H. Marks appealed.

The District Court of Appeal, Griffin, J., reversed the order refusing to vacate the judgment against defendants in the first action, and held that the judgment was supported by the findings, but that appellants could not be twice penalized by an allowance against them of an item which had been permitted as an offset against their judgment in the second action.

1. Appeal and error 🔑82(3)

Order denying a motion to vacate a judgment may be reviewed on appeal as a special order made after judgment. Code Civ.Proc., §§ 663, 663a, 963, subd. 2.

2. Appeal and error 🔑9

Remedy provided by statutes permitting motions to vacate a judgment is merely cumulative, and is not designed to supersede remedy by appeal. Code Civ.Proc. §§ 663, 663a, 963, subd. 2.

3. Judgment ⚷359, 360, 397

The statute providing that judgment not consistent with special verdict may be set aside authorizes Superior Court to vacate judgment as entered which is inconsistent with and not supported by findings of fact, to enter a proper judgment, and also to vacate such a judgment where conclusions of law are incorrect and erroneous and not consistent with findings of fact. Code Civ.Proc. §§ 663, 663a, 963, subd. 2.

4. Appeal and error ⚷172(3)

Where contractor did not file materialman's lien against property, contractor could not complain on appeal from judgment against owners for failure of court to declare a lien in contractor's favor. Code Civ.Proc. §§ 1183, 1191.

5. Contracts ⚷354

In action by subcontractor against landowner to recover money due for removal of trees, findings as to amount of service performed supported judgment in amount allowed by the court.

6. Appeal and error ⚷863

On appeal from order denying a motion to vacate a judgment, the only question to be reviewed is whether findings support judgment. Code Civ.Proc. §§ 663, 663a, 963, subd. 2.

7. Appeal and error ⚷907(3)

On an appeal based on judgment roll alone, evidence cannot be reviewed, and all intendments are in favor of findings and judgment.

8. Judgment ⚷590(2)

Where court had offset subcontractor's claim of $908 against contractor's judgment against landowner, subcontractor was not entitled to allowance of $908 against contractor in second action by subcontractor against landowner in which contractor had been named a party defendant.

◆

Walker & Sullivan, Riverside, for appellants.

Oliver M. Charleville, San Bernardino, for respondent.

GRIFFIN, Justice.

[1] Many of the facts essential to a statement of the facts surrounding this appeal from the order here involved have heretofore been presented to this court for consideration in a denial of a motion to dismiss the appeal. 89 Cal.App.2d —, 200 P.2d 67. A hearing was granted and the motion was subsequently denied by the Supreme Court. 34 Cal.2d 59, 206 P.2d 1083. The motion to vacate the judgment here under consideration was made under secs. 663 and 663a of the Code of Civil Procedure and the order denying it may be reviewed on appeal as a special order made after judgment under sec. 963, subd. 2 C.C.P. Kaiser v. Dalto, 140 Cal. 167, 73 P. 828; Potter v. Pigg, 35 Cal.App. 707, 170 P. 1066.

[2] It has been held that the remedy under secs. 663 and 663a, C.C.P. is merely cumulative and not designed to supersede the remedy by appeal provided in sec. 963 of the Code of Civil Procedure. Patch v. Miller, 125 Cal. 240, 57 P. 986; Modoc Co-operative Ass'n v. Porter, 11 Cal.App. 270, 274, 104 P. 710.

[3] A superior court has jurisdiction on motion under these two sections to vacate a judgment as entered, which is inconsistent with and not supported by the findings of fact and to enter a proper judgment, and also to vacate such a judgment where the conclusions of law are incorrect and erroneous and not consistent with the findings of fact. These questions are therefore the ones presented on this appeal.

The findings are that on July 24, 1946, defendant Joseph Dippolito and defendants Garecht and Marks, doing business as Grading and Excavation Company, entered into a written contract for the removal of 99 eucalyptus trees from the premises owned by the defendants Dippolitos; that between July 24 and August 10, 1946, employees of defendant grading company went upon said premises and "felled all of said trees, allowing the stumps of said trees to remain in or over the holes in the ground from which the stumps of said trees had been pushed over, also permitting the roots of some of said trees and stumps to remain connected with the soil". It found that on August 10 defendant Virgil Grove left the employment of the defendant grading company and, as an independent contractor, entered into a written agreement with the grading company for the completion of the contract existing between it and defendant Joseph Dippolito for the removal of said 99 eucalyptus trees from said premises. It found that plaintiff Rounds agreed with defendant Grove that Rounds would perform labor and furnish equipment consisting principally of a crane for the removal of said trees and stumps and the severance of the remaining connected roots from the ground; that plaintiff Rounds did perform labor and furnish equipment pursuant to said agreement of employment between him and defendant Grove and did remove said trees and stumps from the position where they had been felled and did disconnect and remove said remaining roots from the soil and that the performance of said labor and furnishing of said equipment continued for 102 hours, totaling $918, which sum Grove had agreed to pay plaintiff Rounds and that no part of said sum had been paid except $10, and that there is now due, owing and unpaid from defendant Grove to Rounds the sum of $908. It found that Rounds had filed a proper claim and notice of lien on the premises; that the whole of the above-described property is required for the convenient use and occupation of the improvements and were benefited by the improvements upon which the work and labor were performed and equipment was furnished; that the allegations of the various answers of the several defendants inconsistent with the findings as related were untrue, and concluded that plaintiff Rounds was entitled to a judgment against Grove for $908 and that plaintiff Rounds was entitled to judgment against the defendants Dippolitos for that sum, and that that sum be adjudged a lien upon the Dippolitos' property. Although the findings do not show that a judgment for $908 against appellants was intended, the *judgment,* as entered, recites that plaintiff Rounds recover judgment against *all defendants* for $908, for work and labor performed upon and in the improvement of the land as described. (Garecht and Marks, doing business as Grading and Excavating Company, are parties defendant in this action and appeared by answer.) The court then found that the land be subjected to such lien and be sold to satisfy the judgment and lien, and that in case of a deficiency a judgment be docketed against defendant Grove in favor of plaintiff in such amount.

Defendant grading company requested, as part of the record on appeal, a copy of the judgment in case No. 57843, entitled Garecht and Marks, doing business as Grading and Excavating Company, vs. Joseph Dippolito, et al, defendants, which case was, by stipulation, consolidated with the present action for trial. The judgment there ordered that plaintiff have judgment against defendants Dippolito, et al, for $1200 "provided, however, that there should be deducted from the judgment in favor of said plaintiffs the sum of $908 adjudged due and owing plaintiff C. E. Rounds by the defendants Joseph Dippolito, et al., in action No. 58123." It is appellants' argument that the facts related in the findings in reference to the nature of the work performed by plaintiff had not created a lien on the Dippolitos' property within the meaning of secs. 1183 and 1191 of the Code of Civil Procedure. Respondent contends otherwise.

The judgment roll shows in the instant case that defendants Joseph, Grace, Charles and Angelina Dippolito were the owners of the real property; that Joseph Dippolito agreed in writing with appellant here to have the 99 eucalyptus trees removed from the premises. By written subcontract appellant agreed with defendant McCoy and his agent Grove to sublet the balance of the original contract to him. By that agreement the subcontractor was to furnish all equipment, material, labor and insurance required to do the following work: "(1) to remove all fallen trees from the premises; (2) to remove the stumps from the premises; (3) to clear and burn the brush and trimmings from the trees on the premises; (4) to fill in holes where trees and stumps have been removed on premises; and (5) to clear right of way satisfactory to owner of premises". It was further agreed that the excavating company's job would be complete "when all specified trees are pushed over and fallen."

By his answer Grove alleges that he entered into an oral agreement with plaintiff Rounds for the furnishing of a crane for the removal of logs and stumps from the land and that he paid plaintiff a substantial sum of money on account of such crane rental.

The Dippolitos appeared by answer and admitted that Joseph Dippolito entered into a written agreement whereby the defendant grading company agreed to remove the trees and roots from the property and that Charles Dippolito agreed to pay therefor the sum of $1500 and that $300 was paid on the original contract and the balance was to be paid on the completion of the work. They claim that the work was so negligently performed that they lost 52 grape vines and suffered other damage, all totaling $332. They then admitted that McCoy and his agent Grove and others claim to have furnished labor and material in connection with the performance of the contract and that they owe someone $668, and ask that each set forth their respective claims and that the court adjudicate them.

[4] The judgment entered in case No. 57843, Grading Company v. Joseph Dippolito, et al., was rendered against the Dippolitos for the full contract price of $1500, less the amount of $300 admittedly paid and less the amount of the judgment entered in the instant case, that is, $908. In effect it was a judgment in favor of the grading company for $292, with no right of lien against the property. Appellant can make no complaint in respect to the failure to declare a lien in its favor in this particular action because no lien was ever filed by it.

[5-7] Just how appellant's interests are affected by the court's holding that Rounds is entitled to a lien against Dippolitos' property for services he performed is not clear. The Dippolitos are not complaining and have not appealed from the judgment. The only question that might involve this appellant is the amount of that judgment because it has been held to be an offset against appellants' judgment in the other action. The findings indicate that plaintiff performed that amount of service and the judgment is rendered accordingly. Support for the judgment is therefore found in the findings and that is the only question that can be reviewed on this particular appeal. On an appeal based on the judgment roll alone, the evidence cannot be reviewed and all intendments are in favor of the findings and judgment. Whitney v. Redfern, 41 Cal.App.2d 409, 106 P.2d 919.

[8] The only question that may be properly considered on the appeal from the order denying the motion to vacate the judgment entered against this appellant in case No. 58123 arises from the wording of the judgment as entered. Appellant was named a party defendant in this action and appeared by answer. The trial court, whether inadvertently or otherwise, did give a judgment in favor of Rounds against specified defendants and against "all defendants" named, in the sum of $908. Since the court allowed an offset against appellant's judgment obtained in case No. 57843 in the sum of $908 and that judgment has become final, appellant should not be further penalized by having a judgment against it in this same amount in this case.

The judgment against the other named defendants has become final and cannot be disturbed on appellant's appeal from the order mentioned.

The order refusing to vacate the judgment against appellant for $908 in this action No. 58123 is reversed.

BARNARD, P. J., concurs.

MUSSELL, J., being disqualified does not participate herein.

94 Cal.App.2d 127

DESCHAMPS v. INDEPENDENT CAB CO. et al.

No. 14108.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1949.

Hearing Denied Dec. 13, 1949.

On petitions for rehearing.

The District Court of Appeal denied the petitions, corrected a misstatement in the original opinion and held that orders granting motions for a new trial were invalid.

Prior opinion, 210 P.2d 299.

1. New trial 🔑157

Where notice of intention to move for new trial had been filed and court ordered motions granted, but motions were never submitted nor was there any opportunity given the parties to be heard on them either orally or otherwise, orders were void. Code Civ.Proc. § 659.

2. New trial 🔑140(3)

An order purporting to grant a new trial upon "all other legal grounds" in addition to the ground of insufficiency of evidence was invalid where no affidavits had been filed as required by law. Code Civ.Proc. § 659.

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Dana, Bledsoe & Smith, San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion, San Francisco, for Clark and Independent Cab Co.

Melvin M. Belli, San Francisco, for respondent.

BRAY, Justice.

[1, 2] The court in its opinion stated that the motions for new trial had not been made. This statement is incorrect in view of section 659 of the Code of Civil Procedure which provides that a notice of intention to move for a new trial "shall be deemed to be a motion for a new trial on all the grounds stated in the notice." This incorrect statement, however, does not affect the correctness of our decision. The motions were never submitted, nor was any opportunity given the parties to be heard on them, either orally or otherwise. Moreover, as pointed out in our opinion, the order is invalid upon another ground. No affidavits had been filed as required by law, and yet the court purported to grant the new trial upon "all other legal grounds" in addition to the ground of insufficiency of the evidence. This the court had no right to do. Hence its action on August 9 in setting aside the July 9 order was not only proper but necessary.

In the opinion, a formal order was not made concerning the plaintiff's motion to dismiss the Vallerga appeals. Such motion is hereby denied. The petitions for rehearing, by respondents Robert Deschamps and Don Clark, et al., are denied.

PETERS, P. J., and WARD, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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94 Cal.App.2d 462

CONNOR et al. v. JACKSON et al.

Civ. 17203.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1949.

Action by Timothy Michael Connor, a minor, by his guardian ad litem, Dolores Connor, and Oliver Connor, against Stanley William Jackson, Raybestos-Manhattan, Inc., C. W. Polle, doing business as Acme Oil Company, and others, for injuries sustained by minor when allegedly struck by automobile driven by defendant Jackson.

The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered a judgment for the defendants, and the plaintiff appealed.

A District Court of Appeal, Moore, P. J., held that the trial court did not abuse its discretion in denying plaintiff's motion for a continuance, and held that a defendant's statement that he carried insurance or that his insurance company will do everything necessary immediately was not admission of liability and was properly excluded, and affirmed the judgment.

1. Continuance 🔑46(5, 8)

Where affidavit on which motion for continuance was based contained no statement of anticipated testimony, no excuse for failure within 13 months that had elapsed since commencement of action to procure service of subpoena on absent witness, or obtain his deposition, counsel's statement that he had tried vainly to subpoena the witness and his opinion that witness' testimony was material did not meet statutory requirements of supporting affidavits for continuance of trial, and trial court did not abuse discretion in denying motion. Code Civ.Proc. § 595.

2. Continuance ⚷46(8)

Where application for continuance is made on account of absence of a material witness, court may require that affidavit state the evidence which party expects to obtain. Code Civ.Proc. § 595.

3. Continuance ⚷19

The unavoidable absence of a party does not necessarily compel the court to grant a continuance. Code Civ.Proc. § 595.

4. Appeal and error ⚷966(1)
Continuance ⚷7

The motion for a continuance is addressed to the sound discretion of the trial court and decision will not be disturbed in the absence of abuse of such discretion.

5. Continuance ⚷22

Where plaintiff sets his action for trial knowing that the gravamen of the action can be proved by the testimony of one sole witness, he is not entitled to complain of disappointments resulting from the absence of such witness.

6. Evidence ⚷264

In action by guardian against motorist for injuries sustained by minor, statements in letter written by motorist to guardian that motorist went to see insurance company, and everything necessary would be done for minor immediately, was not an admission of liability, and statements were properly excluded.

7. Appeal and error ⚷1008(3)
Trial ⚷136(3)

A construction of a writing is to be decided by the trial court and its decision will not be cause for reversal in the absence of a showing of prejudice to the complaining party. Code Civ.Proc. § 2102.

8. Appeal and error ⚷1170(7)

No judgment will be reversed on the ground of improper rejection of evidence, unless entire record discloses that error complained of resulted in a miscarriage of justice. Const. art. 6, § 4½.

9. Evidence ⚷317(1)

In action by guardian against motorist and corporation for injuries sustained by minor, conversation had by witness with motorist after accident was properly excluded as to corporate defendant as hearsay where plaintiff failed to show that motorist was agent of corporation on that day or that motorist was at time acting within the scope of his employment.

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Joseph B. Boland, Long Beach (Angelo M. Iacoboni, Long Beach, of counsel), for appellants.

Crider, Runkle & Tilson, Elber H. Tilson, Los Angeles, and E. Spurgeon Rothrock, Los Angeles, for respondents.

MOORE, Presiding Justice.

Recovery for alleged injuries by an automobile having been denied, appellant now demands a reversal of the judgment by reason of (1) the court's denial of his motion for a continuance, (2) its exclusion of a writing by respondent Jackson purporting to admit his liability, and (3) rulings improperly excluding "material portions of evidence."

About 3 p. m. April 13, 1947, Timothy Connor (18 months of age) accompanied his father to the service station of Van and Bill in Los Angeles County and while there the infant received serious bodily injuries. On May 29, 1947, acting through his guardian ad litem, Timothy filed the instant action against respondents alleging that he was struck by an automobile owned by respondent corporation of Oregon, authorized to transact business in California, driven negligently by respondent Jackson who was then acting under the direction of Freeman and Van Der Ham. The action was duly set for trial on June 21, 1948.

[1–4] On the trial date appellant's counsel moved for a continuance. The motion was based upon the affidavit[1] of appellant's attorney which contains no statement of the anticipated testimony, no excuse for failure within the 13 months that had elapsed since the commencement of the action to procure service of subpoena on Jackson or to obtain his deposition. That counsel vainly endeavored to locate and subpoena the witness and his opinion that the witness' testimony is material do not meet the statutory requirements of a supporting affidavit for the continuance of a trial. Code Civ.Proc. § 595. Where the application for continuance "is made on account of the absence of a material witness" the court may require that the affidavit state "the evidence which he expects to obtain." The unavoidable absence of a party does not necessarily compel the court to grant a continuance. Sheldon v. Landwehr, 159 Cal. 778, 781, 116 P. 44. Appellant's statement to this court that the absent witness was the only person who could testify to the manner of his operating the automobile does not improve the virtue of the motion and affidavit which were addressed to the trial court. To have been of compelling merit the affidavit should have averred that Jackson would if present testify that he did some negligent act that caused injury to Timothy. Such facts must be stated in the supporting affidavit so that when read in evidence the document will present facts that will tend to support a judgment. The affidavit is devoid of evidence that Jackson was in the remotest degree negligent in operating his car.

[5] The affidavit disclosed no merit in that an utter want of diligence was established. During the thirteen months preceding the date of trial appellant's counsel did not take out a commission to take Jackson's deposition although he knew the witness was a resident of Oregon. His only effort to obtain his attendance at the trial was at some date prior to June 21, 1948, he "caused an investigation to be made by long distance telephone to the city of Portland, Oregon, in an endeavor to locate" the witness only to discover that the latter had "not been seen around his usual place of residence, to wit, the Elk's Club" and was no longer employed by respondent corporation and that it was learned that Jackson had not been seen about the city for approximately six months. Inasmuch as the affidavit specified no dates when the investigation was made, it must be construed against the pleader. Since the affidavit was made on the 21st day of June, it is a fair deduction that the investigation by remote control was made on the eve of the trial which is no display of diligence. Even if Jackson was the sole witness to the accident appellant was not

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[1] "* * * Joseph B. Boland, being first duly sworn, deposes and says: That he is the attorney for plaintiffs in the above-entitled action.

"That the testimony of the defendant Stanley William Jackson is material to the plaintiffs' case; that the said Stanley William Jackson was the driver of the automobile which struck the plaintiff Timothy Michael Connor, as alleged in the complaint on file herein; that if the said Stanley William Jackson were present at the trial of the said action and examined under the provisions of Section 2055 of the Code of Civil Procedure of the State of California, he could testify to the manner in which he was operating the said automobile at the time the said automobile struck the plaintiff Timothy Michael Connor, as alleged in said complaint; that his testimony is material to the case of the plaintiffs and that the plaintiffs will be prejudiced without the testimony of said defendant under Section 2055 of the Code of Civil Procedure of the State of California.

"That your affiant is informed and believes that the said Stanley William Jackson is a resident of the city of Portland, State of Oregon; that your affiant caused an investigation to be made by long distance telephone to the city of Portland, Oregon, in an endeavor to locate the present whereabouts of the said Stanley William Jackson; that your affiant's investigation revealed that said defendant has not been seen around his usual place of residence, to wit, the Elk's Club in said city; that he is no longer in the employ of defendant Raybestos-Manhattan, Inc., and that investigation in and about the city of Los Angeles, California, reveals that he has not been seen about said city for approximately six months."

for that reason entitled to a continuance, having made no reasonable effort to obtain his testimony or his presence at the trial. In Beckman v. Waters, 161 Cal. 581, 588, 119 P. 922, while a deposition of the plaintiff was excluded because the notary had failed to sign his certificate still the court's order denying a continuance because of the plaintiff's absence was not error. In Bailey v. Pacific Greyhound Lines, Inc., 20 Cal. App.2d 372, 66 P.2d 1246, the denial of plaintiffs' motion for a continuance on the ground that their witness was an expectant mother was not error, since no effort had been made to obtain her deposition during the long period of waiting preceding the date of trial. When a plaintiff sets his action for trial knowing that the gravamen of the action can be proved by the testimony of one sole witness he is not entitled to complain of disappointments resulting from the absence of such witness. Jennings v. American President Lines, 61 Cal. App.2d 417, 429, 143 P.2d 349, 144 P.2d 54. The motion for a continuance is addressed to the sound discretion of the trial court and the decision thereof will not be disturbed in the absence of an abuse of such discretion. Bailey v. Pacific Greyhound Lines, Inc., supra. In view of the foregoing recitals it cannot be said that the court below was arbitrary or that it acted without a fair regard for the rights of both litigants.

[6] Appellant contends that he was prejudiced by the court's excluding from evidence a letter written by Jackson. Those portions of the writing which appellant contends constitute an admission of liability are as follows: "Nothing I could say would express the grief I feel and the hope and prayers I have for your son's recovery. I went to the * * * Assurance Co. yesterday to get them on the case immediately. They assured me that they would send a representative out to see you this morning. I hope that he has seen you already and that much is off of your mind anyway * * * He [the agent] assured me that everything necessary would be done for you immediately. If you run into any difficulties at all, please let me know by telegram [at several successive addresses] I offered to stay here until everything was taken care of but [the insurance agent] said there was nothing more that I could do by staying any longer. Please let me know how the baby is. I have to leave now or would wait longer."

[7, 8] The sentiments expressed in the letter contain nothing that could reasonably be construed as an admission of liability. They indicate no more than a gentleman's normal concern for the welfare of the child injured by contact with the author's automobile and a desire to reassure the parents of his interest. The authorities cited by appellant in support of his contention, King v. Wilson, 116 Cal.App. 191, 2 P.2d 833; Noble v. Bacon, 129 Cal. App. 177, 18 P.2d 699; Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218; McPhee v. Lavin, 183 Cal. 264, 191 P. 23, involved the question whether declarations indicating liability on the part of the declarant should be excluded because they referred to the fact that the defendant carried insurance. In each instance the statement was properly received because it contained words considered by the trial court as defendant's admission of liability which could not be separated from the statement that he carried liability insurance. A defendant's statement that he carries insurance or that his insurance company "will do everything necessary immediately" is not an admission of liability. However, the construction of a writing is to be decided by the trial court, Code Civ.Proc. § 2102, and its decision thereon will therefore not be cause for reversal in the absence of a showing of prejudice to the complaining party. Also, no judgment shall be reversed on the ground of improper rejection of evidence, unless the entire record discloses that the error complained of resulted in a miscarriage of justice. Constitution, Art. VI, sec. 4½.

[9] The witness McGowan was asked to relate a conversation had with Jackson after the accident. Objection was made by the corporation on the ground that it was hearsay and it was sustained as to the corporation only, whereupon the witness proceeded to testify that Jackson "stated that he had driven into the service station

* * * to ask directions to his brother's house and that as he was leaving he felt a bump on the right rear portion of his car * * * looked out * * * and seen the boy Timothy lying on the ground." The ruling was correct. Appellant did not show that Jackson was at the time acting within the scope of his employment, nor did he even attempt to prove that Jackson was on that day the agent of the corporation.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

94 Cal.App.2d 409

LUBERCO, LIMITED, v. KIPP et al.

Civ. 3957.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Action by Luberco, Ltd., a corporation, against Solon S. Kipp and others to quiet title to land sold to state for delinquent taxes and deeded by state to plaintiff.

The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment in favor of plaintiff and defendants appealed.

The District Court of Appeal, Barnard, P. J., held that any defects in notice of tax sale were cured by validating acts and that tax deeds to state must under statute be conclusively presumed to be valid and affirm the judgment.

1. Municipal corporations 🔑575
Taxation 🔑658(3)

Published notice of tax sale containing all the matters required by statute was not defective for failure to state that delinquent assessments were included, where heading of notice stated that it covered not only taxes but five named district assessments and other special district assessments. Pol. Code, § 3764, as amended in 1929.

2. Taxation 🔑688

Any defect in delinquent tax list published in 1934 by reason of variance between delinquent list and addenda list added thereto was cured by validating acts. St. 1943, p. 1993; St.1945, p. 2176; St.1947, p. 1615.

3. Taxation 🔑805(4)

Constructive possession by owner of record of vacant and unoccupied lot will not prevent limitations from running against right of such owner to attack a tax title.

4. Taxation 🔑788(2), 805(1)

The statute providing that a deed to state shall be conclusively presumed to be valid unless held invalid in a proceeding commenced within one year after execution of deed or one year after effective date of statute provides a rule of evidence in addition to a period of limitation. Revenue and Taxation Code, § 175.

5. Taxation 🔑788(2), 805(1)

Tax deeds to state which had not been held invalid in proceeding commenced within one year after execution of deed or one year after effective date of statute must be conclusively presumed to be valid in action to quiet title to land claimed under deeds from state. Revenue and Taxation Code, § 175.

◆

Solon S. Kipp and W. E. Starke, San Diego, for appellants.

Virgil S. Kipp, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to two lots in separate blocks, and to two other lots in another block of a subdivision in San Diego. The plaintiff claims under various tax deeds to and from the state, and the defendants claim to be record owners of the property.

The complaint, in the usual form, was filed on January 28, 1947, and alleged that the plaintiff is the owner in fee and entitled to the possession of these lots. The answer, in addition to a general denial, alleged that the defendants are the owners in fee. There was no allegation with respect to possession by the defendants and no affirmative relief was asked.

The evidence discloses that these lots were sold to the state on June 29, 1929, for delinquent taxes and assessments levied in 1928; that they were deeded to the state August 1, 1934; that they were deeded by the state to the plaintiff on January 7, 1947; and that these deeds were duly recorded. The defendants produced no evidence with respect to their own title but introduced various tax records in an attempt to show that the deeds to the state were invalid. The court found that the plaintiff was, and is, the owner in fee and entitled to the possession of these lots and that the defendants have no right, title or interest therein. Judgment was accordingly entered and the defendants have appealed.

[1] The appellants contend that the deeds to the state were void because of defective notices of sale, and that the statute of limitations does not apply where the proceedings are thus void or "where the legal owner, not out of possession, is not the moving party." It is first claimed that the delinquent list for the 1928 tax first published on June 6, 1929, was deficient in that it did not state that delinquent "assessments" affecting the property were included, and that the notice thus published was not in the form prescribed by section 3764 of the Political Code, as it then existed. Section 3764, as amended in 1929, and in effect when this notice was published, did not set forth a required form for this notice but stated, generally, what the published delinquent list should contain. So far as we can see, the notice published contained all of the matters required by the statute and sufficiently complied therewith. The contention that the notice failed to state that delinquent assessments were included is without merit. The heading of the notice stated that it covered not only taxes but five named district assessments "and other special district assessments levied in the year 1928 for the fiscal year 1928-29." The notice further stated that "Unless the total of all taxes, assessments, penalties and costs, as shown on the list below", was paid before the date named the property would, by operation of law, be sold to the state. It is further contended, with respect to some of these lots, that in the publication in 1934 of the delinquent list for 1933, proper reference was not made to the addenda list added thereto. While there are some variances between the delinquent list and the addenda, with respect to some of these lots, in each case the delinquent list correctly refers to the sale number of the particular lot in the addenda list, the addenda notice is in the exact wording of section 3764, and it is doubtful if any defect here appearing would have been held to invalidate these deeds to the state under the strict application of the tax deed laws which formerly existed.

[2] In any event, any deficiencies which here appear were cured by the validating acts of 1943 [Stats.1943, p. 1993], 1945 [Stats.1945, p. 2176], and 1947 [Stats.1947, p. 1615]. Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Wall v. M. & R. Sheep Co., 33 Cal.2d 768, 205 P.2d 14.

[3-5] Relying on Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015, the appellants contend that no statute of limitations can apply here since it does not appear that the tax sale purchaser was in possession of the property. It is argued that as the successors of the record owner the appellants are presumably entitled to possession. The Tannhauser case involved section 3521 of the Revenue and Taxation Code, that action having been initiated by the record owner. The court there suggested, citing Meigs v. Roberts, 162 N.Y. 371, 56 N.E. 838, 76 Am.St.Rep. 322, and other cases, that such a limitation statute will not run against one in possession of the land but held that it would run, under the circumstances there appearing, against the right of one out of possession to attack a tax title for such defects. However, it was held in Dunkum v. Maceck Building Corp., 256 N.Y. 275, 176 N.E. 392, that no such question could arise where the land in question was vacant and unoccupied. If a limitation statute were here otherwise applicable the matter of constructive possession would not make it inapplicable. We think the rule suggested in the Tannhauser case

was intended to refer to actual possession and not to constructive possession or the mere presumptive right to possession. There is nothing in the record here to indicate that the defendants, or any of them, were in possession of these lots or that any of the parcels was other than a vacant and unoccupied lot. There was neither allegation, proof nor finding in that connection. Moreover, section 175 of the Revenue and Taxation Code, which became effective September 15, 1945, provides that a deed to the state shall be conclusively presumed to be valid unless it is held to be invalid in a court proceeding commenced within one year after the execution of the deed or within one year after the effective date of the section, whichever be later. That section provides a rule of evidence, in addition to a period of limitation. No reason appears why this section is not applicable and controlling here.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

94 Cal.App.2d 418

JONES v. BARTLETT.

Civ. 3958.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Action by Alice C. Jones against Ernest L. Bartlett to quiet title to land sold to state for delinquent taxes and deeded by state to defendant.

The Superior Court of San Diego County, Charles C. Haines, J., entered judgment in favor of defendant and plaintiff appealed.

The District Court of Appeal, Barnard, P. J., held that action was barred by one year statute of limitations and that tax deed to state was conclusively presumed to be valid and affirmed the judgment.

1. Taxation 🔑805(4)

Action commenced by former owner more than one year after June 1, 1941, to quiet title to lands sold to state for delinquent taxes and conveyed to state by deed recorded in 1921, was barred by one year statute of limitations, though attack was based on lack of jurisdiction to sell the land for taxes because of irregularities in notice of sale. Revenue and Taxation Code, § 3521; Pol.Code, §§ 3764, 3765.

2. Taxation 🔑688

That amount stated in published notice of tax sale was one cent more than it should have been and that heading of column in which sale figure was listed used the word "percentage" instead of "penalties" were defects curable by validating acts. Pol. Code, §§ 3764, 3765.

3. Appeal and error 🔑931(1)

All presumptions are in favor of judgment quieting title to land sold to state for delinquent taxes in state's grantee.

4. Taxation 🔑805(4)

Former owner of land sold to state for delinquent taxes could not rely on possession as preventing one year statute of limitations from barring her attack on tax deed to state in absence of showing that she was in actual possession of the land, since any constructive right to possession arising from possession of a deed would be in state's grantee in possession of a deed from the state. Revenue and Taxation Code, § 3521.

5. Taxation 🔑788(2), 805(1)

In action by former owner to quiet title to land sold to state for delinquent taxes, commenced several years after land was deeded to state and more than 19 months after effective date of statute providing that deed to state shall be conclusively presumed to be valid unless held invalid in proceeding commenced within year after execution of deed or effective date of statute, tax deed to state was conclusively presumed to be valid. Revenue and Taxation Code, § 175.

◆

Solon S. Kipp and W. E. Starke, San Diego, for appellant.

Virgil S. Kipp, San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting title to a lot in San Diego. The plaintiff claims as the former owner and the defendant claims under tax deeds to and from the state.

The complaint, which was filed on April 17, 1947, alleged that the plaintiff is the owner in fee and entitled to possession. The answer contained a general denial, alleged that the defendant is the owner in fee and entitled to possession, and prayed for a judgment quieting his title. As a second defense, the answer alleged that the plaintiff's action is barred by section 3521 of the Revenue and Taxation Code.

It was stipulated that the plaintiff is the owner unless her title is divested by the tax deed to the state and the tax deed from the state to the defendant. It appears without question that the lot was sold to the state in 1916 for delinquent taxes assessed in 1915; that the lot was deeded to the state on August 4, 1921, this deed being recorded on August 8, 1921. Also, that it was deeded by the state to the defendant by tax deed dated July 16, 1946, and recorded August 9, 1946. The taxes for 1947 were paid by the defendant. The court found that the defendant was, and is, the owner in fee and entitled to possession; that the plaintiff has no right, title or interest in the property; and that the plaintiff's right to commence or maintain the action is barred by section 3521 of the Revenue and Taxation Code insofar as any attack on the tax deed to the state or the tax proceedings leading thereto is concerned. Judgment was in favor of the defendant and the plaintiff has appealed.

The appellant contends that the tax proceedings were fatally defective and the tax deeds void; that for this reason the tax collector lacked the necessary power to sell; and that the statute of limitations does not apply because of jurisdictional defects. The only attack upon these tax proceedings which is here made is that the notice of sale published in June, 1916, was defective and failed to comply with sections 3764 and 3765 of the Political Code, as then existing, in that the amount stated in the notice as published was one cent more than it should have been, and in that the heading of the column in which the sale figure was listed used the word "percentage" instead of the word "penalties".

[1, 2] The attack here made is directed against the validity of the deed to the state, and against the proceedings leading thereto. In these respects the appellant's action would seem to be barred by section 3521 of the Revenue and Taxation Code, as this action was filed nearly five years after the last date permitted under that section. Davault v. Essig, 80 Cal.App.2d 970, 183 P.2d 39; Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015. The defects relied on would also come within the provisions of the various curative or validating acts. City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397.

[3–5] The appellant further contends, however, that the statute of limitations does not apply to her as the former owner since she is not out of possession. There is nothing in the record to sustain this contention. She did not allege that she was in possession, and there is no evidence that she ever was in possession. The complaint indicates the contrary, there was no finding that she was in possession, and no evidence which would have sustained such a finding. Insofar as the record shows or indicates, the land in question is a vacant and unoccupied lot. All presumptions are in favor of the judgment. Moreover, any constructive right to possession arising from the possession of a deed would not only differ from actual and physical possession, but would also seem to follow from the possession of a deed issued by the state. We know of no presumptions which would operate to destroy the validity and effect of the tax deed here in question, or which would here prevent the operation of section 2531 of the Revenue and Taxation Code. Moreover, under section 175 of that code, the deed to the state which is here attacked is conclusively presumed to be valid since this action was filed more than 19 months after that section became effective.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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94 Cal.App.2d 421

UNION TITLE INS. & TRUST CO. v. THORP.

Civ. 3959.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Rehearing Denied Nov. 22, 1949.

Hearing Denied Dec. 29, 1949.

Action by Union Title Insurance and Trust Company against Howard C. Thorp to quiet title to land sold to state for delinquent taxes and deeded by state to defendant.

The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment in favor of defendant and plaintiff appealed.

The District Court of Appeal, Barnard, P. J., held that the action was barred by limitations and that tax deed to state was conclusively presumed to be valid and affirmed the judgment.

1. Municipal corporations ⚷483(1)

Statute providing that special improvement assessments shall be levied on lands in respective zones of acquisition and improvement district and that resolution of intention shall state the percentages to be raised from lands in each zone relates to formation of district and allocation of percentages to each zone in resolution of intention and not to the form of county's assessment book. St.1925, pp. 849 et seq., 855, §§ 1 et seq., 5.

2. Municipal corporations ⚷483(1)

Assessment of entire half lot in various zones of acquisition and improvement district with stated total value was not illegal or prejudicial to taxpayer, where in other columns portions of lot in each zone were separately assessed with assessed value of each portion and tax thereon appropriately stated and amounts of regular taxes and of special improvement taxes were separately stated and total tax on property within each zone appeared as well as total tax on entire half lot. Pol.Code, § 3650; St.1925, pp. 849 et seq., 855, §§ 1 et seq., 5.

3. Municipal corporations ⚷426

Land in acquisition and improvement district belonging to state was properly omitted from assessment roll under provisions of statute and resolution of intention of district, excluding state owned land, though such omission increased assessments on other lands in the district. St. 1925, p. 890, § 41.

4. Taxation ⚷805(4)

Action by former owner against state's grantee to quiet title to land sold to state for delinquent taxes on ground that tax collector lacked power to sell the land to state because of a variance of one cent between amount shown on delinquent tax roll and amount shown in published tax list was barred by one year statute of limitations, where action was commenced more than one year after tax deed to state was recorded and more than one year after effective date of statute and plaintiff failed to show actual possession of the land. Revenue and Taxation Code, § 3521.

5. Taxation ⚷699

Right to redeem land sold to state for delinquent taxes was terminated in accordance with statute regardless of anything said by tax collector at time of sale of such land by state, in absence of showing that anyone was misled thereby or that former owner desired or offered to redeem at any time before or at time of sale. Revenue and Taxation Code, §§ 3706, 3707.

6. Taxation ⚷788(2), 805(1)

Under statute providing that a deed to state shall be conclusively presumed to be valid unless held invalid in proceeding commenced within one year after execution of deed or effective date of statute, tax deed to state was conclusively presumed to be valid in action by former owner to quiet title to land commenced more than one year after execution of deed and more than one year after effective date of statute. Revenue and Taxation Code, § 175.

◆

Solon S. Kipp and W. E. Starke, San Diego, for appellant.

Virgil S. Kipp, San Diego, for respondent.

BARNARD, Presiding Justice.

In this quiet title action the plaintiff claims as the record owner of the property and the defendant claims under tax deeds to and from the state.

The complaint, filed on July 2, 1947, alleged that the plaintiff is the owner and entitled to possession. The answer, in addition to a general denial, alleged that the defendant is the owner and entitled to possession, and that plaintiff's action is barred by section 3521 of the Revenue and Taxation Code. It also prayed for judgment quieting title in the defendant.

It was stipulated that the plaintiff was the owner of the land unless its title was divested by the tax proceedings and tax deeds. The evidence disclosed that the land was sold to the state in June, 1930, for delinquent taxes and assessments for the year 1929; that it was deeded to the state by a deed dated August 1, 1935, and recorded August 12, 1935; and that it was deeded from the state to the defendant by deed dated January 30, 1947. The defendant introduced in evidence certain of the tax proceedings upon which the deed to the state was based. The court found that the defendant was, and is, the owner in fee and entitled to possession of the property; that the plaintiff has no right, title or interest therein; and that plaintiff's action is barred by section 3521 of the Revenue and Taxation Code. Judgment was entered quieting title in the defendant and the plaintiff has appealed.

The property here in question is described as the "West one half of Lot Sixty-two, HORTON'S PURCHASE, in the Ex-Mission lands of San Diego, in the city of San Diego." This property was included in what was known as Acquisition and Improvement Districts Nos. 8 and 17 under the act of 1925 (Stats.1925, p. 849). Apparently, the west half of this lot was a sizeable parcel and in District No. 17 it was divided into zones F, G, H and I, one quarter thereof being in each zone. These zones were created by the district, a different percentage of the assessments being chargeable to each zone.

The appellant first contends that the county assessor, when assessing the property in 1929, failed to segregate and separately assess the portions of this half lot which were in these various zones, with the effect of charging parts of the property with assessments and charges for which they were not legally chargeable. It is argued that the entire half lot was sold for one sum which would thus include an excess amount because section 5 of the 1925 act, under which this district was formed, provides that assessments shall be levied on the lands in the respective zones and that the Resolution of Intention shall state the "percentages to be raised from the lands in each zone."

[1, 2] Section 5 of the 1925 act, thus relied on, relates to the formation of the district and the allocation of percentages to each zone in the Resolution of Intention and not to the form of the county's assessment book. In the assessment here in question the entire half lot was assessed to "Union Tr. Co. of S. D.", with a total value of $6340 in the appropriate column. In other columns the portions of the property in each zone were separately assessed, with the assessed value of each portion and the tax thereon appropriately stated. These add up to the same total value and total tax. In these columns the amounts of the regular taxes and of the special improvement taxes were separately stated, and the total tax on the property within each zone appears as well as the total tax on the entire half lot. The assessment appears to conform with section 3650 of the Political Code, as then in force. The half lot in question was owned by and assessed to the Union Trust Company, the appellant's predecessor. No excessive tax

appears either as to the whole lot or as to any zone, and the tax could have been paid or redemption made on the portion of the property within any such zone. Neither illegality nor prejudice to the taxpayer appears in this connection, as we understand the record.

[3] It is next contended that the tax assessment for 1929 was defective because the assessor omitted from the assessment roll for that year various parcels of land in Districts No. 17 and No. 8, which had the effect of increasing the assessments on the portions of the half lot in question which were in the various zones, these portions being charged with a percentage of whatever delinquencies had occurred with respect to other property. This is the objection which has frequently been raised to the "pyramiding" of assessments in the so-called Mattoon districts. By section 41 of the 1925 act, St.1925, p. 890, and as provided for in the Resolutions of Intention of these districts, any land belonging to the state of California was excluded. Such state-owned lands are within the exemption provided for in the Constitution. Sutter-Yuba Inv. Co. v. Waste, 21 Cal.2d 781, 136 P.2d 11. The exclusion of such lands under these circumstances has frequently been upheld. Any injustice resulting therefrom is a matter for legislative and not judicial correction. American Securities Co. v. Forward, 220 Cal. 566, 32 P.2d 343, 96 A.L.R. 1268. The appellant admits that this point was unsuccessfully raised in Davault v. Essig, 80 Cal.App.2d 970, 183 P.2d 39, but argues that in the later decisions of Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759 and Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 5 A.L.R.2d 1015, "a different theory seems to have been presented." We are unable to see that any different theory was followed in those cases, with respect to the point now under consideration.

[4] It is next contended that the tax collector lacked the power to sell this property to the state because of a variance of one cent between the amount shown on the 1929 delinquent roll and the amount shown in the published delinquent list, as advertised in June, 1930. That this contention is not available to the appellant under the circumstances here appearing is sufficiently established. Davault v. Essig, 80 Cal.App.2d 970, 183 P.2d 39; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Wall v. State of California, 73 Cal.App.2d 838, 167 P.2d 740.

It is next contended that the statute of limitations does not apply because of the nature of the defects in the proceedings, here relied on, and because it does not appear that the appellant was not in possession. Under the authorities above cited, and many others, no reason appears why plaintiff's action was not barred by section 3521 of the Revenue and Taxation Code. The only new contention here is based upon the suggestion made in Tannhauser v. Adams that in some circumstances such a statute might not run against one who is in possession of the property. We think that was intended to refer to an actual possession in the usual sense. No such possession was either alleged or proved here. So far as the record shows, the property here in question was vacant and unoccupied, and any theory of constructive possession would apply equally to the appellant and to the respondent.

[5] Appellant's final contention is that its right of redemption was illegally terminated. It is pointed out that section 3706 of the Revenue and Taxation Code provides that the right of redemption is in existence until the first bid is made, and that section 3707 states that the right of redemption terminates only upon the completion of the sale. It is argued that the tax collector here testified that it was his practice to refer to the numbers of the sales of pieces of property that he was about to sell and to state in advance that the next time he called the number of a sale "that would cease the right of redemption." There was no testimony that such a statement was made in this case. In any event, the statutes govern the termination of redemption of rights and we are unable to see how this is in any way affected by anything said by the tax collector, in the absence of any showing that a party

was misled thereby. There is no evidence that the appellant desired or offered to redeem at any time before or at the time the sale by the state was completed, although many years had elapsed since the assessment became delinquent.

[6] We see no reason why this action was not barred by section 3521 of the Revenue and Taxation Code, why any possible defects or informalities were not cured by the various validating acts, or why the deed to the state here in question is not valid under the conclusive presumption afforded by section 175 of the Revenue and Taxation Code, the time limit of which became effective nearly ten months before this action was filed.

The judgment appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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94 Cal.App.2d 426

WILSON et al. v. KIPP et al.

Civ. 3960.

District Court of Appeal, Fourth District, California.

Nov. 2, 1949.

Action by Joseph S. Wilson and another against Solon S. Kipp and others to quiet title to land sold to the state for delinquent taxes and deeded by state to plaintiffs.

The Superior Court of San Diego County, Arthur L. Mundo, J., entered judgment in favor of plaintiffs and defendants appealed.

The District Court of Appeal, Barnard, P. J., held that defendants, claiming under sale by trustee of land as to which lien of trust deed had been extinguished by equitable merger in beneficiary, had no such equitable interest in land as would prevent subsequently enacted validating acts from curing defects in tax sale proceedings and affirmed the judgment.

1. Estates 🔑10(1)

In law, a "merger" takes place when a greater estate and a less coincide and meet in the same person in one and the same right, without any intermediate estate.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Merger".

2. Liens 🔑16

Equity will sometimes hold a charge extinguished when it would continue to exist in law, and sometimes equity preserves it when at law it would be merged, depending upon actual or presumed intention of the person in whom the interests are united.

3. Mortgages 🔑319(3)

Evidence justified inference that conveyance by trustor of part of land covered by trust deed to beneficiary thereunder was intended as full payment of debt so far as land conveyed was concerned and resulted in an equitable merger extinguishing lien of trust deed against such land, so that subsequent sale thereof by trustee upon default proceedings conveyed only legal title.

4. Taxation 🔑688

Sale by trustee upon default proceedings of land as to which lien of trust deed had been extinguished by equitable merger in beneficiary conveyed no such equitable interest in land as would prevent subsequently enacted validating acts from curing defects in tax sale proceedings as against those claiming under deed from trustee.

Solon S. Kipp, W. E. Starke, San Diego, for appellants.

Virgil S. Kipp, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to Lots 10 and 11 in Block 13 of Valencia Park, Unit No. 2. The plaintiffs claim under tax deeds to and from the state, and the defendants claim to be successors to an intervening interest, thus becoming the record owners.

The complaint, filed February 2, 1948, alleges that the plaintiffs are the owners in fee and entitled to possession of the property. The answer, in addition to a general denial, alleges that the defendants are the owners in fee, in possession and entitled to possession.

The evidence discloses that these lots were sold to the state on June 29, 1929, for delinquent taxes levied in 1928; that they were deeded to the state on August 1, 1934; that they were deeded by the state to the plaintiffs on August 12, 1947; and that these deeds were duly recorded. The defendants introduced various tax records for the purpose of showing that the deed to the state was invalid. They also introduced certain records upon which their claim as successors to an intervening right is based. The court found that the plaintiffs were, and are, the owners in fee and entitled to the possession of these lots; that the defendants have no right, title or interest therein; and that it is not true that the defendants are in possession or are entitled to possession. Judgment was entered quieting title in the plaintiffs as against the defendants, and the defendants have appealed.

The appellants attack the validity of the deed to the state. It is argued that the notices were illegal and voided the sale because the property was advertised for a sum which was one cent in excess of the proper amount, as shown by the assessment; that this error is jurisdictional; that because of this error the tax collector lacked the necessary power to sell the property; and that the statute of limitations does not apply because the notices and proceedings were void and because "the owner is not out of possession." All of the above contentions are sufficiently answered in our decisions in Luberco, Ltd. etc. v. Kipp et al., Cal.App., 210 P.2d 901; Jones v. Bartlett et al., Cal.App., 210 P.2d 903, and Union Title Insurance & Trust Co. v. Thorp, Cal.App., 210 P.2d 905. Aside from the special point raised, no reason appears, under many decisions, why any error appearing in this connection would not be cured by the various validating and curative acts.

The appellants further contend, however, that these validating acts are ineffective here, and that these tax deeds are void, under the rule set forth in Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531 and Hall v. Chamberlain, 31 Cal.2d 673, 192 P.2d 759, because they are the successors to an intervening interest acquired through a deed given pursuant to a sale under a trust deed.

The following facts appear in this connection. On July 12, 1926, Peoples Finance & Thrift Co. gave a trust deed to Union Trust Company, as trustee, and Lewis J. Utt as beneficiary. This trust deed covered property in Horton's Addition to San Diego and also some thirty lots in Las Alturas Villa Sites, and secured a note for $25,000 payable to Lewis J. Utt one year after date. About a month later, on August 19, 1926, Peoples Finance & Thrift Co. deeded the same lots in Las Alturas Vila Sites (but not the property in Horton's Addition) to Lewis J. Utt. In 1927, portions of Las Alturas Villa Sites were subdivided and became a new subdivision known as Valencia Park, Unit No. 2. The property in Las Alturas Villa Sites covered by the trust deed and deed above mentioned was included in this new subdivision. In 1928, lots 10 and 11 block 13 of Valencia Park, Unit No. 2 were assessed to Lewis J. Utt, this assessment being the one here in question.

On May 28, 1937, pursuant to a court order in the estate of Lewis J. Utt confirming the sale, the executrix deeded all of the right, title and interest of Lewis J. Utt and of his estate in Valencia Park, Unit No. 2 to Roy C. Lichty. On the same day Lichty gave back a trust deed covering all his right, title and interest in and to Valencia Park, Unit No. 2, with Union Trust Company as trustee and the estate of Lewis J. Utt as beneficiary. This trust deed secured a note for $12,000, payable over three years to the executrix of the Utt estate.

On August 1, 1939, the Union Title Insurance & Trust Co., the successor of Union Trust Company, filed notice of default under the original trust deed dated July 12, 1926, stating that there was a default in that the principal of $25,000 was not paid on July 12, 1927, that certain interest had not been paid, that the Union Title Insurance & Trust Co., as owner of said note and beneficiary of said trust, gave notice to the Union Title Insurance & Trust Co., as trustee, to sell the property to satisfy the obligation secured by said trust deed. We find nothing in the record to show that Union Title Insurance & Trust Co. was the owner of the note, or that it was beneficiary under that trust deed. The only record before us is to the contrary. The next thing that appears is on October 23, 1942, when the Union Title Insurance & Trust Co. gave a trustee's deed to The Rogan Corporation conveying about 150 lots in Valencia Park, Unit No. 2, including the two lots involved in this action. The deed recites that it was given after a public sale and pursuant to the notice of default filed on August 1, 1939, and because the principal sum of the note which became due on July 12, 1927, under the terms of the deed of trust given on July 12, 1926, "was not then fully paid." Lots 10 and 11 Block 13 of Valencia Park, Unit No. 2 was included among the large number of lots described in this trustee's deed and thus purportedly conveyed to The Rogan Corporation. On October 2, 1946, The Rogan Corporation quitclaimed to the defendants in this action some 70 lots in Valencia Park, Unit No. 2, including the two lots here in question.

One fact here is different from those appearing in Hall v. Chamberlain, on which the appellants rely. In this case, before these lots were deeded to The Rogan Corporation in 1942, under the power of sale contained in the trust deed, section 3518 of the Revenue and Taxation Code, adopted in 1939, had made the deed to the state which was executed in 1934, conclusive evidence of the validity of proceedings leading up to that deed.

[1, 2] Whether or not the difference is material here, we think no sufficient intervening interest here appears, within the meaning of the rule relied on by the appellants, for the reason that all real interests in this property had actually and equitably merged in Lewis J. Utt the next month after the trust deed was given, the trustor having, on August 19, 1926, conveyed the property by grant deed to Utt, who was the payee of the note and the beneficiary under the trust deed. Although the trustee still retained the legal title the purpose of the trust was accomplished, if that conveyance was made as a payment of the obligation insofar as the land conveyed is concerned, and an equitable merger resulted. The rule which should be applied here is stated in Shaffer v. McCloskey, 101 Cal. 576 and approved in Linforth v. Montgomery, 195 Cal. 49, 231 P. 735, 737, 36 P. 196 as follows:

> "'In law a merger always takes place when a greater estate and a less coincide and meet in the same person in one and the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished when it would continue to exist in law, and sometimes preserve it when at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united.'"

[3] In the Linforth case it was held that testimony to the effect that the trustor, after he conveyed the property to the trustee, had not been asked to pay the debt was admissible for the purpose of showing that the deed amounted to an extinguishment of the debt. In the instant case, the trustor, who had deeded the land to the trustee to secure a note for $25,000 payable to Utt, conveyed the land to Utt by grant deed about a month later. Although $25,000 had become due to Utt on July 12, 1927, under the terms of the note and trust deed, the record shows that the note was "not then fully paid." Not only does this indicate that it was considered partially paid at that time, by transferring a part of the land to Utt, but nothing was done to enforce payment, as far as this land is concerned, until 1939, more than 12 years after the money would have been due. In the meantime the land had been assessed to Utt and had

been sold in Utt's estate to Lichty, who gave a trust deed in favor of the estate to the same trustee as that named in the former trust deed. In the absence of any other evidence this justifies the inference that these lots were conveyed to Utt in August, 1926, as a full payment of the debt, insofar as these lots were concerned, and that it was so intended by the parties. Until this action was filed twenty-two years later no one, so far as shown by the record, had attacked the transfer to Utt or claimed that it was anything other than a payment of the debt, insofar as that land was concerned. For many years both the equitable interests, which as a practical matter were all of the real interests, were united in Utt and after his death were sold to Lichty, with a new trust deed given to the same trustee and securing a new debt to the estate. The appellants have not connected their title in any way with that of Lichty.

While the facts here may not be sufficient to show a merger in law, since the legal title remained in the trustee, this is a case where a court of equity should, as suggested in the cases above cited, "hold a charge extinguished when it would continue to exist at law." Under the circumstances shown by the record, nothing more appears than that the trustee continued to hold the naked legal title to the lots here in question and that when it sold them in 1942, upon default proceedings, it conveyed no more to The Rogan Corporation. For the purposes of this equitable action a merger sufficiently appears.

[4] The deeds and trust deeds above referred to covered a large number of lots, some of them under different descriptions due to the different subdivisions, and it seems highly probable that the two lots here in question may have been erroneously included in the foreclosure proceeding leading to the trustee's deed to The Rogan Corporation in 1942. The sale may have been perfectly proper as to other portions of the property purportedly covered therein. Be that as it may, we think the appellants have not sufficiently established a right to this property, as against these tax deeds, under the intervening rights doctrine upon which they rely. All presumptions are in favor of the judgment, the evidence is sufficient to support the court's findings and conclusions, and the contrary showing made is not sufficient to require or justify a reversal.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

94 Cal.App.2d 451

PEOPLE v. COHEN.

Cr. 4382.

District Court of Appeal, Second District, Division 1, California.

Nov. 3, 1949.

Abe Cohen was convicted after waiver of jury trial in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of feloniously receiving, concealing and withholding from the owner, Harry Maron, certain articles of stolen jewelry and with the crime of grand theft and he appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment on grounds that admissibility of testimony given at preliminary hearing was proper and could be admitted by stipulation of defendant's counsel in defendant's presence especially where defendant had opportunity to cross-examine witnesses at trial.

1. Criminal law 🔑1169(3)

Admission of officer's testimony given at preliminary hearing relating conversation he had with defendant at district attorney's office without benefit of counsel in which defendant refused to give specimen of handwriting, "denied everything" and declared he never possessed stolen jewelry was not prejudicial error where defendant took stand in his own defense and testified to truth of facts he denied earlier and admitted denials made earlier were false.

2. Criminal law 🔑1169(3)

Erroneous admission of evidence of a fact subsequently proved by defendant's testimony is harmless.

3. Criminal law 🔑539(1)

Testimony at preliminary hearing is admissible although defendant is not represented by counsel where an examination is made and on strength of testimony there produced in his presence, he is held to answer.

4. Criminal law 🔑1030(2)
Stipulations 🔑3

Counsel has right to stipulate relative to any steps of an action especially where stipulation is made in the presence of defendant who makes no objection and defendant on appeal cannot claim he was deprived of his constitutional right to due process of law as he is bound by the stipulation. Pen.Code, § 686.

5. Criminal law 🔑662(8)

The right to be confronted by the witnesses is a personal privilege to accused which may be waived when defendant's counsel stipulates that evidence taken at preliminary examination may be considered by court as evidence at trial.

6. Criminal law 🔑662(8)

Where counsel in defendant's presence stipulated that evidence taken at preliminary examination could be considered as evidence at trial and defendant made no objection, defendant's personal privilege to be confronted by the witnesses was waived and the stipulation was binding.

7. Criminal law 🔑232
Stipulations 🔑4

Where defendant was confronted at trial by two of prosecution's witnesses present when stipulation was entered into, that evidence taken at preliminary examination could be considered at trial, and evidence at preliminary hearing was sufficient to raise reasonable belief defendant committed crimes charged, defendant was not deprived of any substantial right by failure to have counsel at preliminary hearing or by his not personally agreeing to stipulation.

8. Larceny 🔑65

Evidence sustained conviction of grand theft where defendant admitted cashing checks for stolen goods in excess of $17 and receiving $1,000 from sales of stolen jewelry.

9. Receiving stolen goods 🔑8(3)

Evidence sustained conviction for feloniously receiving and concealing from owner certain articles of jewelry. Pen. Code, § 496bb.

10. Criminal law 🔑554

Where record disclosed substantial evidence to support judgment of conviction, trial court was not bound to believe defendant's testimony that he acted in good faith and was unaware jewelry had been stolen.

◆

William W. Larsen, Los Angeles, for appellant.

Fred N. Howser, Attorney General, and Dan Kaufmann, Deputy Attorney General, for respondent.

DRAPEAU, Justice.

Defendant was charged by information with violations of section 496bb of the Penal Code in Counts 1 and 2, in that he feloniously received, concealed and withheld from the owner Harry Maron, certain articles of stolen jewelry, and with the crime of grand theft in Count 3, i. e., the felonious taking of personal property of the value of $300 from one Jerry Harwin.

Jury trial was duly waived and it was stipulated that the People's case might be submitted on the transcript of the preliminary hearing and the exhibits on file. At the trial two witnesses testified for the prosecution and defendant took the stand in his own defense, whereupon defendant was adjudged guilty as charged in the information. He moved for a new trial which was denied as to Counts 1 and 3, and granted as to Count 2 which was dismissed. Judgment and sentence were pronounced, the sentences on the two counts to run concurrently. Execution of the sentences was suspended and defendant was granted probation for five years conditioned that he serve the first year thereof in the County Jail.

Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial as to Counts 1 and 3.

The points upon which appellant relies for a reversal of the judgment are: (1) The decision finding him guilty is contrary to the law; (2) The evidence is insufficient to support the decision.

During the month of December, 1947, and theretofore, appellant was a salesman for janitorial supplies. Among his customers was one Daniel W. Lance, superintendent of the Spreckles Building in downtown Los Angeles. One of the tenants of the building was Clyde A. Krasne Company, wholesale jewelers, who occupied as their office a room adjoining the office of said Lance.

Shortly before the arrest of appellant, Mr. Harry Maron, a partner in the Krasne Company, was in the shop of Mr. Jerry Harwin, a retail jeweler of Santa Barbara, and while there he recognized certain pieces of jewelry which were identical to merchandise handled exclusively by his company. Thereafter an inventory of the Krasne Company stock for the period from October, 1947, to within a few days of the trial, disclosed that costume jewelry of an estimated value of $25,000 was missing.

It then developed that on November 17, 1947, Mr. Harwin met appellant in Los Angeles at the home of Mr. Isadore Shapiro, who had told him that appellant had for sale some bankruptcy stocks of costume jewelry. Mr. Harwin bought lots of jewelry from appellant on four different occasions, giving his checks in payment of two lots, i. e., Nov. 17, 1947, $300, and December 14, 1947, $250, and paying cash for merchandise purchased in February and August of 1948. Mrs. Beverly Miller was present at the transaction of November 17th and later bought some of the jewelry from Mr. Harwin, her brother-in-law. Appellant also sold jewelry to Mr. Frederick Slavin, a clothing merchant of Santa Barbara, who testified he had seen appellant in that city three or four times, either in his own store or in the Harwin shop.

Mr. Harwin identified articles of jewelry brought into court as part of the merchandise he had purchased from appellant, and the jewelry turned over to the district attorney by Mr. Harwin was identified by Mr. Maron as jewelry from his inventory.

The checks given by Harwin to appellant were endorsed and cashed by the latter.

Subsequent to the recovery of the articles of jewelry from Harwin, appellant was questioned at the office of the district attorney in Los Angeles by Lieutenant Leonard Busse, an investigator, who testified at the preliminary hearing to the following effect: that appellant refused to give a specimen of his handwriting when requested, and denied knowing anything about the costume jewelry; he refused to compare the endorsement on the $300 check with his signature and refused to compare his signature on his driver's license and several other papers with the endorsement on the check; denied knowing Jerry Harwin or of ever being in Santa Barbara; denied seeing the check for $300; denied selling any merchandise to Mr. Slavin or of knowing him, and when Mr. Slavin later made his statement in front of appellant, the latter stated: "It is a damn lie. I never saw him."

At the instant trial, Lieutenant Busse was called as a witness at which time it was stipulated that the endorsements on the two checks were in the handwriting of appellant.

Daniel Lance was also examined at the trial herein and testified that appellant was well known to him as a salesman of janitorial supplies, and had occasionally remarked to him as they passed by the office of the Krasne Company in the Spreckles Building that "he would like to get in there to get some of their jewelry." Some time in December of 1947, after Lance had relieved the night man from duty at 6:30 a. m., appellant came into the building alone, and the two men entered the Krasne Company office and took two cartons of jewelry therefrom. Lance carried a box 18 inches square weighing 25 or 30 pounds and closed the door as they left. Lance testified that appellant ordered him to open the door of the jewelry office or he would kill him, and also threatened that he would be taken care of if he told any one of the incident. This witness denied that he had conversations with appellant concerning other jewelry; admitted that he himself had been charged with burglary of the Krasne Company office; and stated that thereafter he continued to buy supplies from appellant in the usual course of business.

Appellant as a witness in his own defense stated he had known Mr. Lance since 1943 and sold him supplies until August of 1948. He denied that he was ever in Room 402 of the Spreckles Building (the office of the Krasne Company), and denied that he took any jewelry therefrom, stating that he bought it from Mr. Lance in good faith and did not know that Lance was stealing the merchandise, because Lance told him the articles were salesmen's samples. On cross-examination he admitted that he denied everything when questioned by Lieutenant Busse. He also admitted that he sold jewelry to Mr. Harwin and received the two checks of $300 and $250, which he later cashed. However, he denied that he sold jewelry to any one other than Harwin, stating that he bought jewelry from Lance some ten or twelve times which he resold for about $1,000.

On rebuttal Daniel Lance testified that he never sold any jewelry to appellant and never told him he received the merchandise as samples from salesmen.

[1] Appellant challenges the admissibility of the testimony of officer Busse given at the preliminary hearing. As heretofore stated, the officer related a conversation he had with appellant at the Bureau of Investigation of the District Attorney's office without benefit of counsel, at which time appellant refused to give a specimen of his handwriting; "denied everything" and declared he never had possession of any jewelry. Officer Busse was again called as a witness at the instant trial and it was there stipulated by counsel that the endorsements on the two checks were in appellant's handwriting.

It is manifest that no prejudice resulted to appellant by reason of the admission of the challenged testimony, because he took the stand in his own defense and for the most part testified to the truth of facts of which he had made prior denials, and admitted that the denials made to officer Busse were false.

[2] As was aptly stated in People v. Booth, 72 Cal.App. 160, 166, 236 P. 987, 989: "Erroneous admission of evidence of a fact subsequently proved by defendant's testimony is harmless. People v. Bennett, 65 Cal. 267, 3 P. 868; People v. Collins, 75 Cal. [411], 412, 17 P. 430."

Appellant urges that he was denied his constitutional right to due process of law given by section 686 of the Penal Code, mainly because it does not appear from the record that he personally agreed to the stipulation that the People's case might be submitted on the transcript of the preliminary hearing; and also because he was not represented by counsel at the preliminary hearing.

[3] Although appellant was not represented by counsel at the preliminary hearing, an examination was made and on the strength of the testimony there produced in his presence, appellant was held to answer. At the conclusion of the hearing, the following took place: "The Court: That is the People's case, Mr. Cohen. You have no counsel here, and do you wish to do anything about it at this time?

"The Defendant: No, sir.

"The Court: Under the circumstances, the Court would advise you not to put on any testimony at this time. There has been sufficient cause to hold you to answer to the Superior Court and you will at that time have an opportunity to put on a defense if you wish. You are not putting on any defense at this time then and you have no witnesses and don't wish to take the stand yourself?

"The Defendant: No, sir."

At the trial in the Superior Court, appellant personally waived a jury trial, whereupon the deputy district attorney made the following stipulation which was agreed to by appellant's counsel:

"Mr. Broker: As far as the People's case, we are willing that the court may read and consider the evidence taken at the preliminary hearing as is shown by the preliminary transcript with the same force and effect as if the witnesses who appeared at that time now appear before your Honor, were duly sworn and testified in the manner set forth in the transcript. Also that the exhibits which were introduced in the transcript alphabetically may be deemed in evidence at this time and marked numerically in a corresponding manner. That either side may put on such further evidence as he desires.

"Mr. Sherr: So stipulated."

[4-6] It appears to be well-established law that counsel has the right to stipulate relative to any of the steps of an action or proceeding, particularly where the stipulation was made in the presence of the accused who made no objection to it. People v. Graves, 84 Cal.App.2d 531, 535, 191 P.2d 32; People v. Hanna, 36 Cal.App.2d 333, 336, 97 P.2d 847. Moreover, it has been held that the right to be confronted by the witnesses against him is a personal privilege which may be waived by the accused, and such a waiver is accomplished when counsel for defendant stipulates that the evidence taken at the preliminary examination may be considered by the court as evidence at the trial. People v. Tanner, 77 Cal.App.2d 181, 188, 175 P.2d 26.

The holding in People v. Montanez, 93 Cal.App.2d 493, 209 P.2d 151, is particularly pertinent. There the case was tried on the transcript of the preliminary hearing, and such further evidence as either side saw fit to introduce.

[7] The record herein discloses that witnesses for the prosecution were present when the stipulation was entered into. Thereafter, appellant was confronted by two of them: Officer Busse and Daniel Lance, both of whom were called and were subject to cross-examination by appellant. The evidence given at the preliminary hearing was sufficient to show that there was reasonable and probable cause to believe that appellant committed the crimes charged against him. This evidence was confirmed not only by the testimony of these witnesses called at the trial, but by the testimony of appellant himself.

In the circumstances, it does not appear that appellant was deprived of any substantial right by reason of the fact that he was not represented by counsel at the preliminary hearing or that he did not personally agree to the stipulation hereinbefore referred to.

[8] Appellant also contends that the conviction of grand theft charged under Count 3 of the information is against law because there is no showing that the merchandise stolen had a value of more than $17. Count 3 was based upon the sale by appellant of stolen jewelry to Jerry Harwin and the taking and cashing of the checks for $300 and $250 in payment therefor. Appellant admitted that he endorsed and cashed the checks in question, and also that he received $1,000 from sales of jewelry which it was proved had been stolen from the Krasne Company.

[9, 10] Although appellant maintained that he acted in good faith and was unaware that the jewelry had been stolen, the trial court was not bound to believe him. The record discloses amply substantial evidence to support the judgment of conviction.

The judgment and order are affirmed.

WHITE, P. J., and DORAN, J., concur.

94 Cal.App.2d 504

In re PAYNE'S ESTATE.

JAMES v. SPENCER et al.

Civ. 17005.

District Court of Appeal, Second District,
Division 1, California.
Nov. 7, 1949.

Cora James petitioned for probate of a purported will of Christianna E. Payne, deceased, and E. A. Spencer and Elsie Butler filed objections and introduced a prior will.

The Superior Court of Los Angeles County, John J. Ford, J., rendered a judgment rejecting probate of the later instrument and ordered the prior instrument admitted, and the petitioner appealed.

The District Court of Appeal, Drapeau, J., affirmed the judgment and reversed the order with directions, holding that evidence sustained finding that the later will was the product of undue influence.

Prior opinion, 210 P.2d 73.

1. Wills ⚷166(1)

Evidence sustained finding that will was the product of undue influence and should not be probated.

2. Wills ⚷386

Trier of facts is sole judge of credibility and weight of evidence in a will contest, and while all of the evidence should be examined by a reviewing court, it is not to be weighed, and all evidence favorable to respondent must be accepted as true, and, if evidence so viewed is sufficient as a matter of law, judgment must be affirmed.

◆

Ivan J. Johnson, III, Miller & Sinclair, Loren Miller, Harold J. Sinclair, Los Angeles, for appellant.

David W. Williams, Matthews & Williams, Los Angeles, for respondents.

DRAPEAU, Justice.

Christianna E. Payne died November 16, 1947. At the time of her death she had no living relatives or next of kin. Her last will and testament dated October 20, 1947 was presented for probate. Objections were filed upon the grounds of unsound mind and undue influence.

After trial of these issues, the Court found that the testatrix was of sound and disposing mind and memory, but that the will was made while she was physically and mentally feeble and should be denied probate because of undue influence.

During the trial it developed that the decedent had made a prior will, dated September 17, 1945. This will was introduced in evidence, and admitted to probate. Upon the first hearing on appeal, the Clerk's transcript contained a copy of the petition for probate thereof, but the Reporter's transcript showed no testimony in support of the allegations of the petition. Upon rehearing, by order of this court the record was augmented by a supplemental reporter's transcript containing the testimony taken May 11, 1948, in support of the allegations of the petition for probate of the will dated September 17, 1945. Therefore, it became unnecessary to remand the matter to the Superior Court for further proceedings proving the will.

The issues of unsoundness of mind and undue influence were well tried. The decedent was a little, old lady, 83 years of age. All her life she had been frugal and industrious. For many years she was employed in a bank. Her only son died about two years before she did. This was a great shock to her, from which she never entirely recovered. And as she approached the end of her day she became more and more enfeebled, mentally and physically. She was alone in the world, dependent upon kindly neighbors, friends, and her church for human companionship, and some one to look out for her.

The 1945 will appointed her attorney executor, and left her property to several persons, with $200 to her church for a memorial. These beneficiaries were friends who were taking care of her and her property. The estate consisted of two parcels of real property and nearly $5,000 in cash.

The 1947 will appointed another person, not mentioned in the previous will, executrix, and left the entire estate to her. This lady appears as proponent of that will, and two of the beneficiaries under the 1945 will appear as contestants.

On the issue of undue influence the record shows the following: Proponent lived across the street from the decedent. Proponent was a real estate saleslady. Until decedent entered General Hospital in Los Angeles, September 3, 1947, there had been a casual acquaintance between them. Decedent spent three days in the hospital and went home. She was readmitted on October 4, 1947. During the three days she was at home she found a roomer there whom she feared and disliked. She also said she was afraid of the people in her house.

Proponent called on decedent at the hospital several times. She found decedent in an unhappy state of mind. Decedent thought that the beneficiaries in her then will (the 1945 will) had caused her to be placed in the hospital, and that they were attempting to get her property away from her. And she was afraid to go home.

Proponent arranged to have decedent go to a room in the home of a lady living next door to decedent's house, and across the street from proponent's house. From that time on proponent took charge of decedent and decedent's affairs. After decedent left the hospital the second time, proceedings were commenced in the Superior Court to have her declared incompetent and for letters of guardianship. These proceedings were instituted by a sister of a deceased daughter-in-law. Decedent requested proponent to take decedent to the court hearings in this matter, and that proponent be appointed her guardian.

At the request of decedent proponent secured a lawyer to prepare the will under attack. This lawyer had not previously done any legal work for decedent. Proponent also called in a doctor other than the one who had been attending the patient. Prior to the time decedent went to the hospital, her affairs had all been attended to by one of the beneficiaries of the 1945 will. Thereafter proponent collected rentals from decedent's houses and paid decedent's bills.

[1, 2] The court found against the proponent on the issue of undue influence, and the evidence substantially supports the finding. As stated in Re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384, 387, "The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case." While all of the evidence should be examined by a reviewing court, it is not to be weighed. All of the evidence favorable to the respondent must be accepted as true, and if the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed. In re Estate of Teel, supra. From the testimony in this case the judge was empowered to draw the inferences. (a) That there was a confidential, fiduciary relationship between proponent and decedent; (b) that the decedent was feeble in mind and body; and (c) that the proponent controlled and directed the testamentary act. See In re Estate of Brown, 89 Cal.App.2d 496, 200 P.2d 888.

The judgment rejecting probate of the will dated October 20, 1947, and the order admitting the will dated September 17, 1945, to probate, and for Letters Testamentary, are affirmed.

DORAN, J., concurs.

WHITE, Presiding Justice.

I concur. I am satisfied that the evidence in the case at bar entitled the trial court to find that a confidential relationship existed between the testatrix and appellant, coupled with activity on the part of the latter in the preparation of the will, and from which a presumption of undue influence arose. This I say because, notwithstanding appellant's admission that the testatrix told her, "You get in touch with Attorney Williams, because whenever I want any legal matters taken care of he is the one that takes care of them," appellant nevertheless called another attorney of her own selection to prepare the will, and admitted that she knew in advance that the attorney she contacted was going to prepare the will so that it would leave her sole beneficiary thereunder. Appellant also paid the attorney in question for his services in preparing the will, had talked with the testatrix about making a new will, and was present at its execution. Attorney Williams, above referred to, had been the attorney for the testatrix since 1940. These and other evidentiary facts not necessary to here narrate, in my opinion, make the question of undue influence in the case at bar one of fact for determination by the trier of fact.

94 Cal.App.2d 540

MANUEL v. KISER et al.

Civ. 7623.

District Court of Appeal, Third District, California.

Nov. 7, 1949.

Rehearing Denied Dec. 7, 1949.

J. R. Manuel, also known as Jess R. Manuel, sued Clara E. Kiser and others for reformation of a deed.

The Superior Court, Napa County, W. T. Belieu, J., rendered a decree for the defendants, and plaintiff appealed.

The Court of Appeal, Peek, J., reversed the judgment and held that the trial court erred in finding that there was no mutual mistake in the execution of the deed and that a decree quieting title in some of the defendants was not binding on plaintiff.

1. Reformation of Instruments 🔑45(5)

Evidence that parties mutually understood and intended that they were dealing with certain land and that deed did not describe land so intended to be conveyed but described other property instead entitled grantee in possession of land intended to be conveyed to have deed reformed so as to give effect to actual intent of parties as against grantor and subsequent purchaser.

2. Vendor and purchaser 🔑232(2)

Actual and open possession constitutes notice of rights of possessor in land to subsequent purchasers.

3. Vendor and purchaser 🔑229(1)

Existence of fence around spring on land and pipe leading therefrom to grantee's house gave subsequent grantee means of knowledge of first grantee's claim which was equivalent to knowledge, that first grantee claimed an interest in land on which spring was located. Civ.Code, § 19.

4. Judgment 🔑17(1)

Decree entered in action to quiet title to land against unknown defendants based upon publication of summons directed to such defendants was not binding on a person claiming an interest in land as to whom plaintiff had actual knowledge. Code Civ.Proc. §§ 405–418, 749.

5. Judgment 🔑17(1)
Quieting title 🔑31

Party in actual possession of land cannot be regarded as an "unknown person" within meaning of statute providing for quieting title to land, so as to be bound by decree based upon published service. Code Civ.Proc. §§ 405–418, 749.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Unknown Person".

6. Pleading 🔑166

Where decree quieting title to land in defendants was first raised in answer as a bar to a complaint seeking reformation of deed, such new matter was deemed controverted, thereby entitling plaintiff to offer evidence to show invalidity of decree. Code Civ.Proc. § 462.

◆

Francis H. Frisch, Napa, Tom W. Hanrahan, St. Helena, for appellant.

David R. York, Palmer & York, Calistago, for respondents.

PEEK, Justice.

By his first cause of action plaintiff sought reformation of a deed dated February 13, 1923, by which the defendant Kiser as grantor conveyed to him certain real property near the city of Calistoga in the County of Napa. The basis for his claim being the alleged mutual mistake of said parties in the description of the property, and that Kiser intended to sell and he intended to buy certain property located partly within Lot I of section 32 and partly within lot 2 of section 32 but that because of said alleged mistake he received a deed wherein the property was described as being in lot I of section 32. His second cause of action was founded upon his alleged adverse possession of the property for the statutory period. The third cause of action was predicated upon his alleged prescriptive right to a spring arising on the land in question. The defendants Kiser and the Reeders jointly answered the complaint denying generally the allegations thereof and affirmatively alleging that the Reeders were the owners of said property by reason of a subsequent deed from the defendant Kiser; that plaintiff was guilty of laches; that Kiser and the Reeders would be prejudiced thereby; that plaintiff's action was barred by subdivision 4 of Section 338 of the Code of Civil Procedure since they allege he had full knowledge of all of the facts set forth in his complaint at the time of the execution of the 1923 deed. Lastly the Reeders, on their own behalf, affirmatively allege that by reason of an action filed by them on August 14, 1945 their title was adjudged to be free and clear of any claim of plaintiff and that said judgment is res judicata as to the questions raised in plaintiff's complaint.

At the conclusion of the trial the court found generally in favor of defendants and judgment was entered accordingly. Plaintiff's motion for a new trial was denied and this appeal followed.

Plaintiff's attack is directed primarily at the sufficiency of the evidence to sustain the findings, and in particular (1) that as the evidence relating to the property which was intended to be transferred was uncontradicted the court erred in finding that there was no mutual mistake in the execution of the original deed; (2) that since it also was uncontradicted that he had been in continuous possession of the property from the date of the execution of said deed the court erred in finding that he had not acquired a prescriptive right to the spring, and (3) that as Reeder's testimony conclusively showed his knowledge of plaintiff's use of the spring and possession of the property the court further erred in finding that plaintiff was barred by the proceedings instituted by the Reeders under section 749 of the Code of Civil Procedure.

The record shows without contradiction that plaintiff stated to defendant Kiser he desired to purchase certain property from her but only because of a spring which was located thereon and which was the only spring on said defendant's property. Said property adjoined that owned by the plaintiff and upon which he resided. Following their discussion concerning the proposed sale of the property a deed was prepared in words and figures as follows:

"All that certain real property situated in the County of Napa, State of California, bounded and described as follows, to-wit:

"Lot number One (1) in Section Number Thirty-two (32) Township Nine (9) North Range Six (6) West, Mount Diablo Meridian, containing Fourteen and $^{60}/_{100}$ (14.60) acres of land, more or less.

"Being the same land and understood as as such, as being lands deeded by Amos Simmons and his wife, Martha Simmons to Lewis A. Birdsall, deeded July 11, 1881 in which deed the water on said land was particularly mentioned and are so particularly mentioned in this Deed and considered a part of the same."

The deed was executed on February 13, 1923 and was recorded in the office of the County Recorder of Napa County on February 19, 1923. Shortly thereafter appellant expended considerable money in developing the spring. He tunneled under the spring, built a reservoir which was lined with concrete, and ran a pipe line from the reservoir to his house which is situated approximately 400 feet to the south of the spring. Plaintiff also fenced such portions of the property as were not too precipitous. It appears that except for the spring the land was practically useless and of small value.

The defendant Kiser testified that the plaintiff "* * * wanted a piece of land with some water on it, and I didn't know what piece of land the water was on"; that she did not "know what piece of property that was on"; that the spring referred to was the only spring on her land that she "knew of"; that if there was another she did not know it; that "he got his own deed made out and I signed it."

On July 5, 1945, more than twenty-two years after the execution and delivery of the first deed, the respondent Kiser by a second deed conveyed certain contiguous parcels of property, including that upon which the spring was located, to the defendants Reeders. Approximately one month after this conveyance the Reeders instituted an action under section 749 of the Code of Civil Procedure against "All Persons Unknown" and on October 26, 1945 obtained a default decree quieting their title as against such unknown persons.

It further appears from the records of the Superior Court in and for the County of Napa, in which court said action was heard as a default, that there was no appearance on behalf of any defendant; that the service of process was by publication in a newspaper published in Calistoga and by posting at one place on the property, and that Lowell Palmer, one of the attorneys appearing for the Reeders was the only person called on behalf of the defendants.

The appellant, who was neither named nor personally served in said action testified in the instant case that although he had discussed the error in the deeds with the Reeders he did not know of the quiet title action by them until the judgment therein was pleaded as a defense in the present action, at which time it was too late for him to move to set aside the decree under section 473 of the Code of Civil Procedure.

Under cross-examination the defendant Kiser stated that at the time of the sale to defendants Reeders she said nothing to them and they did not ask concerning the spring. Defendant Reeder testified that he only knew of the spring from an examination of a map subsequent to his purchase. He further testified that on several occasions he had ridden over the property in question; that a trail which started at Manuel's house led to the spring; that he had observed the reservoir and the pipeline from it which he stated "went on down the hill into Manuel's."

[1] Viewing the above evidence in the light most favorable to respondent as we must, it is nevertheless apparent that there is no evidence to sustain the finding of the trial court that the deed was not the result of a mutual mistake and that appellant was not in actual, open and notorious possession of the property upon which the spring was located. Such evidence discloses without contradiction that appellant and respondent Kiser mutually understood and intended that they were dealing with respect to the property upon which the spring was located and not with reference to any other property. The evidence also shows without contradiction that the description in the deed which was intended to convey said property to appellant did not describe the property so intended to be conveyed but described other property instead. Whatever the cause of the mistake or whoever prepared the deed is immaterial in view of the undisputed intention of the parties that said deed was intended to actually convey the property on which the spring was located. Lestrade v. Barth, 19 Cal. 660. Appellant was therefore entitled to have said deed reformed in order to give effect to the actual intent of the parties as disclosed by the uncontradicted evidence. Williams v. Hebbard, 33 Cal. App.2d 686, 690, 92 P.2d 657; Rest.Cont. secs. 504 et seq.

By reason of our conclusion in this regard plaintiff's second contention relating to the question of his alleged prescriptive right to the spring, becomes immaterial to a determination of this appeal.

In view of the foregoing principles it is clear that the judgment attacked herein must be reversed unless it can be said, as respondents contend, that appellant is barred from asserting his title by virtue of the decree entered in the action brought by respondents Reeders under the provisions of section 749 of the Code of Civil Procedure against all "unknown defendants" and which was pleaded as a bar to appellant's action by respondents Reeders in their answer.

[2, 3] In considering the effect of said decree it is pertinent to consider the above narrated evidence which discloses without contradiction that at the time the Reeders caused summons to be published Manuel was in the actual and open possession of the premises upon which the spring was located. Such evidence further disclosed that the spring was partially enclosed by a fence and that a pipe ran from the spring to Manuel's home, which pipe was above the surface of the ground and clearly visible. Thus, irrespective of any question of constructive notice of Manuel's claim to the spring by virtue of the recordation of his deed from respondent Kiser, respondent Reeder by his own testimony must be held to have had actual knowledge that appellant Manuel asserted an interest in said premises. Actual and open possession constitutes notice to subsequent purchasers (Prouty v. Devin et al., 118 Cal. 258, 50 P. 380) and the existence of the fence around the spring and the pipe leading therefrom to appellant's house gave Reeder the means of knowledge of Manuel's claim which is equivalent to knowledge. Civil Code, section 19.

The question thus narrows down to the more precise one of whether a decree entered in an action brought pursuant to section 749 of the Code of Civil Procedure against "unknown defendants" based upon publication of summons directed to such defendants is binding upon a person claiming an interest in the land and as to whom the plaintiff has actual knowledge

[4, 5] By the provisions of section 749 of the Code of Civil Procedure a defendant known to the plaintiff must be served in the manner set forth in sections 405–418 thereof which sections in general require personal service subject to certain exceptions not applicable herein. Thus it would follow that Manuel was entitled to personal service by the very terms of the foregoing sections and such a conclusion is in accord with the general rule that a party in the actual possession of real property cannot be regarded as an "unknown" person so as to be bound by a decree based upon published service. Killian v. Hubbard, 69 S.D. 289, 9 N.W.2d 700, 146 A.L.R. 713; Harris v. Barnes, 137 Neb. 905, 291 N.W. 721, 128 A.L.R. 114. See also People v. One 1941 Chrysler 6 Touring Sedan, 81 Cal.App.2d 18, 183 P.2d 368; Ross v. Thompson, 174 Okl. 183, 50 P.2d 385; Pankey v. Ortiz, 26 N.M. 575, 195 P. 906, 30 A.L.R. 92, and Robbins v. Slavin, 292 Ill.App. 479, 11 N.E.2d 651.

[6] The only remaining issue relates to respondents' contention that since the judgment in the Reeder action was not void on its face appellant cannot attack such a decree in this proceeding. However, it must be noted that the decree in that action was first raised by the Reeders in their answer as a bar to the complaint herein, and under the provisions of Section 462 of the Code of Civil Procedure such new matter was deemed controverted, thereby entitling Manuel to offer evidence as he did showing the invalidity of that decree. Stevens v. Kelley, 57 Cal.App.2d 318, 134 P.2d 56.

For the foregoing reasons the judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

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